No. 07-9712

IN THE SUPREME COURT OF THE UNITED STATES

JAMES BENJAMIN PUCKETT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals correctly applied the plain-error standard to petitioner's forfeited claim that the government breached his plea agreement.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 505 F.3d 377.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2007. A petition for rehearing was denied on December 4, 2007 (Pet. App. 2). The petition for a writ of certiorari was filed on March 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). Petitioner was sentenced to consecutive terms of 262 months of imprisonment on the bank robbery count and 84 months of imprisonment on the firearm count, to be followed by three years of supervised release. Petitioner also was ordered to pay $4275 in restitution. The court of appeals affirmed. Pet. App. 1.

1. On April 4, 2002, petitioner entered Guaranty Bank in Dallas, Texas, approached two tellers, and placed a handwritten note on the counter. The note stated that petitioner was robbing the bank and instructed the tellers not to trigger an alarm or give petitioner trackers or dye packs. One of the tellers moved to assist her colleague, and petitioner pointed a chrome handgun at the moving teller. The second teller handed petitioner $4275 in currency. Petitioner took the money and left the bank. Gov't C.A. Br. 3-4.

2. In July 2002, a grand jury in the Northern District of Texas returned a two-count indictment charging petitioner with armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and

use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). Gov't C.A. Br. 2.

a. On September 3, 2003, the parties filed a written plea agreement in the district court. The agreement provided that petitioner would enter guilty pleas to both counts of the indictment. Plea Agrmt. ¶ 2. The plea agreement also provided that the "government agrees that [petitioner] has demonstrated acceptance of responsibility and thereby qualifies for a three-level reduction in his offense level." Id. ¶ 8. On September 4, 2003, the government filed a motion requesting that petitioner's offense level be decreased by a third level for acceptance of responsibility pursuant to Section 3E1.1(b) of the Sentencing Guidelines. In the motion, the government indicated that it "reserve[d] the right to withdraw" its request if petitioner engaged in conduct inconsistent with his acceptance of responsibility. 9/4/03 Mot. 1-2. No equivalent term appeared in the plea agreement, however.

b. On September 18, 2003, petitioner entered guilty pleas pursuant to the plea agreement. The prosecutor orally recited the terms of the plea agreement, including the government's "agree[ment] that [petitioner] has demonstrated acceptance of responsibility and thereby would qualify for a three level reduction in his offense level." 9/18/03 Tr. 9. An initial presentence report (PSR) dated October 30, 2003, indicated that

petitioner had "clearly demonstrated acceptance of responsibility for his offense" and recommended a three-level downward adjustment under Sentencing Guidelines § 3E1.1, which would result in a total offense level of 31. 10/30/03 PSR ¶ 37. With a criminal history category of VI, the original PSR calculated petitioner's Guidelines range of imprisonment as 188 to 235 months on count 1. Id. ¶ 128. On count 2, petitioner faced a mandatory consecutive term of at least seven years. Ibid.

c. Before sentencing, petitioner suffered a seizure and was diagnosed with a benign brain tumor, which was surgically removed. Sentencing was postponed numerous times. On the defense's motion, the district court also ordered physical and neurological evaluations to determine petitioner's past and present mental capacity. Pet. App. 1 at 1. The resulting reports were filed with the district court. Gov't C.A. Br. 5-6.

On September 27, 2005, petitioner filed a pro se pleading asserting that his counsel had rendered ineffective assistance in failing to pursue a diminished-capacity or mental-defect defense. Gov't C.A. Br. 6. On November 8, 2005, petitioner filed a pro se motion to withdraw his guilty plea alleging, among other things, that his brain tumor and "bipolar disorder" had rendered him incompetent to plead guilty. Id. at 6-7; Pet. App. 1 at 1. On March 20, 2006, the district court denied both motions. Gov't C.A. Br. 7; Pet. App. 1 at 1. The court noted that petitioner had never

been diagnosed with bipolar disorder and that the court-ordered evaluations had revealed no evidence that petitioner was incompetent; the reports instead were "replete with findings of rationality." Gov't C.A. Br. 8; Pet. App. 1 at 1.

d. Because of the delay in petitioner's sentencing, the district court ordered the probation officer to update the original PSR. Pet. App. 1 at 2. On March 31, 2006, the probation officer interviewed petitioner in his attorney's presence. 4/6/06 PSR Supp. Addendum ¶ 26a. Petitioner admitted that in February 2005, while he was in custody pending sentencing in this case, he had assisted another inmate to defraud the United States Postal Service and had received $300 from the scheme. Ibid. The probation officer adjusted her original Guidelines calculation to recommend that petitioner receive no reduction in his offense level for acceptance of responsibility. Id. ¶ 26b; Pet. App. 1 at 2. The probation officer recalculated petitioner's total offense level as 34. 4/6/06 PSR Supp. Addendum ¶ 38. Petitioner's Guidelines range of imprisonment on Count 1, as calculated in the amended PSR, was 262 to 300 months. Id. ¶ 128.

e. At sentencing, defense counsel objected to the PSR on the ground that it incorrectly denied petitioner credit for acceptance of responsibility. 5/4/06 Tr. 4. Defense counsel noted that the government had "filed a motion to allow [petitioner] to have acceptance of responsibility" and that petitioner had "previously

accept[ed] responsibility by entering a plea of guilty." Ibid. The prosecutor responded that the government's motion for a reduction in petitioner's offense level for acceptance of responsibility "was made a long time ago" and predated the new offense that had been reported in the amended PSR. Id. at 5. Based on the new offense, the prosecutor "object[ed] to [petitioner] receiving any acceptance of responsibility levels at this point." Ibid. Defense counsel responded that the court retained discretion to award petitioner credit for acceptance of responsibility, but he did not assert that the government's objection breached the plea agreement. Id. at 6. The district court observed that even if it retained discretion to award petitioner credit for acceptance of responsibility, it was "so rare [as] to be unknown around here" that such credit would be given when a defendant has committed a new crime. Ibid.[1] The court ruled that it would not award petitioner credit for acceptance of responsibility "under the circumstances here." Id. at 36. The court sentenced petitioner to 262 months of imprisonment on the bank robbery count and a consecutive term of 84 months of

[1] The application note to Sentencing Guidelines § 3E1.1 provides that a defendant's "voluntary termination or withdrawal from criminal conduct or associations" is one of a non-exhaustive list of factors that a district court may appropriately consider in deciding whether to award credit for acceptance of responsibility. Guidelines § 3E1.1, comment. (n.1) (2002).

imprisonment on the firearm count, to be followed by three years of supervised release. Id. at 43-45.

3. On appeal, petitioner argued, inter alia, that the government had breached the plea agreement by opposing a reduction in petitioner's offense level for acceptance of responsibility. Pet. App. 1 at 3. The government conceded that "the prosecutor's objection at sentencing to [petitioner] receiving a reduction for acceptance of responsibility was contrary to the government's obligation as stated in the Plea Agreement." Gov't C.A. Br. 21. But the government argued that petitioner's claim of a government breach, which was being raised for the first time on appeal, was subject to review under the plain-error standard. Ibid. The government asserted that petitioner could not meet that standard because he could not demonstrate that the government's breach (1) affected his substantial rights or (2) seriously affected the fairness, integrity, or public reputation of judicial proceedings. Id. at 21-26.

The court of appeals affirmed. Pet. App. 1. The court held that petitioner forfeited his claim of a government breach by failing to object on that ground in the district court. Id. at 3. The court explained that Fifth Circuit precedent contained some inconsistencies on how to apply the plain-error standard in the context of an alleged government breach of a plea agreement. Ibid. The court rejected the suggestion in some decisions that a

government breach always constitutes reversible plain error. Id. at 3-5 & n.7 (citing, e.g., United States v. Goldfaden, 959 F.2d 1324, 1328 (5th Cir. 1992)). The court held that petitioner "must establish the elements of plain error and show prejudice before this court can correct a forfeited error." Id. at 3 (citing United States v. Calverley, 37 F.3d 160, 162-164 (5th Cir. 1994) (en banc), cert. denied, 513 U.S. 1196 (1995), abrogated in part on other grounds by Johnson v. United States, 520 U.S. 461, 468 (1997)).

The court of appeals determined that, in this case, "the first two prongs" of the plain-error standard were met. Pet. App. 1 at 5. The court found, first, that "[t]here was error, as the government concede[d] that its objection at sentencing to the reduction for acceptance of responsibility 'contradicted the terms of the plea agreement.'" Ibid. The court also found that the error was obvious. Ibid. But the court held that petitioner had "not carried his burden of showing prejudice." Ibid. The court noted that it was "clear that the court denied [petitioner] a reduction because he admitted he committed another crime while in custody." Ibid. The court held that petitioner "made no showing that, absent the government's recommendation, the district court would have disregarded his criminal conduct and granted the reduction for acceptance of responsibility." Ibid. In fact, the court observed, "[t]he record indicate[d] exactly the opposite."

Ibid. Accordingly, the court found "no plain error warranting reversal." Ibid.

DISCUSSION

Petitioner contends (Pet. 6-11) that the court of appeals "violated" Santobello v. New York, 404 U.S. 257 (1971), by applying the plain-error standard to petitioner's forfeited claim that the government breached his plea agreement. Petitioner also contends (Pet. 12-16) that if the plain-error standard applies to this case, it requires a less onerous demonstration of prejudice than is demanded in a "conventional application" of the plain-error standard under Federal Rule of Criminal Procedure 52(b). Petitioner argues (Pet. 15) that if a "modified" plain-error standard had been applied in his case, the outcome would have been a remand for vacation of his plea or resentencing.

The court of appeals correctly applied the plain-error standard to petitioner's forfeited claim, and the court also correctly held that petitioner was not entitled to relief under that standard because he failed to demonstrate that his substantial rights were affected by the government's breach of the plea agreement. We agree with petitioner, however, 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 plain-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.[2]

1. The court of appeals correctly held that petitioner forfeited his claim that the government breached his plea agreement by failing to object at the time the breach occurred, i.e., at petitioner's sentencing hearing in the district court. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" United States v. Olano, 507 U.S. 725, 731 (1993) (quoting Yakus v. United States, 321 U.S. 414, 444 (1944)); accord United States v. Cotton, 535 U.S. 625, 631 (2002); Peretz v. United States, 501 U.S. 923, 936-937 (1991); United States v. Frady, 456 U.S. 152, 162-163 (1982); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 238-239 (1940).

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[2] The court of appeals stated that "both parties agree that some form of plain error analysis is appropriate," but its ensuing discussion makes clear that petitioner asked the court to "apply a rule of per se reversal any time the government breaches a plea agreement." Pet. App. 1 at 3. Thus, the parties effectively took opposite positions on the applicability of the plain-error rule, and, in any event, the court of appeals squarely passed on that issue, such that it is properly presented here. See United States v. Williams, 504 U.S. 36, 41 (1992).

That principle is embodied in Federal Rule of Criminal Procedure 52(b), which provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Under Rule 52(b), an appellate court may correct a forfeited error only if the court finds, first, an "error," that is, a "[d]eviation from a legal rule" that has not been waived. Olano, 507 U.S. at 732-733. Second, the court must find that the error is "plain," meaning it is clear or obvious. Id. at 734. Third, the court must conclude that the plain error "affected substantial rights," which ordinarily requires a showing by the defendant that the error "affected the outcome of the district court proceedings." Ibid. Last, "Rule 52(b) is permissive, not mandatory." Id. at 735. Thus, when the first three requirements are satisfied, "the court of appeals has authority to order correction, but is not required to do so." Ibid. At that discretionary stage, the court of appeals "should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" Id. at 736 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

Because petitioner failed to bring his claim that the government breached the plea agreement to the attention of the district court, the claim is subject to the demands of Rule 52(b). The first two requirements of the rule are satisfied. The

government's assertion at sentencing that petitioner did not qualify for a downward adjustment in his offense level for acceptance of responsibility breached the written plea agreement in which the government stipulated that petitioner did so qualify.[3] The breach was also obvious. But the court of appeals correctly held that petitioner is not entitled to relief under Rule 52(b) because he cannot show that the error affected his substantial rights. The record persuasively demonstrates that the outcome of the proceeding would have been the same -- i.e., petitioner would have received the same sentence, which did not incorporate a Guidelines adjustment for acceptance of responsibility -- if the

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[3] The government's position at sentencing responded to petitioner's post-plea misconduct, which was not anticipated at the time the plea agreement was entered. The prosecutor correctly recognized that new criminal conduct by a defendant awaiting sentencing must weigh heavily against an award of credit for acceptance of responsibility under Guidelines § 3E1.1. As the government conceded in the court of appeals, however, notwithstanding those considerations, the prosecutor's position at sentencing constituted a breach of the plea agreement. A prosecutor retains an obligation of candor to the court to inform the court of relevant information at sentencing, even if that information may undercut commitments in a plea agreement. But the prosecutor "must discharge both duties conscientiously." United States v. Saxena, 229 F.3d 1, 6 (1st Cir. 2000) (prosecution did not breach plea agreement by providing court with post-plea information undercutting acceptance of responsibility while standing by plea agreement). Here, the probation officer had already informed the court about petitioner's post-plea activities, and the prosecutor's position at sentencing was directly at odds with the commitment in the plea agreement. Plea Agrmt. ¶ 8 (stating that petitioner "qualified" for acceptance of responsibility credit). Although the government could have drafted petitioner's plea agreement to condition the government's obligations on the defendant's abstention from further criminal conduct, it did not do so.

government's breach had not occurred. As the district court noted, it was "so rare [as] to be unknown" that a defendant would receive sentencing credit for acceptance of responsibility when he committed new crimes while awaiting sentencing. 5/4/06 Tr. 6. On that record, petitioner cannot carry his burden of demonstrating that the government's breach resulted in prejudice to him.

The court of appeals had no need to address the final requirement of plain-error review, but that additional prerequisite to relief supports the court's holding. It was undisputed in the district court that petitioner committed a new crime before he was sentenced -- petitioner admitted to the post-plea misconduct -- and it was beyond dispute that continued criminal conduct negates acceptance of responsibility. The government's failure to fulfill its promise to recommend a favorable Guidelines adjustment for acceptance of responsibility, in circumstances where petitioner eliminated the factual premise on which the promise implicitly was based, does not seriously affect the fairness, integrity, or public reputation of judicial proceedings. Cf. Cotton, 535 U.S. at 633 (omission of drug quantity from indictment did not seriously affect fairness, integrity, or public reputation of judicial proceedings where evidence supporting drug quantity was overwhelming and essentially uncontroverted); United States v. Branam, 231 F.3d 931, 933 (5th Cir. 2000) (assuming that prosecutor's comment at sentencing breached plea agreement and satisfied first three

requirements of plain-error standard, relief was not warranted because the plain error did not affect the fairness, integrity, or public reputation of the judicial system; defendant failed to comply with plea agreement's "wholly reasonable and specific procedures" for determining whether a breach had occurred and for affording the breaching party a reasonable opportunity to explain or cure the breach).

Petitioner argues (Pet. 9-11) that application of the plain-error standard to his forfeited claim violates principles this Court announced in Santobello, 404 U.S. 257. In Santobello, the Court stated 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." Id. at 262. Application of the plain-error standard to petitioner's claim does not conflict with Santobello. Santobello involved a state prosecutor's breach of an agreement to "make no recommendation as to the [defendant's] sentence," id. at 258, and defense counsel "immediately objected" on breach-of-plea grounds when the prosecutor (who was not the prosecutor who negotiated the plea agreement) recommended at sentencing that the defendant receive the maximum one-year term, id. at 259. Because Santobello involved preserved error and emerged from a state court, where Rule 52(b) does not apply, the Court had no occasion to address the standard of review that would have applied in the

federal system if, as in this case, the claim of error had been forfeited. See In re Sealed Case, 356 F.3d 313, 316 (D.C. Cir.) (plea-breach claim in Santobello was preserved by an objection in the trial court; Santobello "[i]n no way" dictates the standard of review in a case of forfeited error), cert. denied, 543 U.S. 885 (2004); see also United States v. D'Iguillont, 979 F.2d 612, 614 (7th Cir. 1992) (Santobello "is predicated upon a defendant's proper objection to the government's alleged breach"), cert. denied, 507 U.S. 1040 (1993).

In this federal case, Rule 52(b) governs, and that rule does not limit the types of forfeited claims to which plain-error review applies. See United States v. Vonn, 535 U.S. 55, 62 (2002) (plain-error standard of Rule 52(b) "cover[s] issues not raised before the district court in a timely way"); Johnson v. United States, 520 U.S. 461, 466-467 (1997) (the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure; Court lacks authority to make exceptions to Rule 52(b)); Peguero v. United States, 526 U.S. 23, 29 (1999) ("Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions.") (quoting Bank of Nova Scotia v. United States, 487 U.S. 250, 254-255 (1988)).

It is true, as the court of appeals observed, that "a plea agreement implicates a defendant's constitutional rights" and the government should not be allowed to induce a defendant to waive his rights through attractive terms of agreement and then violate the agreement with impunity. Pet. App. 1 at 4-5. But when a defendant fails to alert the district court and the government of his concern that the agreement is being breached -- through an objection that would permit resolution of that issue, and possibly a final resolution of the issue in the defendant's favor, in the district court -- it is not unfair to require the defendant, as with every other forfeited claim, to meet the plain-error standard in order to receive relief in the court of appeals. Ibid. The core purpose of the contemporaneous-objection requirement -- to bring alleged errors to the attention of the decisionmaker best suited to evaluate them and correct them if necessary -- applies fully to an asserted breach of a plea agreement:

> [A]n alleged breach of the plea agreement is precisely the type of claim that a district court is best situated to resolve. The claim is fact-specific, [it] may require an evidentiary hearing or proffer of evidence, and the trial court, having taken the plea and having heard the evidence, should have the first opportunity to rule. A claim of breach of the plea agreement is not generally one which the passage of time may illuminate, but rather is the sort of claim which a defendant ordinarily will recognize immediately and should be required to raise when the alleged breach can still be repaired.

United States v. Flores-Payon, 942 F.2d 556, 560 (9th Cir. 1991); see also In re Sealed Case, 356 F.3d at 319 (applying plain-error

standard to plea-breach claim when the defendant had "the opportunity and knowledge to object" in the district court is "totally consistent with the anti-sandbagging philosophy of the Federal Rules"); United States v. Pryor, 957 F.2d 478, 482 (7th Cir. 1992) (observing that alleged government breach "would have been easily cured" if a timely objection had been made at sentencing).

In this case, if petitioner had objected during the sentencing hearing to the prosecutor's recommendation against an acceptance-of-responsibility adjustment, the district court and the parties could have consulted the pertinent term of the plea agreement and the prosecutor, refreshed on the substance of that term, might have corrected her position. The need for appellate consideration of the issue may have been eliminated. See United States v. Amico, 416 F.3d 163, 165 (2d Cir. 2005) (government's retraction of argument made in sentencing memorandum in violation of plea agreement adequately cured the breach where original statement was in a "mild, brief, and unassertive form" and retraction was rapid). Petitioner's failure to object deprived the district court of a clear opportunity to correct the error as it occurred. The court of appeals correctly applied the plain-error standard of Rule 52(b) to petitioner's claim and correctly determined that petitioner failed to meet that standard. See Vonn, 535 U.S. at 73 (under the plain-error rule, which serves the value of finality, "the

defendant who just sits there when a mistake can be fixed cannot just sit there when he speaks up later on").

2. Although the court of appeals correctly resolved petitioner's case, petitioner is correct (Pet. 6-8) that the courts of appeals are divided on the question whether a claim that the government breached a plea agreement is subject to the plain-error standard when it is raised for the first time on appeal. The majority of the courts of appeals have concluded, as the court did here, that such a claim is reviewable only for plain error. See In re Sealed Case, 356 F.3d at 316-319; United States v. Saxena, 229 F.3d 1, 5 (1st Cir. 2000); United States v. Fant, 974 F.2d 559, 562 (4th Cir. 1992); United States v. Barnes, 278 F.3d 644, 646 (6th Cir. 2002); United States v. Matchopatow, 259 F.3d 847, 851 (7th Cir. 2001); United States v. Cohen, 60 F.3d 460, 462-463 (8th Cir. 1995); Flores-Payon, 942 F.2d at 558-560; United States v. Thayer, 204 F.3d 1352, 1356 (11th Cir. 2000). Other courts of appeals have concluded that a plea-breach claim may be remedied on appeal without satisfying the plain-error standard, and thus without a demonstration of "obvious" error or prejudice, even when no objection was raised in the district court. See United States v. Griffin, 510 F.3d 354, 360 (2d Cir. 2007); United States v. Rivera, 357 F.3d 290, 293-295 (3d Cir. 2004); United States v. Peterson, 225 F.3d 1167, 1170 (10th Cir. 2000), cert. denied, 531 U.S. 1131 (2001).

As the court of appeals noted in In re Sealed Case, the "few cases in the minority offer no convincing reasoning" for exempting plea-breach claims from plain-error review. 356 F.3d at 318. The Third Circuit justified its differential treatment of such claims by reference to certain "additional principles" present in the plea-agreement context, such as the principle that "[b]reach of a plea agreement by a prosecutor [] strikes at public confidence in the fair administration of justice" and that the government "has an obligation to adhere strictly to the terms of the bargain it strikes with defendants." Rivera, 357 F.3d at 294 (internal quotation marks and citations omitted). Those principles, however, address the arguable consequences of a government breach that has been established, not whether a defendant's allegation of a breach -- like all other claims that error occurred at a plea proceeding, trial, or sentencing -- is subject to plain-error review if no contemporaneous objection was made in the district court. See Johnson, 520 U.S. at 466 ("the seriousness of the error claimed does not remove consideration of it from the ambit of" Rule 52(b)).

Petitioner also is correct (Pet. 12-15) that analytical variations exist even among the circuits that have held that plain-error review applies to forfeited plea-breach claims. Some courts appear to find that the plain-error standard will be met in any case in which a government breach is established, because such a breach "serve[s] not only to violate the constitutional rights of

the defendant, but directly involve[s] 'the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government.'" Fant, 974 F.2d at 565 (quoting United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986)); see also United States v. McQueen, 108 F.3d 64, 66 (4th Cir. 1997); Barnes, 278 F.3d at 648. Reaching that conclusion in every case of a breach omits crucial steps in the plain-error analysis, however. Before addressing whether a government breach of a plea agreement should be remedied on appeal because it affected the integrity of judicial proceedings -- which is the fourth component of the plain-error standard as articulated by this Court in Olano, 507 U.S. at 735-736 -- the reviewing court must first find that the second and third components of the plain-error standard are met, that is, that the government breach was "plain" or obvious and that the defendant has demonstrated that the outcome of the proceeding was affected by the breach. Id. at 734-735. To the extent that some courts purport to apply plain-error analysis to forfeited plea-breach claims but fail to demand that the defendant demonstrate the plainness of the error and its effect on substantial rights, their approach conflicts with this Court's binding interpretation of the requirements of Rule 52(b).

In sum, the courts of appeals disagree on whether the plain-error standard applies to forfeited claims that the government has

breached a plea agreement. And the courts of appeals that accept the applicability of the plain-error standard in the plea-breach context apply the standard in ways that differ from each other and, in some cases, conflict with this Court's precedent. Because these issues arise repeatedly in the federal courts, this Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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