No. 12-167

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY DAVILA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Federal Rule of Criminal Procedure 52 "normally" requires, before the reviewing court may set aside a criminal conviction, "a specific analysis of the district court record * * * to determine whether [an] error was prejudicial." *United States* v. *Olano*, 507 U.S. 725, 734 (1993). Errors in the guilty-plea process prescribed by Rule 11 are governed by that principle. "[T]he harmless error rule of Rule 52(a) is applicable to Rule 11," Fed. R. Crim. P. 11 advisory committee's note (1983), as Rule 11(h) makes clear. The plain-error principles of Rule 52(b) apply as well, as this Court held in *United States* v. *Vonn*, 535 U.S. 55, 63 (2002). Accordingly, when a court "participate[s] in [plea-agreement] discussions," contrary to Rule 11(c)(1)'s requirements, a reviewing court must apply harmless-error review (if the error was preserved) or plain-error review (if it was not).

Respondent nonetheless maintains that a reviewing court has no choice but to vacate in every case involving a Rule 11(c)(1) error—regardless how minor the error; regardless how clear that the error had no effect on the proceedings; and regardless whether the defendant ever mentions the error. On that view, a reviewing court would be required to set aside a plea entered on the eve of trial, directly following a decision by the defendant's co-conspirators to testify against him, simply because two years earlier, a different judge had "innocuous[ly]" suggested that the defendant discuss with his lawyer the possibility of reducing the potential mandatory-minimum sentence by pleading guilty, cf. *United States* v. *Casallas*, 59 F.3d 1173, 1177 (11th Cir. 1995).

Nothing warrants that per se reversal approach. Rule 11(c)(1) errors vary in degree and kind, and the surrounding circumstances can demonstrate that a defendant was not prejudiced by a Rule 11(c)(1) error. The proper approach is thus the normal case-specific prejudice approach, which allows relief for prejudicial errors but does not disturb convictions when the error is not reasonably likely to have affected the outcome of the proceedings.

A. Rules 52 And 11(h) Require Prejudice Analysis Of Rule 11(c)(1) Violations

Respondent contends (Br. 24-30) that the drafters of the Federal Rules required, or at least expected, automatic vacatur of a guilty plea whenever a Rule 11(c)(1) error has occurred. That contention is insupportable.

Rule 52 textually applies to Rule 11(c)(1) errors the same as it applies to any other sort of error. See, *e.g.*, *Puckett* v. *United States*, 556 U.S. 129, 136 (2009) (Rule 52(b) "sets forth the consequences" for "all" cases in which an error is forfeited); *Zedner* v. *United States*, 547

U.S. 489, 507 (2006) (Rule 52(a) "presumptively applies to '*all* errors where a proper objection is made'") (quoting *Neder* v. *United States*, 527 U.S. 1, 7 (1999)). No "'strong support'" exists "to find an implied repeal of Rule 52" for Rule 11(c)(1) errors. *Zedner*, 547 U.S. at 507 (quoting *Vonn*, 535 U.S. at 65). Rule 11(c)(1) itself says nothing about remedies, and Rule 11(h) expressly *incorporates* Rule 52(a) into Rule 11 by stating that "[a] variance from the requirements of this rule is harmless error if it does not affect substantial rights."

Rule 11(h) thus underscores that Rule 11 errors of every stripe are subject to the prejudice analysis that Rule 52 itself independently requires. Respondent errs in suggesting (Br. 13) that Rule 11(h) covers only "plea-colloquy errors." If that were so, the provision would appear in, or at least be expressly limited to, Rule 11(b), which governs colloquies. Instead, Rule 11(h) appears in a separate subsection and expressly applies to any "variance from the requirements of *this rule*"—*i.e.*, Rule 11. Fed. R. Crim. P. 11(h) (emphasis added). Contrary to respondent's contention (Br. 25), the standard definition of "variance"—which includes, among other things, "difference; deviation; discrepancy," *Webster's New International Dictionary* 2818 (2d ed. 1958)—squarely encompasses a departure from Rule 11(c)(1)'s requirements. See *Black's Law Dictionary* (5th ed. 1979) (making clear that, at the time Rule 11(h) was adopted, respondent's alternative definition of "variance" applied in the context of variations between pleading allegations and proof at trial). Similarly, the reference to "procedures required" (rather than "requirements") in the original version of Rule 11(h) clearly included the requirement that plea negotiations include only the parties and not the judge, which has always appeared in a sub-

section of the Rule labeled "Plea Agreement *Procedure*." Fed. R. Crim. P. 11(c) (emphasis added); see Fed. R. Crim. P. 11(e) (1983).

Respondent is wrong in asserting (Br. 28) that the advisory committee notes provide "strong support" for his construction of Rule 11(h). Rather, those notes are explicit about the drafters' purpose: "Subdivision (h)," they explain, "makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11." Fed. R. Crim. P. 11 advisory committee's note (1983). Respondent acknowledges (Br. 27) that the notes nowhere assert that judicial-participation errors are an exception. And contrary to his contention (Br. 28-29), the notes' endorsement of how courts had handled certain *other* types of errors cannot mean that the drafters expected vacatur in every Rule 11(c)(1) case. The notes caution that Rule 11(h) "does not * * * attempt to define the meaning of 'harmless error,' which is instead left to the case law"; recognize that the "interest in finality of guilty pleas * * * is sufficiently compelling to make unsound the proposition that reversal is required even where it is apparent that the Rule 11 violation was of the harmless error variety"; and emphasize that Rule 11(h) "rejects the extreme sanction of automatic reversal." Fed. R. Crim. P. 11 advisory committee's note (1983).

Especially misplaced is respondent's suggestion (Br. 28, 30) that the drafters of Rule 11(h) expected courts to copy the relief granted in *McCarthy* v. *United States*, 394 U.S. 459 (1969), for every possible Rule 11(c)(1) error. This Court has explained that the "only serious issue" in *McCarthy* had nothing "to do with either the harmless- or plain-error rule," but instead was "simply whether the Government could extend the litigation for additional [prejudice-related] evidence" outside the ex-

isting record. *Vonn*, 535 U.S. at 66-71. In any event, *McCarthy* was decided five years before Rule 11 was amended to prohibit judicial participation, see Fed. R. Crim. P. 11 advisory committee's note (1974), and thus said nothing about how judicial-participation errors should be treated. Furthermore, "the one clearly expressed objective of Rule 11(h) was to end the practice * * * of reversing automatically for any Rule 11 error," a practice that "stemmed from an expansive reading of *McCarthy*" and "imposed a cost on Rule 11 mistakes that *McCarthy* neither required nor justified." *Vonn*, 535 U.S. at 66, 70. Respondent's reliance on Rule 11(h) to reinvigorate that automatic-vacatur practice—and to breathe new life into decisions like *United States* v. *Adams*, 634 F.2d 830 (5th Cir. 1981), that interpreted *McCarthy* too broadly, see Gov't Br. 16-17—inverts both the text and the purpose of that Rule.

B. Rule 11(c)(1) Errors Do Not Automatically Affect Substantial Rights

Respondent no longer disputes the government's observation (Gov't Br. 16-20) that courts cannot invoke their supervisory power to disregard the requirements of Rules 52 and 11(h). See, *e.g.*, *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988); *Johnson* v. *United States*, 520 U.S. 461, 466 (1997). Notwithstanding the intent of the Rules' drafters to require prejudice analysis of all Rule 11 errors, however, respondent (Br. 30-51) and his amici (*e.g.*, Law Professors' Amicus Br. 13-32) contend that courts can and should adopt an automatic-vacatur approach to violations of Rule 11(c)(1). But this Court's recognition of a "limited class" of (primarily constitutional) errors that are deemed to "'affect substantial rights'" under Rule 52(a) without a case-specific showing of prejudice, *Neder*, 527 U.S. at 7, does

not mean that Rule 11(h) contemplates that courts may fashion rules of per se reversal for particular Rule 11 errors. Such a practice is inconsistent with Rule 11(h)'s origins as a specific initiative to overturn a per se reversal approach, as well as with the nonconstitutional and prophylactic nature of Rule 11 itself. At a minimum, Rule 11(h) makes this a particularly inappropriate context for this Court to treat, apparently for the first time, the violation of a Federal Rule of Criminal Procedure as structural error (or its functional equivalent). Moreover, even assuming *arguendo* that an automatic-vacatur approach to Rule 11(c)(1) errors could be squared with Rule 11(h), such an approach would be unwarranted. See Gov't Br. 20-25.

1. A judicial presumption of prejudice for every violation of a prophylactic Federal Rule is inappropriate

a. This Court has stressed that even "'most constitutional violations'" are subject to harmless-error review, and it has recognized that "the argument for applying harmless-error analysis is even stronger" for violations of federal rules that "are not themselves of constitutional magnitude." *United States* v. *Lane*, 474 U.S. 438, 445-446 (1986) (quoting *United States* v. *Hasting*, 461 U.S. 499, 509 (1983)); see *id.* at 446 n.9. As the government's opening brief explains (Br. 20-21), structural errors considered "so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights')" on harmless-error review, "without regard to their effect on the outcome," are almost always "fundamental *constitutional* errors." *Neder*, 527 U.S. at 7-8 (emphasis added); see *Puckett*, 556 U.S. at 140-141 (reserving question whether structural errors "automatically" affect substantial rights in the plain-error context). This Court has repeatedly rejected claims that a violation of a Federal

Rule is automatically prejudicial. See *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81 n.6 (2004) (plea-colloquy errors); *Olano*, 507 U.S. at 737, 740 (alternate jurors present for deliberations); *Bank of Nova Scotia*, 487 U.S. at 253-254 (grand-jury errors); *United States* v. *Mechanik*, 475 U.S. 66, 71-72 (1986) (same); *Lane*, 474 U.S. at 449 (misjoinder).

In particular, the Court has refused to undertake a "rule-by-rule review establishing bright-line *per se* rules whether to conduct harmless-error analysis." *Lane*, 474 U.S. at 448 n.11. "Rule 52(a)," the Court observed, "admits of no broad exceptions to its applicability." *Ibid.* "Assuming there is a 'substantial right'" at issue when a particular Federal Rule is violated, "the inquiry remains whether the error 'affects substantial rights' requiring reversal of a conviction." *Ibid.* "That kind of inquiry," the Court explained, "requires a review of the entire record." *Ibid.*; see *Hasting*, 461 U.S. at 509 ("[T]he Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless.").

b. Respondent does not dispute that Rule 11(c)(1) is a prophylactic Federal Rule, rather than a constitutional command. See Gov't Br. 20-21; cf. *Dominguez Benitez*, 542 U.S. at 83 (observing that "the violation claimed was of Rule 11, not of due process"). Respondent acknowledges (Br. 23) that Rule 11(c)(1) sweeps more broadly than the rules of certain States, a number of which allow some judicial participation in plea discussions, and he does not suggest that such state rules are unconstitutional. See, *e.g.*, N.C. Gen. Stat. Ann. § 15A-1021(a) (West 2011) ("The trial judge may participate in [plea] discussions."); Idaho Crim. R. 11(f) (similar); *McMahon* v. *Hodges*, 382 F.3d 284, 289 n.5 (2d Cir. 2004) ("In New

York State courts, a trial judge is permitted to participate in plea negotiations with criminal defendants."); see also, *e.g.*, Vt. R. Crim. P. 11 reporter's notes (observing that Vermont "departs" from the federal rule by permitting on-the-record judicial participation in plea discussions and noting "advantages to the defendant in having some advance sense of the judge's position"); American Bar Ass'n, *ABA Standards for Criminal Justice: Pleas of Guilty* § 14-3.3(c), at 134-135 (3d ed. 1999) (observing that ABA standards previously "allowed for a more active role for judges in plea negotiations" and that "some evidence" exists "that judicial participation in plea negotiations is common in some state courts").

Yet nearly all of the decisions of this Court on which respondent relies to argue that Rule 11(c)(1) errors are per se prejudicial involved constitutional errors. See, *e.g.*, Resp. Br. 31 nn.4-5; *id.* at 41-42. Respondent appears to believe (Br. 34-38) that Rule 11(c)(1) errors should be treated like fundamental constitutional errors simply because constitutional violations (such as an involuntary plea) *could* occur if Rule 11(c)(1) is violated. But the same is true of many nonconstitutional criminal and evidentiary rules, and this Court's precedents do not support broad judicial authority to disregard Rule 52 in that circumstance. The plea-colloquy requirements of Rule 11(b), for example, like the judicial-participation bar of Rule 11(c)(1), provide a buffer against deprivation of "the jury trial guarantee and the privilege against self-incrimination." Resp. Br. 14. But the Court has held that the omission of a plea-colloquy warning is not even "colorably structural" and is subject to ordinary prejudice analysis. *Dominguez Benitez*, 542 U.S. at 76, 81 n.6.

c. Respondent cites two cases in which this Court has countenanced automatic reversal without specifically addressing whether the error was constitutional. See Br. 32 n.6 (citing *Nguyen* v. *United States*, 539 U.S. 69, 81 (2003); *Gomez* v. *United States*, 490 U.S. 858, 876 (1989)). Both were addressed in the government's opening brief (Br. 19-20, 22), and both involved *statutory* errors that resulted in an unauthorized judicial officer sitting on the case. Automatic reversal in that circumstance does not suggest that automatic reversal is appropriate for every judicial comment that crosses Rule 11(c)(1)'s prophylactic line. Cf., *e.g.*, *Olano*, 507 U.S. at 738-739 (explaining that even "egregious comments by a bailiff to a juror" are subject to prejudice analysis) (citing *Parker* v. *Gladden*, 385 U.S. 363 (1966) (per curiam)).

Respondent asserts (Br. 32) that this Court has "identified several errors" in "the plea context" that "warrant relief without a case-specific prejudice analysis." As already noted (see pp. 4-5, *supra*), respondent's interpretation of *McCarthy* is inconsistent with the Court's narrow reading of that decision in *Vonn*. See 535 U.S. at 66-69. And the errors in *Boykin* v. *Alabama*, 395 U.S. 238 (1969), and *Brookhart* v. *Janis*, 384 U.S. 1 (1966), were of constitutional dimension. In each case, no guilty plea was validly entered, because the defendant did not affirmatively waive the rights that a guilty plea relinquishes. See *Boykin*, 395 U.S. at 242 (reversing where judge accept[ed] defendant's guilty plea "without an affirmative showing that it was intelligent and voluntary"); *Brookhart*, 384 U.S. at 8 (reversing where defendant "neither personally waived his right nor acquiesced in his lawyer's attempted waiver"). In the absence of a valid plea, no actual conviction existed,

and reversal was the only possible course. Cf. *Florida* v. *Nixon*, 543 U.S. 175, 185 (2004) ("[A] guilty plea cannot be inferred from silence; it must be based on express affirmations made intelligently and voluntarily."). A pure Rule 11(c)(1) case, in contrast, involves a constitutionally valid plea that the defendant is seeking to set aside based on the violation of a prophylactic Federal Rule.

2. Rule 11(c)(1) errors are not invariably prejudicial

Respondent's suggestion that all Rule 11(c)(1) errors have the same prejudicial impact on a decision to plead guilty is mistaken. See Gov't Br. 20-25.

a. Respondent attempts to portray Rule 11(c)(1) errors as invariably prejudicial by focusing on what he labels the "core category" (Br. 14) of Rule 11(c)(1) violations, in which the judge "exhorts" (Br. 13), "urges" (Br. 45), or "implore[s]" (Br. 37) an admission of guilt. He asserts that a judge who commits such a "core" violation necessarily "becomes an additional adversary" of the defendant (Br. 12); "cast[s] [himself] in what is essentially a prosecutorial role" (Br. 20); "gravely compromise[s] the neutrality of the court" (Br. 14); leads the defendant "to believe that his trial right is illusory and that a guilty plea is his only real option" (Br. 21); and can induce defense counsel to effectively abandon his client, so that the defendant "find[s] himself facing three prosecutors—the government, the court, and his own attorney—with no one truly acting on his behalf" (*ibid.*).

Respondent's attempt to extrapolate an automatic-vacatur rule by focusing solely on the most extreme types of Rule 11(c)(1) violations, and postulating the most extreme prejudicial effects, is misconceived. See, *e.g.*, *United States* v. *Marcus*, 130 S. Ct. 2159, 2166 (2010) (examining whether "*all or almost all* [of a certain type of] errors *always* affect the framework within

which the trial proceeds") (internal quotation marks and citation omitted). This Court has made clear that "[a]ny assumption that once a 'substantial right' is implicated it is inherently 'affected' by any error begs the question raised by Rule 52(a)." *Lane*, 474 U.S. at 448 n.11. The Court has also emphasized that a "*per se* approach to plain-error review is flawed," *United States* v. *Young*, 470 U.S. 1, 17 n.14 (1985), and that "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure," *Puckett*, 556 U.S. at 143 (quoting *Johnson*, 520 U.S. at 466). An irrebuttable presumption that every Rule 11(c)(1) error is "core," or that every such error necessarily affects the outcome of the proceedings, contravenes the basic purpose of prejudice analysis—namely, to "substitute judgment for automatic application of rules" and allow a reviewing court to differentiate harmful errors from non-harmful ones, based on the nature of the error and the surrounding circumstances. *Lane*, 474 U.S. at 448 (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 759-760 (1946)); see, *e.g.*, *Dominguez Benitez*, 542 U.S. at 84-85; *Young*, 470 U.S. at 16-20.

It would likewise be inappropriate and infeasible for courts to try to carve out "core" Rule 11(c)(1) errors—or some other amorphously defined subset of Rule 11(c)(1) errors involving "judicial pressure," Law Professors' Amicus Br. 10 n.4—for special treatment as automatically prejudicial error. Whether an error is structural must be assessed as a "categorical" matter. *Neder*, 527 U.S. at 14. The text of Rule 11(c)(1) does not differentiate between various types of errors, and the lines between judicially created subcategories would inevitably be blurry. Cf., *e.g.*, *State* v. *Bouie*, 817 So. 2d. 48, 56 (La.

2002) ("We concede that a fine line may at times separate a trial judge's attempts to insure that the defendant understands that a guilty plea might serve his best interest and the overbearing of a defendant's will to reach a result the court, with the best of intentions, deems appropriate."). It makes little sense to have the stark consequence of automatic vacatur turn on an indeterminate question of judicial labeling. Instead, the correct course is individualized prejudice analysis, which allows case-specific judgments that consider both the degree of the error and any circumstances tending to support or rebut the proposition that the error affected the plea.

b. Respondent's passing suggestion (Br. 40) that Rule 11(c)(1) forbids *only* so-called "core" violations is mistaken. Contrary to respondent's assertions (Br. 13), both the plain text of Rule 11(c)(1)—which bars judicial "participat[ion] in [plea] discussions"—and judicial interpretations of that text go well beyond "judicial exhortations to plead guilty." Rather, the bar encompasses statements that are well-meaning, obvious, neutral, and even discouraging of a plea.

The decision below acknowledges that the Eleventh Circuit "usually refrain[s] from inquiring into the degree of judicial participation" before granting relief. Pet. App. 4a. That court has, for example, found a Rule 11(c)(1) violation, and vacated a plea, merely because a judge—in an "innocuous" attempt "to insure that [the defendant] was making an informed decision"—pointed out the obvious fact that the mandatory-minimum ten-year sentence under the plea was "a lot better" than a mandatory-minimum 15-year sentence if the defendant were found guilty at trial and suggested that the defendant "talk to his lawyer some and see if that is really what he wants to do." *Casallas*, 59 F.3d at 1177; see also

Gov't Cert. Reply Br. 7-8 (citing other Eleventh Circuit cases). The Ninth Circuit, which also appears to have an automatic-vacatur rule, has similarly refused to examine the "degree or type of judicial involvement" and has also found a Rule 11(c)(1) violation based on apparently well-intentioned comments about the sentencing exposure of a plea compared to a trial. *United States* v. *Bruce*, 976 F.2d 552, 555, 557 (1992); see also *United States* v. *Washington*, 109 F.3d 459, 463-464 (8th Cir. 1997) (suggesting that Rule 11(c)(1) error occurred where judge helped parties determine the Sentencing Guidelines range resulting from a certain plea).

Those decisions are not isolated examples. Although courts of appeals sometimes state that comments must be "coercive" to violate Rule 11(c)(1), they construe that term so broadly that they "all appear to hold that any discussion of the penal consequences of a guilty plea as compared to going to going to trial * * * , no matter how well-intentioned," will violate Rule 11(c)(1). *United States* v. *Cano-Varela*, 497 F.3d 1122, 1133 (10th Cir. 2007) (internal quotation marks and citation omitted). The Seventh Circuit, moreover, has indicated that Rule 11(c)(1) prohibits a judge from pressuring the *government*—out of the defendant's presence—to *offer* a plea agreement. *In re United States*, 572 F.3d 301, 305-306, 310-311 (2009). The Rule additionally "prohibits participation that effectively *undermines* the parties reaching a bargain," *United States* v. *Baker*, 489 F.3d 366, 371 n.3 (D.C. Cir. 2007) (emphasis added), and courts have found violations even when the defendant does not in fact plead guilty, see, *e.g.*, *United States* v. *Tobin*, 676 F.3d 1264, 1303-1308 (11th Cir. 2012), cert. denied, 133 S. Ct. 647, 648, 658, 666 (2012) and 133 S. Ct. 885 (2013). Courts have also found Rule 11(c)(1) violations when the

judge simply attempts to speed up the plea process by indicating to the parties, following the rejection of a proposed plea agreement, the kind of plea agreement he might accept. See, *e.g.*, *United States* v. *Bierd*, 217 F.3d 15, 20 (1st Cir. 2000) (citing cases).

These different types of errors can affect different cases in different ways, and in some cases may have no effect at all. A judge's indication of what type of plea agreement he might accept would presumably not be prejudicial to the defendant if, for example, the judge recommended a plea with a lower sentencing range, the parties had already (unbeknownst to the judge) agreed to terms similar to those the judge suggested, or if the case were reassigned to a different judge who might be open to a plea that the original judge rejected. Similarly, a judge's comment on the difference in the maximum sentence between a possible plea agreement and trial would not necessarily be prejudicial if, for example, the defendant entered into an even more favorable plea agreement six months later. Nor would a slip-up in a judge's well-intentioned efforts to assure that the defendant was receiving adequate assistance of counsel in the plea process, see *Missouri* v. *Frye*, 132 S. Ct. 1399, 1406-1407 (2012), necessarily be prejudicial if, for example, the defendant had already stated in open court "that he did not intend to go to trial," *Dominguez Benitez*, 542 U.S. at 84.

The ordinary case-by-case prejudice approach advocated by the government—which is the majority approach in the circuits, including some circuits cited by respondent for the proposition that Rule 11(c)(1) errors are particularly serious, see Pet. 16-18—allows courts to assess all of the circumstances and grant relief, or not, as appropriate. Respondent's approach, however, would

unjustifiably leave no room for any court, in any circumstance, to ever find any Rule 11(c)(1) violation non-prejudicial.

3. Prejudice analysis of Rule 11(c)(1) errors is judicially administrable

Respondent does not dispute that reviewing courts must sometimes determine whether a judicial error has affected a defendant's decision to plead. He acknowledges (*e.g.*, Br. 13), for example, that Rule 11(h), as well as this Court's decisions in *Vonn* and *Dominguez Benitez*, require reviewing courts to address that very question when judges omit plea-colloquy warnings. See also, *e.g.*, *Frye*, 132 S. Ct. at 1409-1410 (claim of ineffective assistance of counsel at plea stage requires reasonable likelihood that defendant, prosecutor, and judge would have agreed on plea); *Lafler* v. *Cooper*, 132 S. Ct. 1376, 1385 (2012) (same). He contends (Br. 41-46), however, that an inquiry into the effect of Rule 11(c)(1) violations is so unmanageable that reviewing courts should grant relief automatically, rather than attempt it.

That contention is misplaced. See Gov't Br. 23-24. Respondent's argument largely consists of the question-begging—and erroneous, see pp. 10-15, *supra*—presumption that Rule 11(c)(1) errors are inherently prejudicial. See, *e.g.*, Br. 43 (presuming that errors cause "subversion of the adversary process"); Br. 44 (presuming that "judicial intervention will inevitably affect" the negotiations) (internal quotation marks and citation omitted). The remaining concerns he asserts—that it may be difficult to determine whether the defendant would have entered the same plea, that a full record of plea discussions may not be available on appeal (if the defendant did not raise the issue in district court), and that a defendant's plea calculus may be idiosyncratic—

would apply equally to plea-colloquy errors. Yet neither the drafters of the Federal Rules nor this Court has dispensed with the prejudice inquiry in that context. See *Dominguez Benitez*, 542 U.S. at 84-85 (equating plea-related prejudice analysis with other forms of prejudice analysis); see also Fed. R. Crim. P. 11(h); *Vonn*, 535 U.S. at 74-76.

State courts, for their part, have evaluated the effect of judicial plea-related comments on a case-specific basis on direct appeal, sometimes granting relief and sometimes not. See, *e.g.*, *People* v. *Weaver*, 118 Cal. App. 4th 131, 149-150 (Cal. Ct. App. 2004) (reversing); *State* v. *McCray*, 87 P.3d 369, 371-372 (Kan. Ct. App. 2004) (affirming); *Bouie*, 817 So. 2d at 53-56 (reversing); *State* v. *Jennings*, No. A-08-248, 2008 WL 4443803, at *3-*4 (Neb. Ct. App. Sept. 30, 2008) (affirming); *People* v. *Davis*, 54 A.D.2d 913, 913-915 (N.Y. App. Div. 1976) (affirming); *State* v. *Riggans*, No. 1-09-56, 2010 WL 1175202, at *1-*3 (Ohio Ct. App. Mar. 29, 2010) (affirming in relevant part). Even if the defendant failed to supplement the record on the judicial-participation issue by raising that issue in district court (*e.g.*, in a motion to withdraw his plea), relief does not require certainty about the error's effect, but just a reasonable likelihood (not even a preponderance of the evidence) that it changed the outcome. See *Dominguez Benitez*, 542 U.S. at 76.

A finding of prejudice may be likely, for example, when the error itself was sufficiently serious and nothing in the record provides an alternative explanation for the defendant's actions. See Resp. Br. 45. But some cases will enable a court to reach a different conclusion. See *id.* at 40 n.8 (acknowledging that not every asserted Rule 11(c)(1) error has been deemed prejudicial). In

United States v. *Ebel*, 299 F.3d 187 (2002), for example, the Third Circuit found a judicial-participation error harmless where the defendant was insisting on a plea agreement with a maximum 36-month sentence; the district court agreed to impose a 37-month sentence following a plea if the parties so desired; the defendant moved to withdraw his plea only after his co-defendants were acquitted at trial; and the defendant received only a 33-month sentence. *Id.* at 189-192. And in this case, the government has, at the very least, sound arguments that respondent cannot show prejudice. See Gov't Br. 27-28; pp. 20-21, *infra*. The court of appeals could have and should have considered those arguments, rather than disregarding them entirely.

4. Automatic relief for every Rule 11(c)(1) error would have adverse consequences

Even assuming that pure policy considerations could justify treating Rule 11(c)(1) errors as automatically prejudicial, respondent errs in asserting (Br. 46-50) that his automatic-vacatur approach would benefit judicial administration and the finality of guilty pleas. As the government's opening brief discusses (Br. 25-27), his approach would in fact have a number of adverse practical consequences.

First and foremost, as already discussed, it would require relief even for defendants who clearly were not prejudiced. Second, it would encourage sandbagging, because a defendant would have nothing to lose by staying quiet about a Rule 11(c)(1) error, negotiating the best plea he can, seeing what sentence he receives, and then raising the error only if he is unhappy with his sentence. See *Vonn*, 535 U.S. at 73 (rejecting rule that would increase defendant's incentive to "choose to say nothing about a judge's plain lapse under Rule 11 until

the moment of taking a direct appeal"). Respondent suggests (Br. 50) that appellate courts can sanction such strategic behavior. But he offers no method for appellate courts to distinguish between sandbagging and good appellate issue-spotting. Nor does he offer a sound reason for dispensing with the preexisting mechanism to discourage sandbagging: the plain-error limitations of Rule 52(b). See, *e.g.*, *Puckett*, 556 U.S. at 133-134; *Dominguez Benitez*, 542 U.S. at 82; *Vonn*, 535 U.S. at 73.

Third, respondent's approach would impose serious costs on the government for errors that it cannot prevent, that may take place out of its presence, and that it could not correct. See Gov't Br. 26-27. Respondent's citation (Br. 49) of *Missouri* v. *Frye*, *supra*—a case involving a constitutional ineffective-assistance-of-counsel error that includes a prejudice component, see 132 S. Ct. at 1405, 1409—provides no support for the contention that a court can or should categorically dispense with prejudice analysis for a Rule-based error as a matter of policy.

Finally, respondent implausibly suggests (Br. 47-48) that automatic vacatur in every Rule 11(c)(1) case is *less* disruptive of the finality of guilty pleas than leaving untainted pleas in place, because it preempts claims for postconviction relief. If the mere possibility of a petition for collateral review—alleging, say, a new and different constitutional claim of ineffective assistance of counsel or an involuntary plea, *id.* at 47 & n.11—were grounds for granting automatic relief on direct appeal for every Rule-based error, then Rule 52 would do little, if any, work.

C. The Error In This Case Was Non-Prejudicial

Although the Court need not reach the issue, respondent errs in contending (Br. 51-58) that he was prejudiced in this case.

1. Respondent first asserts (Br. 51-53) that harmless-error, rather than plain-error, review should apply, because neither he nor his lawyer could have been expected to object to the magistrate judge's comments. But respondent forfeited any argument on the standard of review by adverting to it only in a parenthetical quotation attached to a "Cf." citation in a footnote of his opening Eleventh Circuit brief. Resp. C.A. Br. 19 n.7; see *Asociacion de Empleados del Area Canalera* v. *Panama Canal Comm'n*, 453 F.3d 1309, 1316 n.7 (11th Cir. 2006) (finding argument to be "waived because it appears only in a footnote in [the] initial brief and is unaccompanied by any argument"); see, *e.g.*, *Auer* v. *Robbins*, 519 U.S. 452, 464 (1997) (declining to consider improperly preserved argument).

In any event, the argument lacks merit. The Federal Rules encourage plea-related objections to be made before sentencing, not after, to help distinguish "meritorious second thoughts" from "mere sour grapes over a sentence"; "to combat defendants' 'often frivolous' attacks on the validity of their guilty pleas"; to allow district courts to fix their own mistakes; and to create a record. *Vonn*, 535 U.S. at 72-73 & n.10 (quoting *McCarthy*, 394 U.S. at 465); see *id.* at 73 n.10 (explaining that "[a]ny other approach is at odds with Congress's object in adopting Rule 11"). This would be an especially poor case in which to create an exception to the plain-error rule. Even assuming the failure of respondent and his counsel to contemporaneously object to the magistrate judge's comments could be excused, no reasonable ex-

cuse exists for failing to mention the comments to the district judge during the months of ensuing proceedings (including a motion to withdraw the plea) or for failing to mention them on appeal until the court of appeals discovered them on its own.

2. As the government's opening brief explains (Br. 1-8, 27-28), the record here shows no reasonable likelihood that respondent's plea was affected by the magistrate judge's comments. Respondent filed a speedy-trial motion after those comments were made; the guilty plea came three months after the comments; the district judge, not the magistrate judge, presided over the plea and sentencing proceedings; respondent represented at the plea hearing that the plea was uncoerced; respondent explained, in a later motion to withdraw his plea, that he pleaded guilty for "strategic" reasons; and respondent never once mentioned the magistrate judge's comments, either in seeking to withdraw his plea or on appeal, until the court of appeals raised them itself.

Respondent's contrary argument lacks support. Respondent states (Br. 15-16) that "the record offers no alternative explanation," aside from the magistrate judge's comments, "for his change of heart" in deciding to plead guilty. But the record contains respondent's own explanation to the district court, in support of his motion to withdraw his plea, that he pleaded guilty because he wanted to expose alleged misstatements in the indictment (which went only to the scope and manner of the conspiracy, not its existence) and because his counsel had misinformed him about the effect of the plea on a prosecution in another jurisdiction. See Gov't Br. 5-6. And respondent represented under oath that nobody forced or pressured him to plead guilty and never mentioned the magistrate judge's comments when explain-

ing his decision to plead. *Ibid.*; cf., *e.g.*, *Baker*, 489 F.3d at 370 (defendant stated at sentencing that judge's comments had influenced his guilty plea).

Respondent also cannot explain why the passage of time and a different judge are sufficient to remove the taint of a Rule 11(c)(1) error when they result from an appeal, but are insufficient when they come about in the course of the district-court proceedings. Respondent's own theory of why Rule 11(c)(1) error is prejudicial—that it essentially turns the judge into a non-neutral adversary whom the defendant and his lawyer are reluctant to displease by going to trial, *e.g.*, Br. 13-14—falls away when a new judge arrives. Respondent accordingly lacks a sound basis for proposing (Br. 57) that one judge's statements should automatically be attributed to any successive judge who does not "expressly disavow[]" those statements. Here, for example, it makes little sense to presume that respondent believed the district judge "desired a deal" (*ibid.*) and was "on the same page" (Br. 58) as the magistrate judge, when the district judge neither demonstrated an awareness of the magistrate judge's comments nor made any improper comments of his own.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

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Solicitor General

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