No. 07-9712

IN THE
Supreme Court of the United States

JAMES BENJAMIN PUCKETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES

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PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES

1. The Solicitor General agrees that certiorari should be granted in this case:

> We agree with petitioner . . . that there is a conflict among the courts of appeals on whether the plain-error standard applies to a forfeited claim that the government breached a plea agreement, as well as on how the plan-error standard should be applied in that context. Because the applicable standard of review in the plea-breach context is an important and recurring issue in the conduct of federal prosecutions, and because the question is squarely presented in this case, this Court's review is warranted.

Resp. Br. 9-10; *see id.* at 20-21. The Solicitor General's brief agrees there is no obstacle to certiorari in the facts or posture of this case. As the Solicitor General recognizes, the conflict in the circuits is broad and irreconcilable, the issue is important and recurring, and the question is well-presented here. Certiorari should be granted.

2. While agreeing that this Court's review is warranted, the Solicitor General contends that the judgment should be affirmed, on the ground that plain-error review under Rule 52(b) applies to a plea-agreement breach, and that the conceded breach here did not satisfy the requirements of Rule 52(b). The Solicitor General is incorrect. Plain-error analysis should have no application when a prosecutor breaches a plea agreement. The requirements of the plain-error rule are inconsistent with the reasoning of this Court's decision in *Santobello v. New York*, 404 U.S. 257 (1972), which expressly declined to make an individualized showing of prejudice part of its consideration. And even if plain-error review applies, the breach of a plea

agreement nevertheless will ordinarily satisfy the requirements of Rule 52(b) and thus generally should constitute plain error *per se*.

a. In *Santobello*, this Court concluded that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise *must be fulfilled*." 404 U.S. at 262 (emphasis added). The Solicitor General notes that the Court did not apply plain-error review under Rule 52(b) because the error was objected-to and because the case arose from state court, where Rule 52 does not directly apply. Despite those distinctions, *Santobello* is directly relevant here because the Court did consider and reject a *harmless*-error argument that was, in substance, indistinguishable from the *plain*-error analysis applicable under Rule 52(b).

Arguing that the plea-breach was harmless, the State of New York in *Santobello* had pointed to the trial judge's assurance that "I am not at all influenced by what the District Attorney says." *Id.* at 259. Instead, the judge had professed to rely entirely on the probation report, which revealed that Santobello, a convicted murderer, was "notorious" and "has an unbroken record of vicious criminality. He is not amenable to any restraint and is completely asocial. He should be among the last persons to be a legitimate object of leniency." *People v. Santobello*, 39 A.D.2d 654, 655-56 (N.Y. 1st Dept. 1972) (Steuer, J., dissenting). The trial judge agreed with the probation report and sentenced Santobello to the maximum sentence of one year. 404 U.S. at 258. Indeed, the report was so damning as to permit the State to argue in this Court that "Santobello must have appreciated that, in view of his

criminal record, he could hardly have escaped incarceration under any circumstances." Resp. Br. at 11, *Santobello*, No. 70-98 (U.S. 1971), *available at* 1971 WL 133497. And Santobello himself harbored no illusions about faring better on remand – he freely acknowledged that he "would face a substantially stiffer sentence if permitted to go to trial on the original charges" and convicted on remand. Petr. Br. at 12-13, *Santobello*, No. 70-98 (U.S. 1971), *available at* 1971 WL 133498. But he argued that the issue here was "not whether or not the sentencing Court was justified in imposing a one year term of imprisonment, but rather whether the plea of guilty was obtained by virtue of a misrepresentation." *Id.* at 9.

This Court agreed, and reversed the judgment *without inquiring into prejudice*, warning that "at this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial." 404 U.S. at 262. The Court noted that it had "no reason to doubt" that the trial judge had not been influenced by the breach, but reversal was nonetheless required. *Id.* at 263. Its reasoning was straightforward: although plea bargaining is an important tool whose use should be encouraged, the considerations in its favor all "presuppose fairness in securing the agreement between an accused and a prosecutor." *Id.* at 261.

Contrary to the Solicitor General's submission, *Santobello*'s analysis is controlling here even though that case was not formally governed by Rule 52, as this case is. It was clear by the time *Santobello* was decided that the presence of a constitutional error in a state-court judgment alone would not warrant reversal; ordinarily, some degree of prejudice must be shown, at least enough to survive harm-

less-error analysis. *See Chapman v. California*, 386 U.S. 18, 22-23 & n.5 (1967) (clarifying that harmless-error review is appropriate in review of constitutional errors in state-court judgments and adopting the federal definition of harmless errors as those errors that "affect substantial rights," citing Rule 52(a), among other sources). Yet, despite the State's obvious (and persuasive) effort to show that Santobello had suffered no prejudice from the breach of his plea agreement – in the sense that he would not have secured a shorter sentence – this Court reversed. Its decision to do so, consistent with its reasoning that fairness in plea bargaining is a fundamental presupposition of its usefulness, demonstrates that actual prejudice is an irrelevant consideration.[1] The court of appeals in this case thus erred by requiring actual prejudice under plain-error analysis.

b. Even if plain-error review formally applies, the breach of a plea agreement should normally constitute plain error *per se*. That is the only alternative implication that can logically be drawn from *Santobello*. Such a rule would also be consistent with this Court's observation in *Santobello* that the considerations favoring the use of plea agreements "presuppose fairness in securing agreement between the accused and a prosecutor." 404 U.S. at 261. Without such a predicate of fairness, no faith can be had in the result obtained; the entire "bargain" is tainted. The Court's reasoning in *Santobello* echoes the logic of its structural-error cases, which presume

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[1] The prejudice that must be shown under harmless-error analysis is, of course, the same kind of prejudice that must be shown under plain-error analysis. *United States v. Olano*, 507 U.S. 725, 734 (1993) ("Rule 52(b) normally requires the same kind of inquiry" into prejudice that is required under a harmless-error analysis, except that the burden of proof is on the defendant).

error. *See Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (structural error is error that affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself"); *Gonzalez v. United States*, 128 S. Ct. 1765, 1772 (2008) (structural-error doctrine "recognizes that some errors necessarily render a trial fundamentally unfair" (citation and quotation marks omitted)). Thus, at least in cases like this one, where there is admittedly "error" that is "plain," the third and fourth requirements of ordinary plain-error review – that the error affects substantial rights and the fairness, integrity, or public reputation of judicial proceedings[2] – should be established *per se*.

The Solicitor General suggests that this "approach conflicts with this Court's binding interpretation of the requirements of Rule 52(b)," because it "fail[s] to demand that the defendant demonstrate the plainness of the error and its effect on substantial rights." Resp. Br. 20. Not so. The point is simply that an *admitted breach* of a plea agreement is always an obvious error, and that such an error *necessarily* causes prejudice to the defendant, as the *Santobello* Court recognized. Although a given case might fail plain-error review if the existence of the breach itself was a matter of dispute – such a breach might not be "plain" within the meaning of plain-error review, *see id.* at 19 – that is certainly not this case. The Solicitor General fully concedes that the prosecutor "breached the written plea agreement" below, and that the "breach was also obvious." *Id.* at 12. The Solicitor General also agrees that "the government should not be allowed to induce a defendant to waive

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[2] *Cf. Santobello*, 404 U.S. at 262 (indicating remand was required in "the inter-

his rights through attractive terms of agreement and then violate the agreement with impunity." *Id.* at 16. To prevent that result here, certiorari should be granted, and the judgment reversed.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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ests of justice").

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

OTHER AUTHORITIES