No. 08-1341

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

– v. –

GLENN MARCUS,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

HERALD PRICE FAHRINGER*
ERICA T. DUBNO
FAHRINGER & DUBNO
120 East 56th St., Suite 1150
New York, New York 10022
(212) 319-5351

Counsel for the Respondent

* *Counsel of Record*

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QUESTION PRESENTED

Did the court of appeals abuse its discretion by reviewing as "plain error," under Rule 52(b) of the Federal Rules of Criminal Procedure, a defendant's claim, raised for the first time on appeal, that his conviction violated the Ex Post Facto Clause because the relevant criminal statutes were not enacted until nearly two years *after* most acts charged in the indictment occurred -- *and*, the government concedes the defendant could have been convicted exclusively on conduct that took place before the statutes' enactment?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Ex Post Facto Clause contained within Article I, § 9, Clause 3 of the United States Constitution provides, in pertinent part, that no "ex post facto Law shall be passed."

Rule 52(b) of the Federal Rules of Criminal Procedure, provides that a "plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

INTRODUCTION

This Court should not invoke the highly controversial "GVR Order" where the court of appeals, adhering to this Court's plain error standard, reversed a defendant's conviction that violated the Ex Post Facto Clause, even though the issue was raised for the first time on appeal. The Second Circuit reasoned that a retrial was warranted because, as conceded by the government, the defendant could have been convicted of acts of sex trafficking and forced labor that occurred before those statutes were ever enacted.

The Solicitor General now urges that the Second Circuit's approach to plain error review, which considers the *possibility* that the jurors relied exclusively on pre-enactment conduct when considering a remand, varies from this Court's standards. The Solicitor General argues that, instead, a conviction can only be vacated where it is "*reasonably probable*" that the jurors relied solely on conduct occurring before the statute's enactment.

The Solicitor General further suggests that the Second Circuit's position is at odds with the views of other circuits. But, curiously, rather than seek plenary review to resolve this alleged conflict, the Solicitor General asks that the Second Circuit's judgment be vacated, without considering its merits, and remanded for reconsideration in light of the Court's decision in *Puckett v. United States*, 129 S. Ct. 1423 (2009).

However, as explained below, *Puckett* merely amplifies the law relating to plain error review and is *not* an intervening decision. It also does not justify the radical action of overturning the court of appeals' cogent determination. In truth, the Second Circuit appropriately applied the long-standing standard for plain error review, carefully forged by this Court 16 years ago in *United States v. Olano*, 507 U.S. 725 (1993), and the unbroken line of cases that have followed in this Court's well-marked path leading up to the heights of plain error.

Moreover, the Second Circuit's decision is aligned with holdings of other circuits. For example, the Seventh Circuit recently decided that plain error review should presume prejudice where there is "*any possibility*" of a different outcome in the absence of the error.[1]

Finally, this Court has always entrusted plain error review to the sound discretion of each circuit court. Thus, even if slight differences exist among the circuits in the review of such claims, further examination by this Court is not needed because uniformity is not required for a procedural rule. As a consequence, the petition for certiorari, to vacate the judgment and remand for reconsideration, should be denied.

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[1] *See, e.g., United States v. Pitre*, 504 F.3d 657, 662 (7th Cir. 2007) (emphasis supplied).

STATEMENT OF THE CASE

The key events that frame the issues presented by the government's petition go back in time to 1998 when the Respondent, Glenn Marcus, who had no criminal history, became involved in a prolonged intimate relationship with a 29-year-old college graduate, referred to as "Jodi."[2]

Jodi was experienced in the bondage culture, having previously participated in a sadomasochistic relationship where, among other things, she submitted to whipping with a coat hanger; vaginal penetration with a wine bottle; having hot wax dripped on her breasts; and wearing clamps on her nipples. Jodi was photographed during these acts of sadomasochism, which were all consensual (Tr.69-72, 221, 225-28, 230, 276).[3]

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[2] The district court directed that the government's witness be referenced solely by her first name (Pet. App. 21a).

[3] That sadomasochistic relationship only ended because her partner moved out of state (Tr.230).

Pre-Enactment Conduct (October 1998 through October 2000)

In the fall of 1998, Jodi found a chatroom on the Internet for people who were similarly attracted to the alternative sexual lifestyle known as bondage, dominance/discipline, submission/sadism, and masochism ("BDSM") (Tr.72-73, 228). She met Glenn Marcus online and told him about her experiences. Sometime thereafter, Jodi initiated a relationship with him. Marcus was careful to fully explain his brand of BDSM, which did not involve "safewords" or physical limits (Tr.74-76, 247).[4] After learning about his version of bondage, Jodi wanted to meet him (Tr.74).

In the large arc of this narrative, a pivotal point occurred in October of 1998 when Jodi flew from the Midwest to Maryland to engage in a sexual relationship with Glenn Marcus, which included bondage and sadomasochism (Tr.76-79, 248). They spent three to four days together at the home of another woman, who also enjoyed this special brand of sexual activity (Tr.76).

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[4] A "safeword" is used by the submissive party in a bondage relationship to stop the action (Tr.71).

During this excursion, everyone participated in a variety of sadomasochistic activities.[5] Jodi consented to being photographed during her visit and agreed to have her pictures posted on a BDSM website (Tr.252-53). So strongly attracted to the intimate relationship was Jodi that a month later she asked if she could come back to spend more time with Marcus (Tr.77, 260).

During this second visit, they engaged in similarly intense acts (Tr.78).[6] Jodi readily agreed that it would appear to someone, who did not know about the role-playing in a BDSM relationship, that she did not want to be there even though, in reality, she did (Tr.262). Despite the extreme nature of their relationship, Jodi very much enjoyed being with Glenn Marcus (Tr.264).

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[5] For example, Jodi agreed to be blindfolded and kept naked in a cage (Tr.253). She also submitted to being whipped, and let Marcus mark the word "slave" on her stomach with a knife (Tr.76, 78, 254). Their lovemaking included an erotic act called "breath play," where Jodi's oxygen supply was intermittently cut off to heighten her sexual pleasure (Tr.254).

[6] For instance, Jodi was submerged in a bathtub, in handcuffs, with a turkey baster shoved into her mouth as a crude snorkel so that her airflow and breath could be controlled (Tr.263-64).

After this visit in November, Jodi returned to her job and family in the Midwest. However, because of the pleasure she derived from the sexual acts, Jodi wanted to be with Marcus. Therefore, in January of 1999, Jodi packed up her belongings and drove to Maryland where she shared an apartment with the other woman (Tr.266, 270). They regularly drove to New York to bring Glenn Marcus to Maryland for three or four days of "sadomasochistic encounters" (Tr.87). *The government concedes that the relationship was purely voluntary -- and that Jodi acted willingly -- throughout the period from October 1998,* when she first traveled to Maryland, *through October 1999* (Tr.170).

At trial, Jodi claimed that she decided to leave Marcus in October 1999 after an extreme session of BDSM (Tr.106-07, 300). However, Jodi did not end their relationship at that time. Instead, at Christmas, she flew back to the Midwest to celebrate the holidays with her family -- as she did every year (Tr.135, 312-13).

And, rather than confide in her family or the authorities, at the end of the visit *Jodi flew back to Maryland to continue the sadomasochistic relationship* (Tr.313). During this time, Jodi routinely wrote diary entries which were posted on their BDSM website, together with photographs of their activities (Tr.91-92).

The other woman eventually removed Jodi from the apartment because she believed Jodi broke into her bedroom and took her property (Tr.132). As a consequence, in January of 2000, Jodi moved to New York City to live with a childhood friend of Marcus (Tr.327-29). While in New York, Jodi worked, from home, on a BDSM website called "Slavespace.com" (Tr.143, 148-49, 323).[7] In addition, she continued her long-term BDSM relationship with Glenn Marcus, seeing him approximately once a week (Tr.153). All of this conduct occurred *before* the enactment of the Sex Trafficking and Forced Labor statutes.

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[7] The website only earned "several hundred" dollars each month from its advertisers and member section (Tr.152).

Post-Enactment Conduct (November 2000 through October 2001)

On October 28, 2000, the Trafficking Victims Protection Act of 2000, which includes the offenses of Sex Trafficking and Forced Labor, became effective. Shortly thereafter, in November of 2000, *Jodi began working outside of the apartment* in a corporate office, earning more than $40,000 a year (Tr.331-32). Despite commuting from Queens to Manhattan each day for her *fulltime job*, at trial Jodi claimed that she also worked *8 to 10 additional hours each day* on the BDSM website (Tr.332-33).

Jodi testified that in March of 2001, she again wanted to sever her relationship with Glenn Marcus (Tr.159). Marcus supposedly said he would let her leave, if she allowed him to "punish" her one last time (Tr.160). Days later, she met him at a friend's house where they engaged in extreme BDSM activity (Tr.161-66).

In August of 2001, Marcus' childhood friend asked Jodi, who was living with her rent-free, to move out (Tr.172). Therefore, in September of 2001, Jodi moved into her own apartment, and created her own BDSM website (Tr.172, 338, 342). This ended the "non-consensual" period of Jodi's relationship with Glenn Marcus, as charged in the indictment.

Jodi continued to see Marcus for several more years, and they engaged in *consensual* sadomasochistic activities (Tr.173, 176, 340). She also *voluntarily* posed in sexually explicit photographs for the Slavespace website until some point in 2003 (Tr.350, 351, 364, 410).

Jodi concedes that she never told anybody, other than Marcus, that she was unhappy during the relationship (Tr.208).[8] This included her roommate, as well as her family and co-workers (Tr.334). Jodi appeared to be "smart, strong, independent [and] athletic" (Tr.630). And, to outsiders, including Marcus' adult daughter, they seemed like a "normal couple" (Tr.628).[9]

In 2004, three years after Jodi got her own apartment, she went to a lawyer because Marcus refused to remove photographs of her from the Slavespace website (Tr.352). As a consequence, in May of 2005, Marcus was arrested on a complaint and released on a bond secured by his parents' home (A.3). Then, nearly two years later, on February 9, 2007, a superseding indictment was returned (A.26).

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[8] Jodi knew that Marcus never retaliated against any women who decided to end their BDSM relationship with him (Tr.311-12).

[9] She continued to go on camping trips with Glenn Marcus, together with his daughter, and son-in-law, who is a former prosecutor (Tr.340, 363; PSR ¶ 59). In addition, she invited Marcus' daughter to her home for a "family" dinner (Tr.634-35).

Count One alleged "Sex Trafficking" in that, between January 1999 and October 2001, Glenn Marcus knowingly and intentionally caused Jodi to "engage in a commercial sex act" -- referring to the photographs posted on their website -- through force, fraud and coercion, in violation of 18 U.S.C. § 1591 (A.26-27). Marcus was also charged with "Forced Labor" in that, between the same time period, he allegedly obtained Jodi's services by threat of serious harm and physical restraint, in violation of 18 U.S.C. § 1589. This count related to her work on the website (A.27).

After *deliberating for seven days*, the jury found Glenn Marcus guilty of both counts (A.378).[10] The district court then imposed a non-guideline sentence of *nine years imprisonment* (A.379-80).

On appeal, Marcus argued, for the first time, that the convictions violated the Ex Post Facto Clause. The Second Circuit reviewed the matter for plain error under Rule 52(b), vacated the convictions, and remanded for further proceedings (Pet. App. 9a). The Second Circuit then denied the government's petition for rehearing (Pet. App. 65a).

This Court should deny the petition for a writ of certiorari.

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[10] Glenn Marcus was found *not guilty* of a third count, which charged him with transmitting "obscene" pictures on the Slavespace website, in violation of 18 U.S.C. § 1462 (A.27-28).

REASONS FOR DENYING CERTIORARI

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS

The government urges that the Second Circuit "departed from this Court's interpretation" of Rule 52(b) by finding plain error because of a "*possibility*" that the jury could have convicted Glenn Marcus based exclusively on pre-enactment conduct (Pet. I). The petition also argues that this standard conflicts with established law on plain error which holds that the "defendant cannot prevail when prejudice is extremely unlikely" (Pet. 7).

However, the Second Circuit's decision, remanding the erroneous convictions for a retrial, is not in conflict with any precedent from this Court. To the contrary, the Second Circuit accurately cited to the four-part test for plain error review enumerated in *United States v. Olano*, 507 U.S. 725 (1993). There, this Court held that to prevail on a plain error, the defendant must establish "(1) error (2) that is plain and (3) affects substantial rights." *Id.* at 732. In addition, (4) such discretion[11] is only appropriate "if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* at 736. (Pet. App. 6a).

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[11] Of course, whether or not to correct a forfeited error is always left to the sound discretion of the reviewing court. *Olano*, 507 U.S. at 732.

After careful consideration, the court concluded that all four of those standards were satisfied in Glenn Marcus' case (Pet. App. 7a-8a).[12] Specifically, the court found that the government presented evidence at trial of conduct that occurred both *before* and after the statutes were enacted. Moreover, the district court failed to instruct the jury with respect to this issue (Pet. App. 7a). Finally, the government *conceded* that the jury could have found Glenn Marcus guilty based solely on his pre-enactment conduct (Pet. App. 8a-9a). Based on these findings, it is apparent the court of appeals did not abuse its discretion and there is no basis for vacating its decision, which comports with the mandates of Rule 52(b) and *Olano*.

Nevertheless, the government contends that the Second Circuit deviated from the standards established by this Court in *Olano* and as fleshed out in subsequent cases.[13] In particular, the government urges that a defendant may not obtain relief on a "forfeited claim" where there is "no reasonable possibility" that the unobjected-to-error "had an effect on the judgment" (Pet. 11).

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[12] Significantly, in *Olano*, this Court confirmed that Rule 52(b) is *not* reserved solely for cases of actual innocence. 507 U.S. at 736.

[13] Citing *Johnson v. United States*, 520 U.S. 461 (1997), and *United States v. Cotton*, 535 U.S. 625 (2002).

However, this Court has never held that a circuit court cannot exercise its discretion in reviewing, for plain error, a constitutional violation that *may have affected* the judgment. The Solicitor General's cases do not require a "reasonable possibility" or probability that the error affected the judgment before a plain error will be noticed.

For example, in *Johnson*, this Court merely found that the fourth prong of the *Olano* test -- whether the forfeited error seriously affects the fairness, integrity or public reputation of the judicial proceeding -- was not satisfied where the evidence supporting the missing "materiality" element of a perjury conviction was "*overwhelming*" and "*essentially uncontroverted*" at trial. 520 U.S. at 469-70 (emphasis supplied). Thus, in *Johnson*, no "miscarriage of justice" would result from not correcting the error since there was no possibility that the trial was affected by the mistake.

Here, in marked contrast, Marcus' trial was flooded with evidence relating to *two full years of conduct before the statutes were even enacted*, while the proof relating to the post-enactment conduct only consisted of a period of 11 months! Moreover, unlike *Johnson*, where the error related to a matter that was "essentially uncontroverted," in the current case the government *concedes* that it was possible that the jurors convicted Glenn Marcus exclusively on conduct that occurred before the statutes were ever enacted! (Pet. App. 8a-9a).

Furthermore, the government's reliance on this Court's decision in *Cotton* is woefully misplaced where, as in *Johnson*, the defendant was not prejudiced by an error since the evidence at trial relating to that missing element was also "essentially uncontroverted" and "overwhelming." 535 U.S. at 633.

The government is endeavoring to create a conflict where, in fact, none exists. However, we urge that the petition slips into overstatement. And, given the grave consequences to Glenn Marcus, such a distraction is harrowing in its implications. This is especially so where the court of appeals certainly has not departed far from the accepted and usual course of judicial proceedings. At most, any alleged error merely consists of the misapplication of a properly stated rule of law.[14]

Here, the constitutional violation seriously affected Glenn Marcus' substantial rights, as well as the fairness of the judicial proceedings. And, significant public policy concerns arise in the face of the government's suggestion that fundamental, constitutional errors -- even those that affect the framework within which the trial proceeds -- cannot be entertained under the mantle of plain error. As a consequence, the petition for certiorari should be denied.

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[14] *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

II. THIS COURT'S DECISION IN *PUCKETT v. UNITED STATES* DOES NOT PROVIDE A BASIS FOR REMANDING TO THE COURT OF APPEALS FOR RECONSIDERATION

The government's reliance on *Puckett v. United States*, 129 S. Ct. 1423 (2009), for a grant of certiorari is misplaced as it is not an "intervening event" that warrants overturning the court of appeals' sound judgment. For example, *Puckett* does *not* "positively change" the presiding law governing plain error review.[15] Moreover, it certainly is not "sufficiently analogous" or "decisive" to compel reexamination of the case through a GVR order.[16] And, it does not even "cast doubt" on the court of appeals' judgment.[17]

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[15] *See United States v. Schooner Peggy*, 1 Cranch 103 (1801) ("if, subsequent to the judgment [entered by a lower court], and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied").

[16] *See Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964).

[17] *See Stutson v. United States*, 516 U.S. 163, 180 (1996) (Scalia, J., dissenting) (discussion of intervening events and GVR orders).

To the contrary, in *Puckett* the Court only addressed whether Rule 52(b)'s plain error test applies to forfeited claims where *the government failed to meet its obligations under a plea agreement.* 129 S. Ct. at 1428. There, the Court concluded that Rule 52(b) does, indeed, apply to unpreserved breach of contract claims. *Id.* In stark contrast, the government's petition in this case poses a highly distinguishable question relating to what is the proper standard for plain error review concerning constitutional violations involving the Ex Post Facto Clause (Pet. App. I).

Moreover, *Puckett* is nothing more than a restatement of the existing law relating to plain error review, rather than an intervening decision that would change the outcome. *See Tyler v. Cain,* 533 U.S. 656, 666 n.6 (2001) (GVR only warranted where there is a "reasonable probability" that, in light of an intervening decision, the court of appeals would "reject the legal premise on which it relied").

The lack of any change in precedent regarding the standards for plain error review is evident in *Puckett* where the Court concluded that forfeited breach of plea agreement claims are reviewed for plain error "*in the usual fashion.*" 129 S. Ct. at 1428 (emphasis supplied). The uneventful and banal application of existing law is further underscored by language used in the decision itself, where the Court acknowledged that it is merely restating the well-established standard for plain error review.[18]

Furthermore, the Court's statement in *Puckett* regarding "unwarranted extensions" of the authority granted under Rule 52(b) is not new law (Pet. 16-17). Instead, the Court prefaced that statement with the phrase "[w]e have repeatedly cautioned that...," which gives clear notice that there was no change in the law. *Puckett*, 129 S. Ct. at 1429.

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[18] *See, e.g., Puckett*, 129 S. Ct. at 1429 ("We explained in *United States v. Olano*, [citations omitted] that Rule 52(b) review -- so-called 'plain-error review' -- involves four steps, or prongs"). The Court in *Puckett* then reiterated the same four-part *Olano* test that the Second Circuit applied in reviewing the Ex Post Facto Clause violation in this case (Pet. App. 6a).

In addition, the government urges that *Puckett* requires a case specific inquiry into whether the error constitutes a miscarriage of justice (Pet. 17). However, that is certainly not a new rule or change in the law. In fact, in *Puckett* the Court cited to a decision, harkening back to 1985, for the settled proposition that a "*per se* approach to plain-error review is flawed."[19] Thus, *Puckett* clearly does not warrant disturbing the decision of the Second Circuit.

Astonishingly, the Solicitor General contends that the court of appeals "entirely failed to examine the evidence establishing the absence of any real possibility that the jury would have found guilt based solely on pre-enactment conduct" (Pet. 18). However, this completely ignores the government's *concession* that the "jury could have found" that Marcus violated the Sex Trafficking and Forced Labor statutes "solely by his conduct prior to their effective dates" (Pet. App. 8a-9a). The Second Circuit then chronicled specific evidence, which the government conceded established all of the elements of the offenses before the statutes' enactment (Pet. App. 9a).

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[19] *Puckett*, 129 S. Ct. at 1433, quoting *United States v. Young*, 470 U.S. 1, 17 n. 14 (1985).

Finally, several members of this Court have criticized overly expansive uses of GVR orders.[20] Here, a GVR order is not proper since there is no intervening change in the law. As a consequence, the petition should be denied.

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[20] *See, e.g., Youngblood v. West Virginia*, 547 U.S. 867, 871 (2006) (Scalia, Thomas and Kennedy, JJ., dissenting). Significantly, in *Nunez v. United States*, 128 S. Ct. 2990, 2990-91 (2008), Chief Justice Roberts and Justice Thomas joined Justice Scalia in dissenting from a GVR. The Justices urged that the Court has "no power to set aside (vacate) another court's judgment" unless the Supreme Court finds the judgment to be in error.

III. REVIEW IS UNNECESSARY BECAUSE THE SECOND CIRCUIT'S APPROACH IS ALIGNED WITH OTHER CIRCUITS

The Petitioner also contends that the Second Circuit's approach to plain error review of constitutional claims is at odds with authority from other circuits (Pet. 12). However, the Second Circuit's equitable approach, which considers whether there was "any possibility" that the jury could have relied on pre-enactment conduct in reaching a guilty verdict, is fully aligned with decisions from other circuits.

For example, in *United States v. Pitre*, 504 F.3d 657, 662 (7th Cir. 2007), the Seventh Circuit recently found that in cases where a defendant's right to allocution has been violated, "a reviewing court should presume prejudice when there is *any possibility* that the defendant would have received a lesser sentence had the district court heard from [her] before imposing sentence."[21]

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[21] *Id.* quoting *United States v. Luepke*, 495 F.3d 443, 451 (7th Cir. 2007) (emphasis supplied). The Solicitor General's reliance on *United States v. Julian*, 427 F.3d 471 (7th Cir. 2005), is misplaced where that decision *predates* the court of appeals' decision in *Pitre*.

The Seventh Circuit explained the rational underlying the more humane "any possibility" approach and underscored the "quandary facing a defendant who must prove prejudice resulting from a violation of the right of allocution." *Pitre*, 504 F.3d at 662. The court also recognized that it

> would be almost impossible to determine whether, in the context of the advisory guidelines and the court's balancing of the statutory sentencing factors, a defendant's statement, that was never made, would have altered the conclusions of the sentencing court.

As a result, the Seventh Circuit reasoned that the "right to allocution, properly afforded, *could have* had such influence is the most we reasonably can expect a defendant to demonstrate."[22] Notably, the Eleventh Circuit also applies the "possibility" of prejudice standard for plain error review where a defendant was not given an opportunity to allocute. *See, e.g., United States v. Carruth*, 528 F.3d 845, 847 n. 4 (11th Cir. 2008).

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[22] *Id.* quoting *Luepke*, 495 F.3d at 451 (emphasis in original). *See also United States v. Williams-Davis*, 90 F.3d 490, 510 (D.C. Cir. 1996) (rejecting unpreserved Ex Post Facto claim where there was "*no possibility* that the jury finding could have rested solely on conduct preceding the critical date") (emphasis supplied).

Furthermore, no conflict exists among the circuits on this issue. Specifically, in the cases relied upon by the government, the courts essentially found that the evidence relating to the defendants' post-enactment conduct was so overwhelming that no reasonable jury could have convicted the defendants based solely on pre-enactment conduct.[23]

Here, however, there were substantial differences between the pre-enactment and post-enactment evidence. For example, the record establishes that days *after* the Forced Labor statute went into effect *Jodi began to work full-time outside of the apartment in a regular office.* Therefore, her testimony that, during this period, she was also working 8 to 10 hours a day on the website is highly implausible. As a consequence, in contrast to the cases cited by the government, there is a real possibility that the jury only credited Jodi's testimony relating to pre-enactment conduct and, thus, convicted Glenn Marcus based solely on that evidence.

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[23] For instance, in *United States v. Munoz-Franco*, 487 F.3d 25, 57 (1st Cir. 2007), the court saw "nothing to differentiate [the defendants'] pre-enactment conduct from subsequent conduct." Similarly, in *United States v. Todd*, 735 F.2d 146, 150 (5th Cir. 1984), the court noted that the majority of the charged conduct occurred "during the effective period of the amendment."

A National Approach is Not Required

In addition, courts of appeals are allowed broad discretion in how they supervise litigation within their courts. Thus, even if some courts may differ slightly in their review of plain error claims, reconsideration is not warranted here because a uniform national rule is not required for this procedural issue.

The choice of which procedural approach to adopt does not require a uniform national solution. For example, in *Ortega-Rodriguez v. United States*, 507 U.S. 234, 251 n.24 (1993), this Court recognized that uniformity among the circuits is not necessary in their approach to fugitive dismissal rules. The Court also noted "so long as all circuit rules meet the threshold reasonableness requirement ... they may vary considerably in their operation." Therefore, the Court declined to require a uniform rule for the determination as to when pre-appeal flight would warrant dismissal of an appeal. Instead, the Court left that question to the "various courts of appeals." *Id.*

We also urge, most respectfully, that review is not appropriate in such a factually intense case. *See, e.g.*, Rule 10. Here, the government *conceded* that there were sufficient facts to justify Glenn Marcus' convictions for both Forced Labor and Sex Trafficking based exclusively on pre-enactment conduct (Pet. App. 8a-9a). Any questions relating to that issue are, effectively, rendered moot by this critical concession.

Furthermore, the result in this case is not unfair to the government. The Second Circuit, after carefully considering the issue for seven months, remanded for a retrial. The issues are relatively straightforward, especially since the jury acquitted Glenn Marcus of the obscenity charge. And, in light of the nine-year sentence facing Marcus, as well as the fact that the initial jury deliberated for seven days, it is only fair that any questions should be resolved in Glenn Marcus' favor.

Here, there certainly was an (1) error, (2) that was plain, and (3) that affects Glenn Marcus' substantial rights. The constitutional violation also seriously affected the fairness, integrity and public reputation of the judicial proceedings. Thus, there is no reason to unsettle the decision of the court of appeals.

Finally, in the event the Court believes that the court of appeals' rule stands in conflict with authority from this Court or from other circuits, then plenary review -- rather than a GVR order -- would be the proper course to follow.

CONCLUSION

The petition for a writ of certiorari should be denied.

July 1, 2009

Respectfully submitted,

HERALD PRICE FAHRINGER*
ERICA T. DUBNO
FAHRINGER & DUBNO
120 East 56th St., Suite 1150
New York, New York 10022
(212) 319-5351

Counsel for the Respondent

* *Counsel of Record*