No. 07-___

IN THE

Supreme Court of the United States

CURTIS A. BEASLEY,

Petitioner,

v.

UNITED STATES OF AMERICA.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

21 U.S.C. § 851(a) requires the government to file a notice "before trial" if it intends to seek an enhanced punishment for a drug offense based on the defendant's prior criminal conviction. In this case, the government did not provide notice "before trial," but provided it after the jury had been selected.

1. Whether the failure to provide timely notice under Section 851(a) jurisdictionally bars a court from imposing an enhanced sentence.

2. Whether notice is untimely under Section 851(a) when it is not provided until after trial has commenced but before the jury selection has been completed.

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Petitioner Curtis Beasley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-12a) is published at 495 F.3d 142. The district court's judgment (Pet. App. 13a-17a), entered on August 24, 2004, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

21 U.S.C. § 841(a) provides in relevant part: "[I]t shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense . . . a controlled substance."

21 U.S.C. § 841(b)(1)(B) provides in relevant part:

> In the case of a violation of subsection (a) of this section involving . . . (iii) 5 grams or more of a mixture or substance . . . which contains cocaine base . . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment . . . .

21 U.S.C. § 851(a)(1) provides: "No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon."

STATEMENT OF THE CASE

Federal law permits the government to request the imposition of an enhanced sentence for repeat offenders in certain drug cases by providing notice of its intent to rely upon a prior conviction to the court and the defendant "before trial." 21 U.S.C. § 851(a)(1). In this case, the government failed to provide timely notice, but the petitioner did not object. The district court then applied the sentencing enhancement. On appeal, the Fourth Circuit held that the statute requiring pre-trial notice is not jurisdictional and is therefore waivable, expressly rejecting the Eleventh Circuit's contrary holding that the district court's power to impose the enhancement is conditioned on the government's timely filing of notice. The court of appeals further held that any error by the district court was not plain and therefore

was not cognizable because there was no controlling precedent in the Fourth Circuit or from this Court, even though several courts of appeals had already held that notice must be provided prior to jury selection.

1. Under federal law, any person who manufactures, distributes, or possesses with the intent to manufacture or distribute five grams or more of crack cocaine is subject to a sentence of imprisonment of between five and forty years. 21 U.S.C. § 841(a)(1)(A). Federal law also allows the government to request an enhanced sentence for repeat drug offenders. 21 U.S.C. 841(b)(1)(B). However, the government's ability to seek that enhanced sentence is expressly conditioned on its compliance with certain procedural requirements. Specifically, the base sentencing range will apply "unless *before trial*" the government "files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." 21 U.S.C. § 851(a)(1) (emphasis added). When the government thus provides timely notice, the district court can impose a sentence in the significantly higher range of ten years to life imprisonment. 21 U.S.C. § 841(b)(1)(B).

2. In March 2003, petitioner Curtis Beasley was indicted on various federal drug charges. The parties selected the jury on January 6, 2004. Six days after jury selection, the government served the court and the petitioner with notice under 21 U.S.C. § 851(a)(1). The petitioner did not object to the untimely notice. The district court subsequently swore in the jury, after which the petitioner was tried and ultimately convicted.

At sentencing, the district court held that, as a consequence of the government's § 851(a)(1) submission, petitioner's applicable statutory sentencing range was enhanced to ten years to life

imprisonment. Absent the § 851 enhancement, the federal sentencing guidelines' recommended sentencing range would have been 262 to 327 months in prison. Pet. App. 4a. With the enhancement under § 841(b)(1)(B), however, the recommended sentencing range increased to 360 months to life imprisonment. The court sentenced the petitioner to 408 months of imprisonment, to be followed by eight years of supervised release. *See* Pet App. 14a.

3. Petitioner appealed the sentencing enhancement. The United States did not object to the petitioner's raising the issue for the first time on appeal; to the contrary, it specifically urged the Fourth Circuit to review the claim *de novo*. *See* U.S. C.A. Br. 12. The court of appeals held, however, that plain error review applied.

The court first held that plain error review was appropriate because, in its view, compliance with the notice requirement of § 851(a)(1) is not jurisdictional. Pet. App. 4a. The court reasoned that "when a district court imposes a sentence outside of the statutory range . . . it is not acting without power, it is exercising its power erroneously." *Id.* at 5a-6a (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)). The court noted that its holding on that question was consistent with the rulings of several circuits, but was in direct conflict with the law of the Eleventh Circuit. *Id.* 7a (citing *Harris v. United States*, 149 F.3d 1304, 1306 (11th Cir. 1998)).

Applying the plain error standard, the court of appeals held that "there can be no plain error where there is no precedent from the Supreme Court or this court directly resolving" the issue. Pet. App. 10a (quotations and citations omitted). The court accordingly held that the failure to provide notice as mandated by the statute was not plain error, even though every published opinion of every court of appeals to address the question had held that §

851(a)(1) notice must be provided prior to jury selection. Pet'r C.A. Br. 13; *infra* at 11.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons. First, as the Fourth Circuit acknowledged, its holding that § 851(a)(1) is not a limit on the district court's jurisdiction squarely conflicts with the law of the Eleventh Circuit. Second, the Fourth Circuit's holding that error cannot be "plain" if there is no on-point precedent within the circuit or from this Court conflicts with the decisions of several other courts of appeals, which have held that a uniform line of out-of-circuit authority can establish that an error is "plain." Finally, given the frequency with which sentences are enhanced in accordance with § 851, the question arises with some frequency and is important to the administration of federal criminal procedure.

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE CONFLICT IN THE CIRCUITS CONCERNING WHETHER § 851(A)(1) IS JURISDICTIONAL AND THUS NOT SUBJECT TO FORFEITURE.

1. The courts of appeals have issued conflicting decisions concerning whether the government's compliance with 21 U.S.C. § 851(a)(1) is a jurisdictional requirement, which must be reviewed *de novo*, or whether the error is subject to forfeiture and hence subject to plain error review. The Fourth Circuit held in this case that § 851(a)(1) is not jurisdictional. *See* Pet. App. 2a. As the court of appeals noted, the First and Seventh Circuits agree. Pet. App. 7a (citing, *e.g.*, *United States v. Ceballos*, 302 F.3d 679, 690-92 (7th Cir. 2002); *Prou v. United States*, 199 F.3d 37, 43-46 (1st Cir. 1999)).

As the Fourth Circuit recognized, however, the Eleventh Circuit has squarely held to the contrary.

Pet. App. 7a; *Harris v. United States*, 149 F.3d 1304, 1306 (11th Cir. 1998). In *Harris*, the defendant pleaded guilty to drug charges and his sentence was enhanced even though the government did not provide timely notice under § 851(a)(1). The defendant did not object to the late notice. The Eleventh Circuit nonetheless reversed. The court explained that the "Eleventh Circuit and its predecessor court have unambiguously and repeatedly held that a district court lacks jurisdiction to enhance a sentence unless the government strictly complies with the procedural requirements of § 851(a)." *Id.* at 1306 (citing *United States v. Olson*, 716 F.2d 850, 853 (11th Cir. 1983); *United States v. Cevallos*, 538 F.2d 1122, 1125 n.4 (5th Cir. 1976); *United States v. Noland*, 495 F.2d 529, 533 (5th Cir. 1974)). Quoting one of its prior decisions, the Eleventh Circuit explained that:

> An enhanced sentence is a special remedy prescribed by the Congress; prosecutorial discretion is vested in the executive branch of the government, and the district court has no authority to exercise it or pretermit it. As we have pointed out, Congress advisedly vested this discretion in the prosecutor. Unless and until prosecutorial discretion is invoked and the government files and serves an information as required by Sec. 851, the district court has no power to act with respect to an enhanced sentence; it can no more enhance the sentence than it could impose imprisonment under a statute that only prescribes a fine. Harmless error cannot give the district court authority that it does not possess.

Id. at 1306 (quoting *Olson*, 716 F.2d at 853). Accordingly, in *Harris*, the court of appeals reaffirmed its view that "Congress could not have

more clearly evinced its purpose" in authorizing enhanced sentences pursuant to § 851 only when the government seeks such enhancement by filing an information before trial or plea. *Id.* at 1307.

As the Fourth Circuit recognized, Pet. App. 7a, the conflict between its ruling and the Eleventh Circuit's holding is irreconcilable. In the Eleventh Circuit, the enhancement of petitioner's sentence would have been reversed. That court would find it determinative that the prosecution had not, through timely notice, conferred on the district court the authority to impose the enhanced sentence.

This conflict is squarely presented by this case. The issue was directly addressed below. The Fourth Circuit also observed that the question is outcome determinative, because the application of § 851 substantially enhanced petitioner's sentence. Pet. App. 4a. A ruling in petitioner's favor would have reduced the recommended guidelines range by 81 months.

2. The Fourth Circuit's decision was moreover erroneous. It is beyond question that Congress has the power to set the statutory ranges for various criminal offenses. *United States v. Booker*, 543 U.S. 220, 246 (2005); *cf. Bowles v. Russell*, 127 S. Ct. 2360, 2364 (2007). The mandatory provisions of 21 U.S.C. § 851(a)(1) demonstrate Congress's intent to exercise that authority to limit the jurisdiction of the federal courts when enhancing sentences based on prior convictions. The statute provides:

> No person who stands convicted of an offense under this part [21 U.S.C. § 841 *et seq.*] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a

> copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

Just last Term, this Court made clear that a party's failure to file a timely notice of appeal constitutes a jurisdictional defect. *Bowles*, 127 S. Ct. at 2364 (2007). The United States' failure to file a timely notice under § 851(a)(1) is no different. In both cases, Congress has exercised its authority to establish procedural prerequisites to the invocation of a court's powers – in *Bowles*, the court of appeals' power of review; in this case, the sentencing court's power to consider an enhanced sentence. In both cases, the required notice and its deadline perform the same important functions: when timely filed, the filing puts the opposing party on notice that a special power of the court is being invoked; and when the time for the filing has passed, the deadline provides the opposing party a right of repose that is not to be disturbed.

Strict observance of the requirements of § 851(a)(1) is also required to give effect to Congress's determination that the decision whether to seek an enhancement belongs to the prosecution—subject to procedural protections for the defendant—and not to the courts. Both the extent of the prosecutor's discretion and the strict limits on how that discretion may be exercised demonstrate Congress's intent that executive branch compliance with § 851(a)(1) be necessary to trigger the jurisdiction of the courts. *See United States v. Cespedes*, 151 F.3d at 1333. In § 851, Congress struck a balance between the authority of prosecutors to seek enhanced sentences—sentences that can dramatically increase a defendant's punishment—and the need to provide fair notice and procedural protections to defendants who suddenly find themselves facing a significantly increased sentence. When courts fail to enforce the procedural protections and limitations that Congress prescribed,

courts displace the careful balance that Congress struck and, in effect, permit a sentence to be imposed in a manner that Congress forbade. Indeed, courts have relied on the fact that § 851 provides only a narrow window in which the government may seek an enhancement to demonstrate that the delegation of legislative authority to the executive branch is constitutional. *Cespedes*, 151 F.3d at 1333; *see also United States v. Jensen*, 425 F.3d 698 (9th Cir. 2005). If the power to seek an enhancement is constitutionally delegated to the executive branch only because there are strict conditions, courts ignore Congress's intent to comply with our system of separated powers when they exercise jurisdiction to enhance sentences when the prosecutor has failed to comply with the commands of the statute. Unless the prosecutor files an information before trial providing notice of its intent to seek an enhanced sentence, a court lacks jurisdiction to enhance the sentence.

This Court has held that the decision to provide notice under § 851(a)(1) is similar to a charging decision. That is, the "discretion [to determine whether a particular defendant will be subject to the enhanced statutory maximum] is an integral feature of the criminal justice system." *United States v. LaBonte*, 520 U.S. 751, 762 (1997); *see also Cespedes*, 151 F.3d at 1333. A court has no greater jurisdiction to enter an enhanced sentence without a proper information from the prosecution than it would hold to enter a judgment of conviction in the absence of a criminal charge. Like charging decisions, the decision to file a § 851(a)(1) notice is within the discretion of the executive branch, and courts cannot exercise jurisdiction to undermine that discretion. *See In re Ellis*, 356 F.3d 1198 (9th Cir. 2004).

The court of appeals erred in concluding that its contrary holding was compelled by *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998), and *Jones v. United States*, 527 U.S. 373, 386-

88 (1999). In *Steel Co.*, this Court held that a substantive legal question going to the merits of a cause of action—whether the Emergency Planning and Community Right-To-Know Act of 1986 permits citizen suits for purely past violations—was not jurisdictional and did not need to be addressed before the issue of standing: "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." 523 U.S. at 89. That holding has no bearing on the proper construction of § 851. This case concerns the compliance with procedural requirements that Congress statutorily commanded to be fulfilled before a prosecutor can seek, and a court can impose, an enhanced sentence.

The court of appeals' reliance on *Jones v. United States* (Pet. App. 6a), fares no better. In *Jones*, the defendant was convicted of capital murder for a killing committed in the course of a kidnapping. 527 U.S. at 387-388. He objected to the jury instructions and decision forms. *Id.* Jones argued that, although he had failed to raise those objections before the jury retired, the Federal Death Penalty Act created an exception to plain error review for such claims. *Id.* This Court rejected that argument, in large part because the Act contained a provision that explicitly required defendants to preserve allegations of errors in accordance with the rules of criminal procedure. *Id.* at 389. § 851, by contrast, lacks any such limitation. Beyond that, § 851(a)(1)'s requirements are preconditions to the prosecutor's power to charge and the court's power to sentence; they are not routine rules of trial procedure.

II. THE FOURTH CIRCUIT'S HOLDING THAT A UNIFORM LINE OF AUTHORITY FROM OTHER CIRCUITS CANNOT RENDER AN ERROR "PLAIN" CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND OF THIS COURT.

Having ruled, in conflict with the Eleventh Circuit, that the government's failure to comply with § 851(a)(1) was subject to plain error review, the Fourth Circuit proceeded to create a second circuit split on the application of the plain error doctrine. That ruling, which is also incorrect, warrants review by this Court as well.

1. As a judge of the Fourth Circuit previously recognized, "[e]very court of appeals to have addressed [the issue] in a published opinion has concluded that before trial [in § 851] means before jury selection begins (which is obviously also before the jury is sworn)." *United States v. Jones*, 78 Fed. App'x 844, 856 (4th Cir. 2003) (Michael, J., dissenting).[1] In *United States v. Johnson*, 944 F.2d 396 (1991), the Eighth Circuit held that "before trial" means "before jury selection," *id.* at 407. The court explained that reading "before trial" to mean what it says "allows the defendant ample time to determine whether he should enter a plea or go to trial, and to plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." *Id.* Furthermore, enforcing § 851(a)(1) according to its terms would not overly burden the government because § 851(a)(1) allows the government to seek a

[1] The only contrary appellate authority of which petitioner is aware is the unpublished decision in *United States v. Galloway*, No. 94-3173, 1995 WL 329242, at *8 (6th Cir. May 31, 1995).

postponement of a trial if it encounters difficulty discovering a defendant's prior convictions. *Id.*

The First, Second, Seventh, and Tenth Circuits have likewise held that, unless the government files the required information with the court prior to the commencement of jury selection, the information is untimely, such that the district court lacks the power to enhance the defendant's sentence pursuant to § 851. *See Prou v. United States*, 199 F.3d 37, 48 (1st Cir. 1999); *Kelly v. United States*, 29 F.3d 1107, 1110 (7th Cir. 1994); *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1484 (10th Cir. 1994); *United States v. White*, 980 F.2d 836, 842 (2d Cir. 1992). Additionally, the Eleventh and D.C. Circuits have held an information timely filed where the government provided notice of its intention to file the information "prior to selection of the jury." *See United States v. Weaver*, 905 F.2d 1466, 1481 (11th Cir. 1990); *United States v. Brown*, 921 F.2d 1304, 1309 (D.C. Cir. 1990).

2. The Fourth Circuit failed to consider whether this uniform line of authority had any bearing on whether the trial error was "plain." Pet. App. 7a-10a. Adopting the position of the Eleventh Circuit, the court of appeals held that, if the statutory language is arguably ambiguous, there can be no plain error unless there is controlling in-circuit or Supreme Court precedent directly resolving the question in the defendant's favor. Pet. App. 9a (citing *United States v. Lejarde-Rada*, 319 F.3d 1288 (2003). "Because there is no controlling precedent—either in the Supreme Court or in our court—on the issue of when a trial begins for purposes of defining 'before trial' in § 851(a)," the court held, "we cannot say that it was error for the district court to assume that a § 851 information filed after the jury was selected but before it was sworn was timely filed." *Id.*

The Eleventh Circuit has held the same. *See United States v. Lejarde-Rada*, 319 F.3d 1288, 1291

(11th Cir. 2003) (holding that, where the explicit language of a statute or rule does not specifically resolve an issue, "there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it"); *United States v. Magluta*, 198 F.3d 1265, 1280 (11th Cir. 1999) ("[A] district court's error is not 'plain' or 'obvious' if there is no precedent directly resolving an issue.").

Although consistent with the law of the Eleventh Circuit, the Fourth Circuit's construction of the plain error rule conflicts with the decisions of several other circuits that rely on out-of-circuit authority to find an error "plain." In *United States v. Gore*, for example, the Second Circuit held that:

> [t]he lack of this Court's precedent directly on point . . . will not prevent the district court's error from being deemed 'plain' because this is not a case in which we have taken no position on a certain issue and upon which no other circuit has spoken, or upon which there is a sharp dispute among the other circuits.

154 F.3d 34, 43 (2d Cir. 1998). The court then found plain error in the district court's application of a federal drug trafficking provision. The court explained that, even though "[t]his Court . . . has not yet addressed directly the application of Double Jeopardy . . . [to] § 841(a)(1) . . . other circuits have uniformly decided" that in § 841 Congress did not intend for multiple punishments to be based on a single quantity of drugs, and that analogous cases from this Court and the Second Circuit supported that conclusion. *Id.* Consequently, the court held that "the rules laid out in [this Court's previous cases], the uniform holdings of our sister circuits, and our own line of cases are relevant precedents with a sufficient level of specific applicability to the facts of this case so that the district court's error was clear

and obvious under the law at the time of [the defendant's] trial." *Id.* at 47.

Since *Gore*, the Second Circuit has reiterated the importance of looking at cases from other circuits when performing plain error review. *See United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) ("It may be appropriate for this Circuit to find an error plain, even in the absence of binding precedent from the Supreme Court or this Circuit, where other circuits have uniformly taken a position on an issue that has never been squarely presented to this Court."); *United States v. Brown*, 352 F.3d 654, 664 (2d Cir. 2003) ("We can, in certain cases, notice plain error in the absence of direct precedent, or even where uniformity among the circuits, or among state courts, is lacking.").

Five other courts of appeals have likewise looked to precedent from their sister circuits to justify a finding of plain error, even where the specific error at issue had not been addressed previously by the reviewing court. For example, in *United States v. Hardwell*, the Tenth Circuit held that it was sufficient to render an error "plain" that precedent from other circuits supported the defendant's claim on appeal. 80 F.3d 1471, 1484 (10th Cir. 1996). "Although neither the Supreme Court nor this court has decided this issue," the court wrote, "given the weight of authority from other circuits, we conclude that the error was sufficiently clear and obvious to be plain error . . . ." *Id.*

The First, Fifth, Seventh, and Ninth Circuits have reached the same conclusion. *See United States v. Munoz-Franco*, 487 F.3d 25, 56 (1st Cir. 2007) (holding that, "consistent with recent circuit court decisions" in four other circuits, the district court plainly erred); *United States v. Chea*, 231 F.3d 531, 537 (9th Cir. 2000) (finding plain error, and noting that "[w]hile we have not previously considered whether [this error] is plain error, other circuits

have, and have concluded that it is"); *United States v. Leonard*, 157 F.3d 343, 345-46 (5th Cir. 1998) (acknowledging that a claim was "*res nova* in this Circuit," but finding plain error anyway where four other circuits recognized the alleged error); *United States v. Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994) (holding that "[i]n light of [our previous cases,] as well as the fact that each of the other circuits has determined that [the district court's action is erroneous], we are of the opinion that it was plain error").

3. The Fourth Circuit's plain error standard is not only contrary to the majority rule in the circuits, but is also wrong. Under Federal Rule of Criminal Procedure 52(b), "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Thus, the threshold inquiry under Rule 52(b) is whether "the error is clear under current law," not whether there happens to be binding precedent within a particular geographic jurisdiction. *See United States v. Olano*, 507 U.S. 725, 734 (1993).

There is no basis for the Fourth Circuit's view that "current law" means only the law of the court of appeals or this Court. As this Court observed in *United States v. Frady*, Rule 52(b) "reflects a careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly addressed." 456 U.S. 152, 163 (1982). Based on those two competing interests, this Court said that the Rule was "intended to afford a means for the prompt redress of miscarriages of justice." *Id.* When, as here, the error can be discerned from a straightforward reading of the statutory text and has been consistently construed by numerous courts of appeals, then the error can be "clear under current law" even before this Court speaks or the particular circuit in which the defendant is convicted happens to confront the

question. Moreover, if the Fourth Circuit had believed that the uniform authority of the other circuits was incorrect, it could have denied relief on that ground. Accordingly, the principal effect of the stringent rule of the Fourth and Eleventh Circuits is to deny relief when there is unquestionable error, but the issue simply has not yet arisen in those particular circuits. Denying relief in such circumstances does nothing to promote the balance of interests sought by Rule 52(b). The miscarriage of justice suffered by petitioner in this case would have been addressed had he found himself in any one of the six circuits to have confronted the question presented here. Unless there is substantial reason to believe that those circuits have misunderstood the law, justice is not served by denying relief based on an accident of geography or timing.

Moreover, the logic of the Fourth and Eleventh Circuit's rule predictably denies relief when relief is most warranted. One might reasonably expect that the most obvious and plain errors will arise the least frequently. Yet, unless the same error has previously arisen in that circuit, the Fourth and Eleventh Circuits would hold that the error is not "plain." Such a result not only leads to an "obvious injustice," *Frady*, 456 U.S. at 163, but is in conflict with this Court's teachings in the related area of qualified immunity from civil liability, in which the Court has made clear that the absence of directly on-point, controlling precedent does not mean that law is not "clearly established." *See Hope v. Pelzer*, 536 U.S. 730, 741-42 (2002); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (holding that "a consensus of cases of persuasive authority" would be sufficient to clearly establish a legal rule).

Directing the lower courts to consider out-of-circuit precedent also will aid the district courts that will inevitably decide *res nova* claims in the future, reduce the incidents of plain error, and avert unnecessary litigation. In *Frady*, this Court stated

that "recourse may be had to [Rule 52(b)] only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely [objection]." 456 U.S. at 163. Had the district court surveyed the law of the circuits on the meaning of "before trial" in § 851(a)(1) at the time of the petitioner's sentencing, and had the Fourth Circuit looked beyond its own cases at the time of the appeal, they would have found that every court of appeals to publish an opinion has determined that trial begins at jury selection. Consequently, the district court's error was sufficiently clear to fall within the meaning of "plain error" under Rule 52(b).

CONCLUSION

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

Respectfully submitted,

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