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INTRODUCTION

Federal appellate courts apply plain error review if a criminal defendant has forfeited an objection to an error that occurred at or before trial. It has long been established that in most cases appellate courts may only correct such an error in a narrow set of circumstances. Current doctrine holds that courts may not correct such errors unless the error was plain, it affected the defendant's substantial rights (usually meaning that the error affected the outcome of the case at the district court level), and failure to correct the error would "seriously affect[ ] the fairness, integrity, or public reputation of judicial proceedings."[1]

This Essay addresses jurisprudence surrounding the requirement that the error affect a defendant's substantial rights. In most cases, the appellant must use facts from the record to make a specific showing that there is a reasonable probability that the error prejudiced the outcome of the case. However, there is a subset of cases in which courts of appeals lift that burden by presuming that prejudice has occurred,[2] frequently because it would be almost impossible for the appellant to demonstrate prejudice based on the specific facts of the case. Often, this occurs when a district judge has imposed a sentence based on an erroneously-calculated range under the United States Sentencing Guidelines. Yet courts disagree on when and whether this presumption should apply, leading to disparate and confusing results. Some courts lift the defendant's burden, implicitly applying the presumption, but fail to discuss the presumption or its appropriate usage. Aside from resulting in doctrinal incoherence, the current jurisprudence fails to effectively meet the goals of the plain error

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1. United States v. Marcus, 130 S.Ct. 2159, 2164 (2010).

2. There is also a subset of "structural errors" that may call for a finding of plain error regardless of their effect on the outcome. Some courts have found that this subset is part of the same group of cases in which prejudice should be presumed. This Essay will focus on the presumption of prejudice, only discussing structural error when necessary. Unless otherwise indicated, references to errors that may call for a presumption of prejudice are intended to refer to non-structural errors.

rule, principally because the courts usually do not consider those goals. This Essay provides a brief discussion of some of the relevant case law and examines the presumption in an attempt to reach more clarity about its role and its meaning. It then proposes that, in determining whether to apply a presumption of prejudice, courts should consider several factors that will lead to results more consistent with the goals of the plain error rule.

Part I introduces the contemporaneous objection requirement and its corollary, the plain error rule. It briefly discusses the purposes behind requiring litigants to forfeit objections that are not made at the district court level. Part II examines plain error rule doctrine that has developed in recent years. While appellate courts sometimes apply the Supreme Court's four-part test without difficulty, the Court's holdings and dicta do not clarify how courts should apply the test in all circumstances. Recent cases have purported to require appellate courts to look to the facts of individual cases to determine whether there is a serious risk the error in question affected the district court's ultimate judgment. Yet, in certain situations, there is no way to perform such an inquiry, and the Court's language seems to allow for varied application of the rule when necessary. Part II also examines various sets of circuit court cases attempting to apply the Supreme Court's test and demonstrates both the existence of circuit splits and the fact that courts often fail to thoroughly analyze the appropriateness of applying a presumption of prejudice.

Part III comes to several conclusions. First, courts have sporadically applied the term "presumption of prejudice," but even courts that rarely use the term generally recognize a subset of cases in which they must lift the appellant's burden of showing prejudice. Looking closely at such cases reveals that, despite the Supreme Court's refusal to explicitly endorse a category of cases in which appellate courts should apply the presumption, that category must exist. However, courts differ in their conceptions of how they should apply Supreme Court precedent and when to conclude that a reasonable probability of prejudice exists.

Second, Part III argues that plain error jurisprudence will improve if courts work toward a clearer definition of this class of cases and develop a more consistent set of considerations to determine when to lift a defendant's burden of showing prejudice. The considerations should serve the purpose of the plain error rule, which is to preserve fairness to defendants while meeting the goals of the contemporaneous objection rule. Thus, courts addressing cases in which there may be a reasonable probability of prejudice, but in which the defendant cannot point to specific events at trial or sentencing that demonstrate that probability, should consider the following factors:

(1) the probability that prejudice occurred;
(2) whether the error below is one of the type that often defies typical analysis because it is unlikely there is anything in the record that the defendant could use to demonstrate prejudice;
(3) the level of risk that sandbagging occurred;
(4) the burden to the judicial system that remanding the case would cause;
(5) whether the proceedings on remand would be jeopardized because of delay.

I. THE CONTEMPORANEOUS OBJECTION RULE AND PLAIN ERROR REVIEW

Plain error review arises from the contemporaneous objection rule, which requires a litigant to object if an error occurs during a federal judicial proceeding.[3] If a criminal defendant fails to lodge such an objection, she will face a daunting challenge on appeal because an appellate court may only correct the error if it determines that the appellant has met the requirements of Federal Rule of Criminal Procedure 52(b). Rule 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." Though the text of the rule provides little guidance for appellate courts, the Supreme Court has set forth a four-factor standard to apply in such cases. An appellant satisfies the test if she can show the following:

(1) There is an error;
(2) The error is clear or obvious, rather than subject to reasonable dispute;
(3) The error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and
(4) The error seriously affects the fairness, integrity or public reputation of judicial proceedings.[4]

3. *See* FED. R. CRIM. P. 51(b) ("A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection."); *see also* Puckett v. United States, 129 S.Ct. 1423, 1428 (2009).

4. *Marcus*, 130 S.Ct. at 2164.

Further, appellate courts may still affirm a conviction if an appellant meets the four-factor test. The test is simply a precondition to the exercise of a court's discretion to remedy the error below.[5]

There are several reasons for the contemporaneous objection rule. It encourages litigants to raise objections in a timely manner in front of the court best suited to rule on those objections.[6] In making some objections, such as objecting to the introduction of certain evidence, "[a] contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later."[7] If a defendant raises the objection before the district court, the court may be able to forge a remedy that will prevent the mistake from affecting the outcome of the proceeding or prevent the error from occurring in the first place.[8] Especially important for those supporting a stricter plain error standard, the rule prevents "sandbagging"—purposely forfeiting an objection in order to preserve a basis for appeal if the result of the trial court proceeding is unsatisfactory.[9] Further, the rule promotes the interest of finality, spares judicial resources, and can avoid "set[ting] aside a criminal conviction where retrial may be difficult if not impossible."[10]

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5. *Id.*

6. *Puckett*, 129 S.Ct. at 1428.

7. Wainwright v. Sykes, 433 U.S. 72, 88 (1977).

8. *Id.* at 88–89; *see also* Henderson v. United States, 133 S. Ct. 1121, 1134 (2013) (Scalia, J., dissenting).

9. *Wainwright*, 433 U.S. at 89; *see also Henderson*, 133 S. Ct. at 1134 (2013) (Scalia, J., dissenting) ("Where a criminal case always has been, or has at trial been shown to be, a sure loser with the jury, it makes entire sense to stand silent while the court makes a mistake that may be the basis for undoing the conviction."); United States v. Alvarado, 720 F.3d 153, 157 (2d Cir. 2013) ("Rigorous plain error analysis is especially appropriate in contexts that present the possibility of 'sandbagging' *i.e.*, the risk that a defendant will strategically withhold an objection below, only to raise it on appeal."); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1135 (1986) (explaining that litigants "may find some strategic advantage in disregarding" contemporaneous objection rules, and therefore that "[f]orfeiture provisions supply a necessary bite").

10. *Henderson*, 133 S.Ct at 1134. Of course, commentators and courts have expressed varying reasons for the contemporaneous objection rule over time. In an early case concerning the issue, the Supreme Court explained that "[t]he verdict of a jury will not ordinarily be set aside for error not brought to the attention of the trial court" because of "considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." United States v. Atkinson, 297 U.S. 157, 159 (1936). The *Atkinson* Court also provided an early version of the current plain error rule, allowing for reversal "if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 160; *see also*

The plain error rule provides some relief from the contemporaneous objection requirement. Instead of automatically rejecting claims that are based on an argument forfeited below, the rule allows for exceptions in extreme circumstances. Existence of the rule provides some protection for defendants who might be subject to an improper or wrongful conviction or an erroneous sentence.[11] While the interests justifying the contemporaneous objection rule are strong, there are obvious drawbacks to upholding problematic convictions or sentences, including unfairness to the defendant, injury to society's interest in just results, decreased deterrent effect of the criminal law, and unnecessary expenditure of state resources.[12] Some who argue for a more defendant-friendly plain error rule in the sentencing context note that the arguments regarding the importance of finality and controlling the use of judicial resources are much weaker when an appellate court merely requires a district court to impose a new sentence rather than conduct a new trial.[13]

II. SUPREME COURT PRECEDENT AND SUBSEQUENT CIRCUIT COURT APPLICATION

Modern plain error jurisprudence began with *United States v. Olano*,[14] which the Supreme Court decided in 1993. This Part introduces

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Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1029 (1987) (addressing civil cases, noting delay caused by considering new issues and explaining that "if the party who objects to the trial court's action is forced to state its objection and to offer an alternative, the adversary or the trial court or both can" agree with the objector, offer an alternative, "or set out in the record the factual or legal basis for the trial court's action").

11. *See, e.g.*, Dustin D. Berger, *Moving Toward Law: Refocusing the Federal Courts' Plain Error Doctrine in Criminal Cases*, 67 U. MIAMI L. REV. 521 (2013).

12. Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 88, 150–52, 161–62 (2012) (discussing "weighty counter-arguments to finality" such as prisoners' interests in correct sentences and the harm to society when an unjust sentence is not corrected).

13. *Id.* at 139–62 (arguing that "when a habeas petition seeks merely a correction of a sentence, rather than a retrial, there should be less of a concern about draining resources as a court can correct a sentence more efficiently than holding a new trial, and shortening a sentence means saving money that would otherwise have been spent on incarceration"); Brandon Garrett, *Accuracy in Sentencing*, 86 S. CAL. L. REV. __ (2014) (forthcoming) ("To the extent that the lower courts' varying approaches towards the cognizability of sentencing error claims display a concern for finality, that concern is partially misplaced. Reversing a sentence does not involve the outright vacating of a conviction. As noted, the burden of simply resentencing is far slighter than a do-over of a trial.").

14. United States v. Olano, 507 U.S. 725 (1993).

Olano and several subsequent Supreme Court cases. It then examines courts of appeals' decisions applying Supreme Court case law and showing both disagreement over result and lack of clarity over when to apply the presumption.

A. Supreme Court Cases

1. *United States v. Olano*

In *Olano*, the district court improperly allowed an alternate juror to sit in the jury room during deliberations, and the jury found the two defendants guilty. The Ninth Circuit concluded that the district court's error was "inherently prejudicial and reversible *per se*."[15] It also concluded that "[b]ecause the violation is inherently prejudicial and because it infringes upon a substantial right of the defendants, it falls within the plain error doctrine."[16]

The Supreme Court first reviewed the plain error rule, explaining that, in order to invoke Rule 52(b), there must be a violation of a rule that is "clear" or "obvious."[17] Second, it addressed the "third and final limitation," under Rule 52(b), the requirement that the error affect the defendant's substantial rights. For an appellant to meet this requirement, "in most cases . . . the error must have been prejudicial: it must have affected the outcome of the district court proceedings."[18] The Court explained that this "normally requires" the appellate court to "engage[ ] in a specific analysis of the district court record . . . to determine whether the error was prejudicial."[19]

After contrasting Rule 52(b) with Rule 52(a), the Court explained that it "need not decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial.'" The Court left for another day whether there is a category of forfeited errors (usually called "structural errors") that courts should correct regardless of their effect on the outcome.[20] Similarly, the Court declined to examine "those errors that

15. *Id.* at 730 (internal quotation marks omitted).
16. United States v. Olano, 934 F.2d 1425, 1439 n.23 (9th Cir. 1991).
17. *Olano*, 507 U.S. at 733-34.
18. *Id.* at 734.
19. *Id.*
20. *Id.* at 735. Structural errors are those that deprive the defendant of "basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (quotation marks omitted); *see also Olano*, 507 U.S. at 743 (Stevens, J., dissenting) ("At least some defects bearing on the jury's deliberative function are subject to reversal regardless of whether prejudice can be shown, not only because it is so difficult to measure their effects on a jury's decision, but also because such defects 'un-

should be presumed prejudicial if the defendant cannot make a specific showing of prejudice."[21] Finally, the Court clarified that even if an appellant meets the first three prongs, courts have discretion concerning whether to reverse the trial court. Courts should exercise that discretion only if the error "'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'"[22]

The Court then analyzed whether the appellant had met the third prong of the test in the case at bar. It first decided that if structural errors indeed can affect substantial rights without the existence of prejudice, the presence of alternate jurors is not that type of error, noting that courts traditionally have analyzed "outside intrusions" on jury deliberations for prejudicial impact.[23] Next, it explained that the defendants had not submitted evidence attempting to show how the alternate jurors' presence may have affected the jury's deliberations.[24] Finally, the Court held that this was not a situation in which the court should presume prejudice because the alternate jurors took an oath and received the normal admonishment, and courts should assume that jurors (and alternates) follow their instructions.[25] Nor was the risk that the alternates' presence created a chilling effect high enough to call for a presumption of prejudice.[26] The Court concluded that the appellant had not demonstrated that the error had any effect on the outcome and, therefore, reversed the Ninth Circuit's holding.[27]

2. Subsequent Supreme Court Cases

The Supreme Court has applied the plain error standard several times since its *Olano* decision in 1993. None of the subsequent decisions have categorized an error as structural or requiring a presumption of prejudice,[28] but dicta has left the existence of those categories essentially in the same place they were after *Olano*.

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dermin[e] the structural integrity of the criminal tribunal itself.'") (quoting Vasquez v. Hillery, 474 U.S. 254, 263–64 (1986))).

21. *Olano*, 507 U.S. at 735 (also noting that normally a "defendant must make a specific showing of prejudice" to satisfy the rule's third prong).

22. *Id.* at 736 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

23. *Id.* at 737–38.

24. *Id.* at 739–40.

25. *Id.* at 740.

26. *Id.* at 741.

27. *Id.*

28. In one case, a sharply divided Court reversed an error that was not objected to below without applying the plain error standard. *See* Nguyen v. United States, 539 U.S. 69 (2003) (refusing to apply plain error review when one judge on appellate panel was not an Article III judge).

In *United States v. Dominguez-Benitez*,[29] the Court applied the plain error test when the defendant sought to revoke his guilty plea because the district judge had failed to warn him that he could not withdraw his guilty plea in the event that the judge did not accept the government's recommendations.[30] The Court first explained that it is only when a structural error occurs "that even preserved error requires reversal without regard to the mistake's effect on the proceeding."[31] Thus, the Court required Dominguez-Benitez to show a reasonable probability that, without the district judge's error, he would not have entered the guilty plea.[32]

Five years later, the Court decided *United States v. Puckett*.[33] In *Puckett*, the defendant pled guilty to bank robbery. As part of the plea deal, the government filed a motion for a sentence reduction for acceptance of responsibility. There was a long delay between that motion and sentencing, and, during that time, Puckett engaged in additional criminal activity. At sentencing, the government no longer supported the reduction, and the district judge did not grant it. The judge explained that even if he had the discretion to grant the reduction, he would refuse because of the subsequent criminal activity. Puckett's attorney did not object to the government's failure to adhere to the plea agreement.[34]

The *Puckett* opinion did not actually apply the plain error standard, but it examined the standard while answering the question of whether to apply it. One of Puckett's arguments was that the Court should not apply the plain error test because breach of a plea agreement would always meet the third prong of *Olano* test: such a breach would always affect substantial rights, because it is a structural error. Again, the Court shied away from providing much guidance, simply holding that if such a category of cases exists, breach of a plea deal is not part of the category.[35] It also rejected the logic of Justice Souter's dissent, which would have held that Puckett's sentence to a prison term without either a trial or an agreement that the government honored affected Puckett's substantial rights.[36] Criticizing the dissent, the majority opinion was concerned that if all breaches of plea agreements were held to affect substantial rights, it would "make[ ] a nullity of *Olano*'s instruction that a defendant normally

29. 542 U.S. 74 (2004).
30. *Id.* at 79.
31. *Id.* at 81.
32. *Id.* at 83.
33. 129 S. Ct. 1423 (2009).
34. *Id.* at 1427.
35. *Id.* at 1432.
36. *Id.* at 1435 (Souter, J., dissenting).

'must make a specific showing of prejudice' in order to obtain relief."[37] The Court did not elaborate on its use of the qualifier "normally," but, of course, the Court's use of the word indicates the existence of some class of cases in which a specific showing of prejudice is not required.

In *United States v. Marcus*,[38] the defendant argued that his conviction was flawed because the statute under which he was convicted did not come into effect until after the date he was alleged to have begun the illegal activity in the indictment. The Second Circuit held that the plain error test called for reversal of the conviction because it was possible that the jury had convicted Marcus solely on conduct that occurred before the statute was enacted.[39] The Supreme Court reversed, holding that the mere possibility of a different outcome was not sufficient to require reversal; rather, "[i]n the ordinary case . . . there must be a reasonable probability that the error affected the outcome of the trial."[40] The Court noted that such errors "come in various shapes and sizes" and, thus, often might not affect the outcome.[41] Further, if the enactment of the statute had come only a few days after the alleged start date of the criminal activity alleged in the indictment, the "tiny risk" of conviction based on pre-enactment conduct was "most unlikely" to cast doubt on the integrity of the judicial system.[42]

The *Marcus* opinion contained a paragraph about structural error very similar to the paragraph from *Puckett* discussed above, highlighting the limited nature of the class of structural errors and the fact that "it is often 'difficult' to assess the 'effect of [a structural] error.'"[43] In concluding that the error in *Marcus* was not structural, the Court explained that it saw "no reason why, when a judge fails to give such an instruction, a reviewing court would find it any more difficult to assess the likely consequences of that failure" than with other non-structural errors.[44]

Thus, Supreme Court precedent up to this point has made clear that in most cases in which courts apply the plain error rule, a defendant bears the burden of making a specific showing of prejudice in order to obtain relief. Yet the Court has identified two categories for which appellate

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37. *Id.* at 1433 (quoting *Olano*, 507 U.S. at 735).

38. 130 S. Ct. 2159, 2163 (2010).

39. *Id.* at 2163–64.

40. *Id.* at 2164.

41. *Id.* at 2166 (noting also that "[t]he kind and degree of harm that such errors create can consequently vary").

42. *Id.*

43. *Id.* at 2165 (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006)).

44. *Id.*

courts would not apply the typical test, though it has not explicitly opined on whether those categories actually exist. The first category is comprised of structural errors, which may require reversal regardless of their effect on the outcome.[45] The second category, at issue in this Essay, is comprised of non-structural errors for which prejudice must exist, but may be presumed.[46] However, the Court has also cautioned against the broad application of either of those classes. *Puckett* and *Marcus* clarify that, for cases in which courts can assess the potential prejudicial effect of an error by looking at the record, the typical *Olano* analysis applies. The following section will discuss how circuit courts have treated the second category of cases.

B. Circuit Court Decisions After Olano

Though *Olano* ensured that courts would apply the proper four-part test for plain error review, questions remain unanswered, even after *Puckett*, *Marcus*, and more recent decisions such as *Henderson v. United States*.[47] This section will address some of the circuit court decisions after *Olano*, which exhibit significant confusion as to the scope of cases in which courts should presume prejudice. Most importantly for purposes of this Essay, it demonstrates that circuit courts have not engaged in a thorough analysis to determine what the presumption means or whether its application would serve the goals of the plain error rule.

1. Post-*Booker* Confusion

In perhaps the most problematic set of cases, courts of appeals split on how to apply *Olano* to sentencing errors after the Supreme Court decided *United States v. Booker*[48] in 2005.[49] *Booker* struck down provisions of the Sentencing Reform Act that made it mandatory for judges to apply the United States Sentencing Guidelines, thereby making the Guidelines advisory. District courts that had sentenced defendants assuming the Guidelines were mandatory committed error.

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45. United States v. Olano, 507 U.S. 725, 735 (1993).

46. *Marcus*, 130 S.Ct. at 2165.

47. 133 S. Ct. 1121 (2013) (holding that error can be "plain" if it was made plain after trial, but before appeal).

48. 543 U.S. 220 (2005).

49. *See Appeals*, 42 GEO. L.J. ANN. REV. CRIM. PROC. 899, 927 n.2630 (2013) ("Courts have taken three routes in applying the plain error rule when reviewing post-*Booker* appeals from pre-*Booker* sentencing."); Deborah S. Nall, *United States v. Booker: The Presumption of Prejudice in Plain Error Review*, 81 CHI.-KENT L. REV. 621, 634–38 (2006) (arguing that the Supreme Court should provide guidance concerning whether *Booker* errors affect substantial rights).

Naturally, before the Court decided *Booker*, many defendants did not argue that application of the Guidelines was improper. For those who appealed based on a *Booker* error, five circuits made it almost impossible for the appellant to win by requiring that they show prejudice under the traditional *Olano* analysis.[50] This meant that in order for the appellant to succeed, the district court judge would have had to somehow indicate on the record that he or she would have imposed a lower sentence if the Guidelines were not mandatory.

For example, in *United States v. Epstein*,[51] the district court sentenced the defendant to 108 months of imprisonment for his role in a fraud scheme.[52] The defendant successfully argued that the court committed a *Booker* error, but had not raised the argument below. The First Circuit applied the typical *Olano* analysis, requiring the defendant to "show a reasonable probability that he would have received a more lenient sentence under an advisory guidelines regime."[53] The defendant attempted to complete this difficult task, pointing out that the district court had sentenced him to the lowest possible Guidelines sentence, had reduced the sentence because of the disparity with another defendant, and had noted that the grounds shown were not sufficient for granting of a downward departure. While the First Circuit recognized that the first two points worked in the defendant's favor, it found that there was no indication from the trial transcript that the judge would have granted a downward departure if he had been permitted to do so under the law and noted that the judge "flatly stated" that the sentence was appropriate under the law.[54] Thus, the defendant had not shown the requisite reasona-

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50. *Nall*, *supra* note 49, at 635 ("The First, Fifth, Eighth, Tenth, and Eleventh Circuits follow this approach, which requires the defendant to demonstrate by a reasonable probability that the district court would have imposed a more lenient sentence under an advisory-Guidelines scheme."); *Appeals*, *supra* note 49, at 927 n.2630 ("Most circuits continue to require defendants to show a reasonable probability that the sentencing judge, sentencing under an advisory scheme rather than a mandatory one, would have reached a different result."); *see also* Peter A. Jenkins, Comment, *Requiring the Unknown or Preserving Reason:* United States v. Gonzalez-Huerta *and the Tenth Circuit's Compromise Approach to* Booker *Error*, 83 DENV. U. L. REV. 815, 838 (2006) (opining that "[m]ost, if not all, plain error post-*Booker* sentencing challenges do not satisfy the policy of encouraging objections because the affected defendants did not know at the time of their trial that a legal right to object to mandatory application of the Sentencing Guidelines existed").

51. 426 F.3d 431 (1st Cir. 2005).

52. *Id.* at 436.

53. *Id.* at 443 (internal quotation marks omitted) (quoting United States v. Martins, 413 F.3d 139, 154 (1st Cir. 2005)).

54. *Id.*

ble probability that the district court judge would have lowered his sentence under an advisory regime.

The court did not address *Olano*'s category of errors that courts should presume are prejudicial. It did mention that the defendant argued that the *Booker* error was structural, but cited to a previous case that had held "sentencing under a mandatory system is not an error that undermines the fairness of a criminal proceeding as a whole."[55] As with many courts applying *Olano*, the *Epstein* court did not engage in analysis of the difficulty in showing prejudice in certain situations, nor did it discuss whether applying the standard *Olano* third prong served the purposes of the plain error rule.[56]

Unlike the *Epstein* court, the Tenth Circuit in *United States v. Gonzalez-Huerta*[57] addressed the possible existence of a category of nonstructural errors that courts should deem prejudicial. However, it declined to presume prejudice because (1) the Supreme Court had never again mentioned the category of errors in question since *Olano*, and (2) it would not be impossible in all such cases for an appellant to demonstrate a presumption of prejudice using evidence from the record.[58] Yet it did not provide additional analysis, nor did it explain why the impossibility of an appellant demonstrating prejudice in the entire class of cases in question is a prerequisite to applying the presumption of prejudice.[59]

Other circuits took varying, more sensible approaches. For example, some circuit courts applied the presumption of prejudice mentioned in *Olano*, recognizing that without such a presumption, defendants are in an almost impossible situation. In *United States v. Barnett*,[60] the Sixth Circuit reviewed a typical post-*Booker* appeal, concluding that the district court erred by treating the Guidelines as mandatory. The court then applied

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55. *Id.* at 444 (quoting United States v. Antonakopoulos, 399 F.3d 68, 80 n.11 (1st Cir. 2005)).

56. *Accord* United States v. White, 405 F.3d 208, 219 (4th Cir. 2005). In *White*, the Fourth Circuit recognized that it was important to weigh not the gravity of harm to the defendant, but the risk that a defendant would be subject to prejudice but unable to demonstrate its existence. However, it found that because courts post-*Booker* would generally engage in the same Guidelines analysis, the risk was not high enough to presume prejudice. *Id.*

57. United States v. Gonzalez-Huerta, 403 F.3d 727, 733–34 (10th Cir. 2005).

58. *Id.* at 735. The court also decided that the defendant already had reason to present mitigating factors to the judge. *Id.*

59. *See* Jenkins, *supra* note 50, at 838 ("Guiding principles should not be supported by their extremes, and the presence of sufficient evidence in the trial record to establish prejudice is certainly an extreme situation in post-*Booker* challenges.").

60. 398 F.3d 516, 528 (6th Cir. 2005); *see also Appeals*, *supra* note 49 at 891–1041 (noting that some circuits presume prejudice in such cases, and others always remand to the district court to reconsider in light of *Booker*).

the plain error test, noting that it was "quite clear" from *Olano* that a presumption of prejudice is sometimes appropriate.[61] The court found that the presumption of prejudice was appropriate in "cases where the inherent nature of the error made it exceptionally difficult for the defendant to demonstrate that the outcome of the lower court proceeding would have been different had the error not occurred."[62]

2. Overlapping Guidelines Cases

As one would expect in any statutory system involving the analysis of multiple factors, district courts occasionally make plainly erroneous Guidelines calculations that neither party notices. Often the error is relatively minor, creating a situation in which the erroneous, higher Guidelines range overlaps with the correct, lower Guidelines range. If the district court's sentence falls within the overlapping span, appellate courts must decide how to correct the error. This occurred in *United States v. Knight*,[63] a Third Circuit case in which the district court calculated the defendant's Guidelines range to be 151 to 188 months of imprisonment and sentenced him to 162 months.[64] Knight failed to raise an objection at sentencing; however, on appeal, the government conceded that the proper Guidelines range was 140 to 175 months.[65]

Clearly the district court had committed plain error, but the appellate panel had to decide whether the error affected the defendant's substantial rights even though his sentence fell within the proper Guidelines range. The court recognized that, "absent a fortuitous comment by the sentencing judge on the record, it is very difficult to ascertain the impact of an erroneous Guidelines range."[66] It also pointed out that "the Supreme Court has cautioned that some errors to which no objection was made should be presumed prejudicial if the defendant cannot make a specific showing of prejudice," and concluded that overlapping Guidelines errors fell into that category.[67]

The Fourth Circuit reached the same result using the same reasoning as the *Knight* court in *United States v. Agyepong*.[68] The district court erroneously calculated the defendant's criminal history score and sen-

61. *Barnett*, 398 F.3d at 526.
62. *Id.* at 526–27.
63. United States v. Knight, 266 F.3d 203 (3d Cir. 2001).
64. *Id.* at 205.
65. *Id.*
66. *Id.* at 207.
67. *Id.* (quoting United States v. Adams, 252 F.3d 276, 285 (3d Cir. 2001) (internal quotation marks omitted)).
68. 312 F. App'x 566 (4th Cir. 2009).

tenced the defendant to the bottom of the 15 to 20 month range. On appeal, the Government conceded that the correct range was 12 to 18 months and that, even though the 15-month sentence fell within the correct range, Agyepong was entitled to resentencing.[69] The court explained that it could not know how the district court's sentence might have changed if it had applied the correct range, but because the sentence was at the bottom of the incorrect range, it was "reasonable to presume the court would have imposed a lower sentence had it been aware of the correct guidelines range."[70]

The Fifth Circuit has taken a different approach. For example, in *United States v. Blocker*,[71] the district court erroneously calculated the defendant's Guidelines range to be 78 to 97 months.[72] The defendant was sentenced to 85 months, which fell almost at the top of the correct range of 70 to 87 months.[73] Citing several similar cases but providing no analysis, the court explained that, "where the resulting sentence falls within both the correct and incorrect guidelines, we do not assume, in the absence of additional evidence, that the sentence affects a defendant's substantial rights."[74]

Blocker was based in part on *United States v. Jones*[75] and *United States v. Jasso*,[76] Fifth Circuit cases that came to a similar conclusion. Interesting for the purposes of this Essay, in none of the three cases did the

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69. *Id.* at 568–69; *see also* Brief of Appellee at 11, United States v. Agyepong, 312 F. App'x. 566 (4th Cir. 2008) (No. 08-4053), 2008 WL 3883544 at *11 ("Although the district court imposed a sentence within the new corrected range, re-sentencing is still required because the court might impose a different sentence when applying the correct range.").

70. *Agyepong*, 312 F. App'x at 569. Interestingly, the *Agyepong* court cited to *United States v. Price*, 516 F.3d 285, 289 (5th Cir. 2008), which reached a similar conclusion. As the next paragraph discusses, the Fifth Circuit has decided many cases that do not follow the same logic.

71. 612 F.3d 413 (5th Cir. 2010).

72. *Id.* at 415.

73. *Id.*

74. *Id.* at 416; *see also* United States v. Jones, 596 F.3d 273, 277 (5th Cir. 2010); United States v. Campo-Ramirez, 379 F. App'x 405, 409 (5th Cir. 2010); United States v. Jasso, 587 F.3d 706, 707 (5th Cir. 2009); United States v. Cruz-Meza, 310 F. App'x 634, 637 (5th Cir. 2009). *But see Price*, 516 F.3d at 289 (explaining that the sentencing error affected defendant's substantial rights). The Government has recently sought to expand this line of reasoning, arguing that *Puckett* and *Marcus* mandate the result reached by the Fifth Circuit. Calling *Blocker* "well-reasoned," a brief seeking to persuade the Third Circuit to overrule *Knight* argued in essence that courts may not presume prejudice after *Puckett* and *Marcus*. Corrected Brief for Appellee at 26–30, United States v. Perez, No. 12-2311, 2012 WL 5295988 (3d Cir. Oct. 17, 2012).

75. 596 F.3d 273, 277 (5th Cir. 2010).

76. 587 F.3d 706, 707 (5th Cir. 2009).

court discuss whether to apply a presumption of prejudice. The court asked if there was a "reasonable probability" that the lower court would have given the defendant a lower sentence but for the error.[77] The Fifth Circuit has found no reasonable probability in most similar cases; however, it did find such a probability in *United States v. Price*,[78] a case in which the overlap between the two sentencing ranges was relatively small and the potential minimum sentence was 18 months lower than the defendant's original sentence.[79] *Price* also failed to discuss a presumption of prejudice yet was willing to determine that the "reasonable probability" test was met because of the error and the small overlap. However, unlike the other cases discussed in this subsection, the court did not highlight the fact that it had no way of knowing whether the district court would have acted differently had it applied the correct range. Thus, while the Fifth Circuit has held that remand for resentencing may be required based only on the district court's sentencing calculation (and not on additional evidence of the judge's intention from the record), the cases have not analyzed when this should occur. Instead, the Fifth Circuit has simply decided that some circumstances create the requisite "reasonable probability," while others do not.

3. Plain Error Decisions Demonstrating Doctrinal Confusion or Inconsistency

The previous two subsections have demonstrated significant disagreement between courts of appeals about the role of the presumption of prejudice and have also begun to show that courts often have failed to fully probe the parameters of the presumption and its purposes. While the post-*Booker* cases and overlapping Guidelines cases may provide the best examples of stark differences in application, a smattering of other cases helps show doctrinal confusion.

First, it is clear that in some cases, the Fifth Circuit applies the presumption of prejudice despite its usual refusal to do so in overlapping Guidelines cases. In *United States v. Perez*,[80] the court reviewed a case in which the defendant was denied the right to allocute.[81] The court first concluded that although the district court had questioned Perez on several topics during the sentencing hearing, it had violated his right to allo-

77. *Id.* at 713.

78. 516 F.3d 285, 289 (5th Cir. 2008).

79. *Id.* at 290 n.28.

80. United States v. Perez, 460 F. App'x 294 (5th Cir. 2012).

81. Black's Law Dictionary defines "allocution" as "[a] crime victim's address to the court before sentencing." *Black's Law Dictionary* (9th ed. 2009).

cution by failing to let him speak on a topic of his choice.[82] Directly applying precedent, the court held that "when 'the record reveals that the district court did not sentence at the bottom of the guideline range, . . . we will presume that the defendant suffered prejudice from the error, i.e. that the error affected the defendant's substantial rights.'"[83] While application of the presumption in this situation appears appropriate, the Fifth Circuit's opinions do not make it clear why the presumption is appropriate in allocution cases but not in most overlapping Guidelines cases. By implication, the court's reasoning indicates that there is a greater percentage of cases in which the allocution error causes a higher sentence than the percentage of cases in which application of an incorrect but overlapping Guidelines range does so. Of course, we usually do not know what the "correct" original sentence would have been in either situation, so it is impossible to know whether that conclusion is correct. It is also unclear why the Fifth Circuit has reached that conclusion.

The Fourth Circuit's treatment of allocution cases serves to demonstrate that sometimes, even when they do not explicitly apply the presumption, courts reach the same conclusion they would have reached if they had applied the presumption. In other words, they remove the burden of showing prejudice from the appellant. While almost all courts of appeals explicitly apply the presumption in allocution cases, the Fourth Circuit does not.[84] One basis of the Fourth Circuit's jurisprudence is *United States v. Cole*,[85] which was decided shortly after *Olano*. In *Cole*, the court held that under plain error review, it would not deem an allocution error prejudicial if there was no possibility that a district court could have imposed a lower sentence. The court explained that its duty was to "examine each case to determine whether the error was prejudicial."[86] Yet in examining Cole's case, the court simply found "two grounds upon which the court *might have* imposed a reduced sentence," and concluded

82. *Perez*, 460 F. App'x at 299.

83. *Id.* at 300 (citing United States v. Magwood, 445 F.3d 826, 829 (5th Cir. 2006)). The original case that made such a holding stated that "[w]e further conclude that when such an error occurs without objection by the defendant and the record reveals that the district court did not sentence at the bottom of the guideline range *or if the court rejected arguments by the defendant that would have resulted in a lower sentence*, we will presume that the defendant suffered prejudice from the error, i.e. that the error affected the defendant's substantial rights." United States v. Reyna, 358 F.3d 344, 353 (5th Cir. 2004) (emphasis added).

84. *See* United States v. Landeros-Lopez, 615 F.3d 1260, 1264 n.4 (10th Cir. 2010) (listing the Fourth Circuit as a court that "review[s] for plain error without presuming prejudice").

85. United States v. Cole, 27 F.3d 996, 999 (4th Cir. 1994).

86. *Id.*

that "[a]s long as this possibility remained, we are unable to say that Cole was not prejudiced by the denial of his right to allocute prior to the imposition of sentence."[87] Though it was decided twenty years ago, *Cole*'s language still accurately describes the circuit's jurisprudence.[88]

While the Fourth Circuit indeed "examine[s] each case" to make a determination, finding prejudice from the mere possibility of a reduced sentence clearly does not follow the typical *Olano* analysis. Instead, it removes the defendant's burden of showing a reasonable probability, based on the specifics of the case, that the district court would have imposed a lower sentence but for the error. If merely identifying grounds for the possibility of a better outcome was the only third-prong requirement, the plain error standard would look much different.

Other courts have similarly utilized analyses that do not explicitly apply the presumption of prejudice but, in reality, remove the burden from the defendant.[89] While these cases may sometimes reach the correct result, they show that the uncertain nature of the presumption of prejudice leads to jurisprudential incoherence.

III. IMPROVED JURISPRUDENCE

After *Booker*, the time was right for the Supreme Court to clarify the category of cases in which an appellant could succeed on plain error review without making a specific showing of prejudice. That clarification never came, and courts of appeals struggled, dividing sharply on how to review *Booker* errors. While the *Booker*-inspired wave of cases may have subsided, Part II shows that courts still grapple with this issue in a variety of contexts.

This Part seeks to encourage greater doctrinal coherence by attempting to clarify the term "presumption of prejudice" and explain how it should be understood in light of *Olano* and subsequent circuit court

87. *Id.* (emphasis added).

88. *See, e.g.*, United States v. Johnson, No. 13-4672, 2014 WL 783751, at *2 (4th Cir. Feb. 28, 2014) ("If, however, we can identify a ground on which a lower sentence might have been based, we may notice the error." (citing *Cole*, 27 F.3d at 999)); McGee v. United States, Cr. No. 6:11-cr-2026, 2013 WL 4434382, at *5 (D.S.C. Aug. 15, 2013) ("The Fourth Circuit concluded that a denial of the opportunity for allocution will not result in a *per se* reversal. Rather, the Court will examine each case to determine whether the error was prejudicial." (internal quotation marks omitted)).

89. *See, e.g.*, United States v. Burroughs, 613 F.3d 233, 245 (D.C. Cir. 2010) (holding that the district court plainly erred by imposing internet monitoring as part of defendant's sentence, and concluding that substantial rights were affected in part because nothing in the record showed appropriateness of condition); United States v. Price, 516 F.3d 285, 289 (5th Cir. 2008).

cases. Next, the Essay concludes by suggesting a new method for analyzing the category of cases in which courts should apply the presumption of prejudice. When considering whether to apply *Olano*'s typical third prong, circuit courts should take more into consideration than they often have. The answer to whether a court should presume prejudice may not be totally clear in all cases, but courts can only reach a meaningful answer by examining the policy goals underlying the plain error rule. Aside from consistency, such examination and the resulting jurisprudence would more reliably balance the interests of fairness and justice with the goals of encouraging contemporaneous objection.

A. Understanding the Presumption

Though *Olano* acknowledged the possible existence of a presumption of prejudice and many circuit courts have used the term to justify reversal or remand, courts have typically said little about what it really means to presume prejudice. Courts are split on whether to apply the presumption, and some courts have implicitly applied a presumption without using the term "presumption."

First, it is necessary to clarify exactly what types of cases raise the presumption issue. It is the subset of cases in which the defendant cannot use events from trial or sentencing to demonstrate a reasonable probability of prejudice, but the circumstances of the case show that there is definitely some chance the error affected the verdict or sentence. The reviewing court may be able to surmise a ballpark estimate of the probability of prejudice, but would not be able to make an estimate with any certainty.

If courts simply disagreed on the category of cases to which the presumption applied, that would create a circuit split but would not create abnormal incoherence. However, that is not exactly what has happened. Some courts have seemed to conclude that in any cases that belong to the category at issue, the only way to conclude that prejudice exists is to apply the presumption. This conclusion logically arises from the Supreme Court's requirement that defendants "engage[ ] in a specific analysis of the district court record . . . to determine whether the error was prejudicial."[90] Thus, courts such as the Sixth Circuit have opined that the presumption is appropriate in certain cases if the defendant "cannot make a specific showing of prejudice."[91] While courts have not made this explicit, this position concludes that the mere circumstances of the case—such as a *Booker* error or an erroneous Guidelines range—cannot create the requi-

90. United States v. Olano, 507 U.S. 725, 734 (1993).

91. United States v. Barnett, 398 F.3d 516, 526 (6th Cir. 2005).

site "reasonable probability" under *Olano*'s third prong by themselves. Rather, one can only show that probability by events that happened at trial or sentencing, such as a judge's comments.

Other courts take a different view.[92] Instead of applying a presumption, they implicitly conclude that some circumstances can create *Olano*'s reasonable probability without a specific showing of further events that affected the proceeding. For example, the Fifth Circuit in *Price* simply concluded that the difference between the correct and incorrect Guidelines ranges created a reasonable probability of prejudice, and never mentioned the presumption.[93]

To achieve doctrinal coherence, courts must explicitly recognize the class of cases in which a defendant cannot make a specific showing of prejudice because there were no events at trial or sentencing the defendant can use to demonstrate prejudice.[94] This recognition will improve judicial analysis by clearly delineating when courts must consider whether the presumption applies.

This explicit recognition will also serve to establish that some class of cases requiring a presumption must exist. Although there is fairly broad agreement on the existence of such a class of cases, some still deny it exists or seem to ignore its existence.[95] Yet if courts define the class of cases to include all cases in which the defendant's burden to make a specific showing is removed, it would be difficult to argue that the presumption should not apply in cases in which the probability of prejudice seems very high. For example, if a district court erroneously calculates a Guidelines range that is well above the proper one (such as 97 to 121 months instead of 70 to 87 months, as was the case in *United States v. John*),[96]

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92. The jurisprudence is not always consistent within circuits.

93. *See Price*, 516 F.3d at 289; *see also Cole*, 27 F.3d 996.

94. It could be argued that this class of cases should simply be viewed as a subset of cases in which a reasonable probability can be demonstrated without a specific showing of prejudice, and no "presumption" is needed. That may be logically valid, but it is unclear if Supreme Court precedent allows for such a class of cases to be viewed outside the "presumption" class. And because courts will strongly disagree about the cases that have that level of probability, attempting to analyze such cases under a separate doctrine would likely create even more confusion than already exists.

95. *See, e.g.*, Brief for Appellee at 30, United States v. Perez, 531 F. App'x 246 (3d Cir. 2012) (No. 12-3964). Though many of the cases cited in this Essay predate both *Puckett* and *Marcus*, courts undeniably continue to apply the presumption after those cases arguably narrowed the potential class of presumption cases. *See, e.g.*, United States v. Sutton, 433 F. App'x 364, 365–66 (6th Cir. 2011).

96. 597 F.3d 263, 285 (5th Cir. 2010); *see also* United States v. Mudekunye, 646 F.3d 281, 289 (5th Cir. 2011) (remanding for resentencing when defendant's sentence

almost any judge[97] would be compelled to conclude that there was a reasonable probability that, absent the error, the district court judge would have issued a lower sentence.

Recognizing this set of cases will also help define what "presumption" really means in this context. The set of cases to which the doctrine applies will include cases such as *John*, where prejudice almost certainly occurred, as well as cases in which there is very little chance that prejudice occurred. Regardless of where a certain case falls on the spectrum, the court must simply decide when it is appropriate to lift the typical burden that *Olano*'s third prong creates. Courts currently lift that burden haphazardly, in part because they do not always recognize that they are applying a presumption, such as in *Cole*.[98] Many courts rightly lift the burden when it would generally be impossible for an appellant to make *Olano*'s typical showing.[99] Yet it is unclear why this should be the only factor that courts consider; indeed, courts have sporadically explicitly taken other factors into consideration, such as the probability of prejudice.[100] Some have argued that sentencing errors are less burdensome and, therefore, that courts should less rigorously apply the plain error standard to sentencing error.[101] The Second Circuit has explained

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was 19 months above top of the correct Guidelines range, but failing to use term "presumption").

97. *But see John*, 597 F.3d at 290 (Smith, J., dissenting) ("This sentence of 108 months is only 21 months above the maximum of 87 months in the proper guideline range. Although the majority accurately cites decisions declaring lesser increases to affect substantial rights, it should not be a foregone conclusion that *every* erroneous increase in a sentence satisfies the third prong.").

98. *See supra* notes 85–87 and accompanying text.

99. Even courts that use this consideration do not always agree on which cases fall into the category, at least partially because some of courts' view that if a certain case applies the presumption, the presumption would need to be applied for the entire class of cases at all times. *See, e.g.*, United States v. Brandao, 539 F.3d 44, 65 (1st Cir. 2008) (Lipez, J., concurring) (refusing to apply presumption because "many so-called constructive amendment claims lend themselves readily to ordinary plain error analysis"); United States v. Gonzalez-Huerta, 403 F.3d 727, 735 (10th Cir. 2005) (refusing to apply presumption because it would not be impossible in all such cases to demonstrate a presumption of prejudice using evidence from the record).

100. *See, e.g.*, United States v. Massenburg, 564 F.3d 337, 344 (4th Cir. 2009) ("We have noted that our recognition of such an error depends on consideration of two factors: (1) the general risk that defendants subjected to the particular type of error will be prejudiced and (2) the difficulty of proving specific prejudice from that type of error.").

101. United States v. Terrell, 696 F.3d 1257, 1263 (D.C. Cir. 2012) ("[I]n the sentencing context that probabilistic showing is 'slightly less exacting' than that required for trial errors."); United States v. Joaquin, 326 F.3d 1287, 1290 (D.C. Cir. 2003) ("Under plain error review, defendants bear the burden of persuasion as to prejudice,

that courts should more rigorously apply the plain error standard when the risk of sandbagging is higher.[102] The following section will examine considerations the courts should take into account when making their decisions that would help clarify the plain error doctrine while remaining faithful to its goals.

B. Determining Whether to Lift the Burden

Instead of continuing down the current path, courts approaching cases that fall into the category described herein should consider several factors in determining whether to lift the defendant's burden of pointing to specific parts of the record that demonstrate prejudice. First, courts should assess the probability that prejudice occurred, if that is ascertainable. Second, they should ask whether the error below defies typical analysis because there is nothing in the record the defendant could use to make a specific showing that there was a reasonable probability of prejudice. Third, they should determine whether lifting the defendant's burden would disserve the goals of the contemporaneous objection rule by discouraging contemporaneous objection and encouraging sandbagging. Fourth, courts should analyze the burden to the judicial system that would be created by remanding the case. Fifth, they should ask whether delay would jeopardize the proceedings on remand.[103]

The first two factors will weigh most heavily, an appropriate outcome given courts' overwhelming focus on these two factors. The courts' focus on the first has been more implicit, such as in *John* and

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but that burden is slightly less exacting with regard to sentencing proceedings as compared to trial errors, since a defendant need show only a reasonable likelihood that the error affected the court's sentence." (internal quotation marks omitted)); *see also* Brandon Garrett, *Accuracy in Sentencing*, 86 S. CAL. L. REV. (forthcoming 2014) (manuscript at 28) ("To the extent that the lower courts' varying approaches towards the cognizability of sentencing error claims display a concern for finality, that concern is partially misplaced. Reversing a sentence does not involve the outright vacating of a conviction. As noted, the burden of simply resentencing is far slighter than a do-over of a trial.").

102. United States v. Alvarado, 720 F.3d 153, 157 (2d Cir. 2013) ("Rigorous plain error analysis is especially appropriate in contexts that present the possibility of 'sandbagging' *i.e.*, the risk that a defendant will strategically withhold an objection below, only to raise it on appeal.").

103. It should be noted that sometimes, some of these factors will be indiscernible: there may be no indication of the risk that sandbagging occurred, it may be impossible to know whether proceedings would be especially jeopardized on remand, and there may be no way to quantify the risk that the defendant was prejudiced. This is surely an obstacle, but should not prevent application of the test; rather, the indiscernible factor should be seen as neutral in such a situation.

Mudekunye.[104] By more heavily weighing the first factor, a court would reach the same result that circuit courts would already reach. While this reflects fairness in general, it also recognizes, as the Fifth Circuit did in *John* and *Mudekunye*, that, in certain cases, one can show a high level of probability without pointing to specific facts from the record. It would be tremendously unfair for courts to affirm an erroneous result in this set of cases but not in cases in which a defendant could show a reasonable probability of prejudice from events during trial or sentencing. Many courts already consider the second factor, and the same fairness considerations are present. A defendant who suffers from errors that may have a less definite effect because of the nature of their case should have some chance to achieve remand.

The third factor is also important, allowing courts to consider whether lifting the defendant's burden would disserve the contemporaneous objection rule.[105] If the case is such that lifting the burden would encourage sandbagging, the third factor would weigh against doing so. The final two factors seek to serve similar goals: if remand would create an extra burden or would risk less accurate proceedings, courts should be more wary of lifting the defendant's burden.

These factors would provide clarification for courts that currently implicitly struggle to reconcile the mandate to usually apply the typical *Olano* analysis with the fact that the third prong of the test simply does not serve the purposes of the plain error rule in a small but significant set of cases. Importantly, the courts' application of the factors need not lead to the same result in every case of the same class. For example, if there is a special reason to fear that a defendant is sandbagging in a certain case, that fact would weigh against presuming prejudice. Similarly, if there is a specific reason the court should be concerned that a retrial would not reach a just result, that fact would also weigh against applying the presumption.[106]

Introducing this five-factor analysis would definitely not create complete harmony between the circuits, and it may not even come close to

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104. *See supra* note 96 and accompanying text.

105. *See* Jenkins, *supra* note 50, at 838 ("Most, if not all, plain error post-*Booker* sentencing challenges do not satisfy the policy of encouraging objections because the affected defendants did not know at the time of their trial that a legal right to object to mandatory application of the Sentencing Guidelines existed.").

106. Reaching different results in different cases of the same class does not mean that a "presumption" has not been applied—as explained, the presumption refers to whether an appellant must show specific evidence from the record indicating that the outcome of his case differed as a result of the error in question. The presumption will yield anytime such evidence is present.

doing so. Yet that is a secondary concern. Most importantly, with the introduction of the five-factor analysis, courts would begin to apply the same analysis to all cases that fall into this category, hopefully at least achieving intra-circuit doctrinal consistency. The analysis would balance the principal concerns of the plain error rule, which seeks to encourage contemporaneous objection, with the need to maintain fairness to defendants. The balance will not always be perfect, because courts will still affirm erroneous convictions or sentences of some defendants whose attorneys have made honest mistakes, while defendants whose attorneys engaged in sandbagging will still sometimes win on remand. Yet those undesirable results can only occur less often if courts are willing to straightforwardly address cases in which defendants argue that their burden to make a specific showing of prejudice should be lifted.

A cursory look at some of the types of cases discussed in Section II.B demonstrates how the five-factor analysis would work in practice. In overlapping Guidelines cases, discussed in Section II.B.2, *supra*, the result would usually call for remand: the error defies typical analysis, it is unlikely that a defendant would purposely withhold an argument that would provide him with a lower Guidelines sentence, resentencing after correcting the error would cause little disruption for the district court, and there would be a fairly minor concern that delay would lead to less accurate resentencing. While the risk of prejudice will vary, it likely will normally be high enough to warrant remand when combined with the other factors.

Courts may often reach the same result in allocution cases, though the outcome may depend more on individual circumstances and be somewhat less likely to merit remand. The risk of prejudice would be significant, but likely not as high as it is in incorrect Guidelines cases. Loss of the allocution right defies typical analysis, but the appellant still may present to the appellate court the things he would have said to seek a lower sentence. There is some risk of sandbagging, though it seems somewhat unlikely that a defendant would engage in sandbagging in an attempt to achieve a second sentencing hearing when the same sentence would likely result. Like other sentencing cases, there would be little burden on the district court if the appellate court remanded the case. However, there would be a greater accuracy concern, since circumstances affecting a defendant's allocution could change between sentencing hearings.

Aside from the jurisprudential merits of applying these factors, one could argue that there is no textual basis in Rule 52(b) for taking them into consideration. Indeed, the textual basis for the third prong of the *Olano* test is simply whether an error has "affect[ed] substantial rights." Yet because that phrase is not self-explanatory, courts must find ways to

determine what it means. The Supreme Court and courts of appeals have already done so to some extent. For example, under *Olano*, an error is usually said to affect substantial rights only if it creates prejudice. Of course, as this Essay and many cases have demonstrated, that is often a difficult question to answer. When it is especially difficult to answer, courts have sometimes looked at the difficulty of showing prejudice, and less often at other factors such as the risk of prejudice and the burden remand creates. Thus, it is indisputable that courts must divine some method for guidance, and that guidance is not found in Rule 52(b); explicitly considering the factors proposed here would not further divorce the jurisprudence from the Rule's text.[107]

CONCLUSION

While the *Olano* test is entrenched in our law, courts of appeals have struggled to discern when to lift a defendant's burden of making a specific showing of prejudice. Despite some criticism of the presumption, courts will continue to apply it, either explicitly or implicitly. Therefore, courts should develop a more thorough method of determining when to lift the burden, and that method should take into account the purposes behind the plain error rule. Only if those factors are considered can courts hope to develop a jurisprudence that properly balances fairness to defendants with courts' interests in encouraging contemporaneous objection.

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107. On a related note, it may be argued that the proper forum for considering some of the factors included herein is *Olano*'s fourth prong, which asks whether an error seriously affects the fairness, integrity or public reputation of judicial proceedings. *See* Dustin D. Berger, *Moving Toward Law: Refocusing the Federal Courts' Plain Error Doctrine in Criminal Cases*, 67 U. MIAMI L. REV. 521, 544 (2013) (criticizing *Olano* for including same inquiry in both third and fourth prongs). It is true that some of the considerations may overlap, but in this context that should not counsel against considering these factors in the small subset of cases in which presumption of prejudice is an issue—some of the concerns that should lead to applying the presumption should also lead a court to conclude that the fourth prong is met, and because differences remain between the inquiries, attempting to collapse them into one factor would be unwise.