No. 04-1210

In the Supreme Court of the United States

GREGORY WADE HEMBREE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Circuit abused its discretion by applying an established procedural default rule to decline to consider a claim of error under *United States* v. *Booker*, 125 S. Ct. 738 (2005), where petitioner failed to raise the claim in his opening brief.

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OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction and sentence (Pet. App. 1a-31a) is unreported, but the judgment is noted at 125 Fed. Appx. 981 (Table). The order denying petitioner's motion to file a supplemental brief (Pet. App. 44a) is unreported. The order denying petitioner's motion to file a substitute principal brief or for reconsideration of the denial of his motion to file a supplemental brief (Pet. App. 45a-46a) is reported at 381 F.3d 1109.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2004. A petition for rehearing was denied on February 7, 2005. Pet. App. 47a. The petition for a writ of

certiorari was filed on March 8, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was convicted, following a jury trial, of conspiracy to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(iii); and perjury, in violation of 18 U.S.C. 1623. Petitioner was also convicted, following a guilty plea, of failure to appear, in violation of 18 U.S.C. 3146(a)(1), (b)(1)(A)(i) and (ii). Pet. App. 32a-33a. Pursuant to the Sentencing Guidelines, the district court imposed concurrent sentences of 60 months of imprisonment for the perjury conviction and 78 months of imprisonment for the drug conviction, and a consecutive sentence of 12 months for the failure-to-appear conviction. *Id.* at 34a.

2. In his opening brief on appeal, petitioner raised several claims of plain error with respect to his conviction, including challenges to the district court's evidentiary rulings, jury instructions, and its decision to join the conspiracy and perjury counts. Pet. App. 2a. Petitioner also argued that, at sentencing, the district court failed to credit him properly for acceptance of responsibility in the failure-to-appear case and misapplied a Sentencing Guidelines provision. *Id.* at 25a. Petitioner did not challenge the constitutionality of using judicially found facts at sentencing.

After petitioner's principal brief was filed, this Court issued its decision in *Blakely* v. *Washington*, 125 S. Ct. 2531 (2004). Petitioner then filed a motion for leave to file a supplemental brief seeking to raise, for the first time in any court, a claim that the district court's application of the Guidelines violated the Sixth Amendment. Pet. 4 n.2. The court of appeals denied petitioner's motion, citing circuit precedent establishing that a party may not raise a claim

for the first time in a supplemental brief. See Pet. App. 44a (citing *United States* v. *Ford*, 270 F.3d 1346, 1347 (11th Cir. 2001), cert. denied, 535 U.S. 1098 (2002); *United States* v. *Ardley*, 242 F.3d 989, 990 (11th Cir.), cert. denied, 533 U.S. 962 (2001); *United States* v. *Nealy*, 232 F.3d 825, 830 (11th Cir. 2000), cert. denied, 534 U.S. 1023 (2001)). Petitioner then filed a motion to file a substitute principal brief or in the alternative for reconsideration of the denial of his motion to file a supplemental brief. The court denied the motion, Pet. App. 45a-46a, noting that permitting the filing of substituted or amended principal briefs would permit circumvention of the general rule that "a party may not raise through a supplemental brief an issue not previously raised in his principal brief." *Id.* at 46a.

The court affirmed petitioner's conviction and sentence. Pet. App. 1a-31a. The opinion discussed only the arguments raised in petitioner's principal brief, and did not discuss *Blakely*.

3. In *United States* v. *Booker*, 125 S. Ct. 738 (2005), this Court held that the Sixth Amendment, as construed in *Blakely*, applies to the federal Sentencing Guidelines. *Id.* at 748-756 (Stevens, J., for the Court). In answering the remedial question in *Booker*, the Court applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for unreasonableness. *Id.* at 757-769 (Breyer, J., for the Court).

4. In *United States* v. *Dockery*, 401 F.3d 1261 (2005) (per curiam), the Eleventh Circuit addressed the application to *Booker* claims of its rule that issues not raised in a party's opening brief will be deemed abandoned. There, the court of appeals held, in a case that this Court had remanded for reconsideration in light of *Booker*, that the defendant would be deemed to have abandoned his Sixth

Amendment challenge to the Guidelines by failing to raise it in his opening brief. *Id.* at 1262-1263. The court stated that it saw nothing

> in the Supreme Court's remand order, which is cast in the usual language, requiring that we treat the case as though the * * * issue had been timely raised in this Court. In the absence of any requirement to the contrary in either [*Booker*] or in the order remanding this case to us, we apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned.

Ibid. (quoting *Ardley*, 242 F.3d at 990); accord *United States* v. *Senn*, No. 02-16983, 2005 WL 1006885, at *1 (11th Cir. Apr. 29, 2005) (per curiam) (following *Dockery*, on remand for reconsideration in light of *Booker*).

ARGUMENT

Petitioner contends (Pet. 7-11) that the Eleventh Circuit's practice of treating as abandoned *Booker* and *Blakely* claims that are not raised in a party's initial brief contravenes the retroactivity principle of *Griffith* v. *Kentucky*, 479 U.S. 314 (1987). Petitioner also contends (Pet. 7-21) that the Eleventh Circuit's rule is an "absolute bar" (Pet. 5; see also Pet. 6) to consideration of issues not raised in a defendant's opening brief that conflicts with decisions of "[e]very other circuit." Pet. 15. Neither contention has merit. Further review is not warranted.[1]

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[1] Because the court of appeals confirmed in *United States* v. *Dockery*, 401 F.3d 1261 (11th Cir. 2005) (per curiam), and *United States* v. *Senn*, No. 02-16983, 2005 WL 1006885, at *1 (11th Cir. Apr. 29, 2005) (per curiam), that a remand for further consideration in light of *Booker* does not alter the court of appeals' application of its longstanding rule that issues not raised in an appellant's opening brief are deemed abandoned, it is unnecessary for this Court to remand this case for

1. a. In *Griffith*, this Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases * * * pending on direct review or not yet final." 479 U.S. at 328. Because the petitioner in *Griffith* had preserved the claim on which he sought review, the Court (as petitioner concedes, see Pet. 11) did not have occasion to consider the interplay between the retroactivity rule adopted in that case and principles of waiver, forfeiture, and other prudential doctrines. See 479 U.S. at 317, 318.

Application of procedural default rules is consonant with the retroactivity principle of *Griffith*. *Griffith* concluded that retroactive application of new rules on direct appeal was necessary both because of "the nature of judicial review" and in order to "treat[] similarly situated defendants the same." 479 U.S. at 322-323. That rationale is in no way inconsistent with application of procedural default rules to bar consideration of claims that have not been adequately preserved. Defendants who have not preserved a claim of error are not "similarly situated" (*id.* at 323) to those who have. Cf. *Shea* v. *Louisiana*, 470 U.S. 51, 59-60 (1985) (holding that it is not inequitable to draw a distinction between a defendant who raises a claim on collateral attack and one who raises it on direct review because "[t]he one litigant already has taken his case through the primary system" and "[t]he other has not"). Application of procedural bar rules does not offend principles requiring the retroactive application of new constitutional rules to cases open on direct review.

> Retroactivity doctrine answers the question of which cases a new decision applies to, assuming that the issue involving that new decision has been timely

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reconsideration in light of *Booker*.

> raised and preserved. Procedural bar doctrine answers the question of whether an issue was timely raised and preserved, and if not, whether it should be decided anyway. It makes no more sense to say that a procedural bar should not be applied in this situation because doing so undermines or frustrates retroactive application of a Supreme Court decision, than it does to say that procedural bars should not be applied in any situation because doing so undermines or frustrates the constitutional doctrines and commands underlying the issue that is held to be defaulted.

United States v. *Ardley*, 273 F.3d 991, 992 (11th Cir.) (Carnes, J., concurring in denial of rehearing en banc), cert. denied, 533 U.S. 962 (2001) and 535 U.S. 979 (2002).

On several occasions, this Court has indicated that the retroactivity principle embodied in *Griffith* is in no way inconsistent with the application of procedural default rules. In *Shea* v. *Louisiana*, *supra*, for example, the Court held that the rule announced in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), would be applied retroactively to cases pending on direct review. 470 U.S. at 59. In doing so, the Court explicitly noted that the retroactive application of *Edwards* was "subject, of course, to established principles of waiver, harmless error, and the like." *Id.* at 58 n.4. Similarly, in *Booker* itself, the Court stated that, while courts were bound to apply its holding "to all cases on direct review," 125 S. Ct. at 769 (citing *Griffith*, 479 U.S. at 328), "we expect reviewing courts to apply ordinary prudential doctrines," including, specifically, the plain error doctrine for claims that have not been preserved. *Ibid.* See also *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (noting that rule of *United States* v. *Gaudin*, 515 U.S. 506 (1995), applied retroactively under *Griffith*, but unpreserved claims

were subject to review only for plain error); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 105 n.1 (1993) (Scalia, J., concurring) (noting, as the Court extended the holding of *Griffith* to civil cases, that "a party may procedurally default on a claim in either [the civil or criminal] context").[2] This Court has never suggested the contrary.[3]

b. Petitioner errs in contending (Pet. 5) that the Eleventh Circuit's procedural bar rule "is an absolute bar" to consideration of issues that were not raised in a defendant's opening brief. See also Pet. 15 (contending that "the Eleventh Circuit made clear * * * that its rule against raising a new issue * * * was absolute"). The court of appeals has, however, addressed claims of *Booker* error although

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[2] Accord, *e.g.*, *United States* v. *Humphrey*, 287 F.3d 422, 442 (6th Cir. 2002) (noting that although *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), applies retroactively to cases on direct review under *Griffith*, unpreserved claims were subject to plain error review); *United States* v. *Outen*, 286 F.3d 622, 634 (2d Cir. 2002) (same); *United States* v. *Wheat*, 278 F.3d 722, 739 (8th Cir. 2001) (same), cert. denied, 537 U.S. 850 (2002); *United States* v. *Keys*, 133 F.3d 1282, 1285-1286 (9th Cir.) (en banc) (holding that although rule of *Gaudin* applied retroactively to cases on direct review under *Griffith*, unpreserved claims were subject to review only for plain error), cert. denied, 525 U.S. 891 (1998).

[3] The Fourth Circuit recently stated in a footnote, and without briefing or argument by the parties on the issue, that "[a]lthough appellate contentions not raised in an opening brief are normally deemed to have been waived, the *Booker* principles apply in this proceeding because the Court specifically mandated that we 'must apply [*Booker*] . . . to all cases on direct review.'" *United States* v. *Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005) (citation omitted) (quoting *Booker*, 125 S. Ct. at 769 (Breyer, J., for the Court)). The government was unable to seek rehearing in that case because the court of appeals, after the time for filing a petition for rehearing had expired, denied the timely filed joint motion of the parties for an extension of time in which to file a rehearing petition. The Fourth Circuit should be given an opportunity to reconsider that erroneous conclusion in an appropriate case.

they were not raised in the defendant's opening brief where the government has conceded the error. See *United States* v. *Dacus*, No. 04-15319, 2005 WL 1017985, at *1 (11th Cir. May 3, 2005) (per curiam) ("Although we ordinarily refuse to consider an argument not raised in an initial brief, we consider the argument that Dacus's sentence was erroneous under *Booker* because both parties have joined the issue without objection.") (citing *United States* v. *Levy*, 379 F.3d 1241, 1242-1243 (11th Cir.), reh'g denied, 391 F.3d 1327 (11th Cir. 2004), petition for cert. pending, No. 04-8942 (filed Mar. 1, 2005)). In addition, the Eleventh Circuit has explicitly recognized that it has the authority to relieve litigants of the consequences of failing to raise an issue in an opening brief and to address an issue on the merits where manifest injustice would otherwise result.[4]

2. Petitioner contends (Pet. 7-21) that the Eleventh Circuit's application of its procedural bar rule conflicts with the law of the other courts of appeals, and that Supreme Court review is necessary to resolve the circuit conflict.

a. The Federal Rules of Appellate Procedure provide that an appellant's brief "must contain * * * appellant's contentions and the reasons for them." Fed. R. App. P. 28(a)(9)(A). The courts of appeals have without exception interpreted that provision to establish a general prudential

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[4] See, *e.g.*, *United States* v. *Rivera Pedin*, 861 F.2d 1522, 1526 n.9 (11th Cir. 1988) (pursuant to Rule 2 of the Federal Rules of Appellate Procedure, considering an issue raised only in co-defendant's brief, despite defendant's failure to adopt by reference his co-defendant's arguments); *Gramegna* v. *Johnson*, 846 F.2d 675 (11th Cir. 1988) (vacating judgment based on issue raised sua sponte by the court, pursuant to Rule 2); see also *United States* v. *Levy*, 391 F.3d 1327, 1335 (11th Cir. 2004) (Hull, J., concurring in denial of rehearing en banc) ("The issue is not whether this Court has the power to consider issues not raised in the initial brief; of course it does."), petition for cert. pending, No. 04-8942 (filed Mar. 1, 2005).

rule that "[a]n appellant waives any issue which it does not adequately raise in its initial brief." *Playboy Enters.* v. *Public Serv. Comm'n*, 906 F.2d 25, 40 (1st Cir.), cert. denied, 498 U.S. 959 (1990).[5] The courts of appeals have recognized that that rule is not jurisdictional or absolute and

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[5] Accord, *e.g.*, *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) ("It is well established that an argument not raised on appeal is deemed abandoned, and we will not ordinarily consider such an argument unless manifest injustice otherwise would result.") (citations and internal quotation marks omitted); *Ghana* v. *Holland*, 226 F.3d 175, 180 (3d Cir. 2000) ("It is well settled that if an appellant fails to comply with these [Rule 28] requirements on a particular issue, he normally has abandoned and waived that issue on appeal.") (quoting *Kost* v. *Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993)) (alterations omitted); *Shopco Distrib. Co.* v. *Commanding Gen. of Marine Corps Base*, 885 F.2d 167, 170 n.3 (4th Cir. 1989) (holding that any claim not raised in a party's initial brief will be deemed waived) (collecting authorities); *United States* v. *Miranda*, 248 F.3d 434, 443 (5th Cir.) ("Failure to satisfy the requirements of Rule 28 as to a particular issue ordinarily constitutes abandonment of the issue."), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *Bickel* v. *Korean Air Lines Co.*, 96 F.3d 151, 153 (6th Cir. 1996) ("We normally decline to consider issues not raised in the appellant's opening brief.") (quoting *Priddy* v. *Edelman*, 883 F.2d 438, 446 (6th Cir. 1989)), cert. denied, 519 U.S. 1093 (1997); *Holman* v. *Indiana*, 211 F.3d 399, 406 (7th Cir.) (finding arguments not raised in initial brief waived), cert. denied, 531 U.S. 880 (2000); *Sweat* v. *City of Ft. Smith*, 265 F.3d 692, 696 (8th Cir. 2001) ("[C]laims not raised in an initial appeal brief are waived."); *Greenwood* v. *FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief."); *Adams-Arapahoe Joint Sch. Dist. No. 28-J* v. *Continental Ins. Co.*, 891 F.2d 772, 776 (10th Cir. 1989) (holding that "[a]n issue not included in either the docketing statement or the statement of issues in the party's initial brief is waived on appeal"); *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 319-320 (D.C. Cir. 1985) (deeming an issue waived where a party did not raise it until supplemental briefing); *Becton Dickinson & Co.* v. *C.R. Bard, Inc.*, 922 F.2d 792, 799 (Fed. Cir. 1990) ("an issue not raised by an appellant in its opening brief * * * is waived").

therefore that courts have authority, in the exercise of their discretion, to address issues not timely raised by the parties. See, *e.g.*, *United States* v. *Miranda*, 248 F.3d 434, 443-444 (5th Cir.) (noting that "the issues-not-briefed-are-waived rule is a prudential construct that requires the exercise of discretion" and that the court may consider an issue that was not timely raised "where substantial public interests are involved"), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) (court will review issue not raised in the brief where manifest injustice would otherwise result); *Leer* v. *Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) (same). See also Fed. R. App. P. 2 (granting courts discretion to suspend most rules for "good cause"). As noted above, see p. 8, *supra*, the Eleventh Circuit has recognized that it has the authority to relieve litigants of the consequences of default and address an issue on the merits where manifest injustice would otherwise result. In the exercise of its discretion, however, the Eleventh Circuit has declined to exempt *Booker* and *Blakely* claims from the operation of its long-standing rule that it will not consider claims unless they were timely raised in the appellant's opening brief. See, *e.g.*, *Dockery*, 401 F.3d at 1262-1263; *Levy*, 379 F.3d at 1243 n.3 ("[W]e conclude that 'there would be no miscarriage of justice if we decline to address' *Blakely*-type issues not raised in opening briefs on appeal.") (quoting *McGinnis* v. *Ingram Equip. Co.*, 918 F.2d 1491, 1496 (11th Cir. 1990) (en banc)); see also *United States* v. *Ardley*, 242 F.3d 989, 990 (11th Cir.) (declining to exempt claims under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), from operation of rule), cert. denied, 533 U.S. 962 (2001).

Petitioner asserts that "all of the circuits have ruled on the question presented," Pet. 21, and "[e]very other circuit" permits defendants "to raise a new issue based on an inter-

vening Supreme Court decision, even if the issue was not raised in the initial brief." Pet. 15. In the vast majority of the cases petitioner cites, however, the courts did not explicitly consider application of the rule that courts will not entertain issues not raised in an opening brief, and there is no indication the government urged the court to hold the claims to be defaulted.[6] Thus, it appears that most courts that have addressed claims in this posture have not explic-

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[6] Of the thirty-four cases petitioner cites to support his contention that "all of the circuits have ruled on the question," only one discusses whether to apply the ordinary rule that issues not raised in an opening brief will not be considered; even that case did so only in passing in a footnote, without the benefit of briefing or argument by the parties. See *United States* v. *Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005); see also note 3, *supra*. Four other cases state in passing that it was appropriate to consider the claims in that posture because this Court had recently clarified the law, without explicitly discussing the rule that claims must be raised in a party's opening brief. See *United States* v. *Hines*, 398 F.3d 713, 721 (6th Cir. 2005); *United States* v. *Oliver*, 397 F.3d 369, 376 n.1 (6th Cir. 2005), petition for reh'g pending (filed Mar. 15, 2005); *United States* v. *Henningsen*, 387 F.3d 585, 591 (7th Cir. 2004), subsequent determination, 402 F.3d 748 (7th Cir. 2005); *United States* v. *Cordoza-Estrada*, 385 F.3d 56, 69 (1st Cir. 2004).

The United States is aware of only three decisions besides *Washington* (none of which petitioner cited, and one of which is nearly 20 years old) that have entertained claims raised in supplemental briefing in light of intervening decisions of this Court that have explicitly considered whether to apply the ordinary prudential rule against considering issues not raised in the opening brief. See *Miranda*, 248 F.3d at 443-444 (discussing *Apprendi* claim); *United States* v. *Garcia*, 242 F.3d 593, 599 & n.5 (5th Cir. 2001) (same); *United States* v. *Byers*, 740 F.2d 1104, 1115 n.11 (D.C. Cir. 1984). In two of those cases, the courts may have exercised discretion to proceed to the merits of the argument the defendant had raised only because the court concluded it clearly lacked merit. See *Miranda*, 248 F.3d at 446; *Byers*, 740 F.2d at 1118 ("obvious" that conditions necessary for relief not met); *id*. at 1121 (noting claim has been "uniformly rejected by other circuits").

itly declined to apply the procedural bar rule, and thus those decisions cannot be said to "conflict" with the decision below. Petitioner is therefore incorrect that (Pet. 23) the law in the courts of appeals "is as developed as it is likely to get" and that the positions of the courts of appeals on this issue "are all set in stone." *Ibid.*

b. Even if other courts of appeals *had* explicitly declined to apply the usual procedural bar rule to claims based on intervening decisions of this Court in *Booker* and *Blakely*, further review would not be warranted. Rules governing the consideration of unpreserved claims may appropriately be viewed as local rules that can differ from circuit to circuit. So long as such local rules are reasonable, see *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985), and consistent with Acts of Congress and the Federal Rules of Appellate Procedure, see Fed. R. App. P. 47(a), there is no requirement of "uniformity among the circuits in their approach to [such] rules." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993). This Court specifically has acknowledged the power of courts of appeals to adopt rules restricting the consideration of issues not raised in a timely manner. In *Thomas* v. *Arn*, *supra*, this Court held that the Sixth Circuit had not abused its discretion by promulgating a rule that a party waived the right to appellate review of a district court judgment that adopted a magistrate's recommendation when the party had failed to file objections with the district court identifying those issues on which review was desired. The Sixth Circuit's "nonjurisdictional waiver provision," like the rule at issue here, would ordinarily "preclud[e] appellate review of any issue" not raised in the manner prescribed, although the court of appeals could "excuse the default in the interests of justice." 474 U.S. at 147-148, 155. Noting that such a rule was supported by sound considerations of judicial economy, *id.* at 148, this

Court concluded that the courts of appeals had authority to adopt "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." *Id.* at 146-147 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)).

Procedural bar rules of the sort at issue here promote efficiency by avoiding piecemeal briefing of appeals and ensuring that the appellee has the opportunity to respond to all issues raised by the appellant without supplemental briefing. Such rules are especially important because of the courts of appeals' increasingly heavy caseloads. Petitioner contends (Pet. 14-15) that the court of appeals' rule should be rejected because it would give litigants an incentive to raise numerous claims that are precluded by existing precedent. Although the same could be said of any procedural default rule that attaches consequences to the failure to raise a claim, this Court rejected the position that the futility of raising a claim under existing law wholly excuses a litigant from preserving it. See, *e.g.*, *Johnson*, 520 U.S. at 467-468 (reviewing unpreserved claim only for plain error although the argument was foreclosed by "near-uniform precedent both from this Court and from the Courts of Appeals"). See also *Levy*, 391 F.3d at 1332 (Hull, concurring in the denial of rehearing en banc) ("If defendants were going to raise a long and useless laundry list of objections, they already would have been doing exactly that in the district court so objections could receive full *de novo* review [on appeal], rather than plain-error review."); *id.* at 1333 (noting that even before *Blakely*, "numerous defendants" had properly preserved their claims by "rais[ing] *Apprendi*-type arguments in their challenges to enhancements under the federal Sentencing Guidelines") (collecting cases).

This Court has denied review in a number of cases in which the Eleventh Circuit declined to entertain a claim under the intervening decisions in *Blakely* or *Apprendi* solely because it was not raised in the petitioner's opening brief, see, *e.g.*, *Ardley* v. *United States*, 535 U.S. 979 (2002) (No. 01-8714); *Nealy* v. *United States*, 534 U.S. 1023 (2001) (No. 01-5152); *Padilla-Reyes* v. *United States*, 534 U.S. 913 (2001) (No. 01-5284), and denied review in several cases that specifically challenged application of the procedural bar rule in that context. See, *e.g.*, *Phillips* v. *United States*, 536 U.S. 961 (2002) (No. 01-5718) (denying review when petitioner challenged application of rule to bar consideration of *Apprendi* claim); *Garcia* v. *United States*, 534 U.S. 823 (2001) (No. 00-1866) (denying review when Eleventh Circuit declined, on remand from this Court for reconsideration in light of *Apprendi*, to consider claim because it was not raised in initial brief); see also *Thompson* v. *United States*, 535 U.S. 1114 (2002) (No. 01-8603) (challenging application of rule to bar consideration of ex post facto claim). There is no reason for a different result in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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