No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GLENN MARCUS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals departed from this Court's interpretation of Rule 52(b) of the Federal Rules of Criminal Procedure by adopting as the appropriate standard for plain-error review of an asserted ex post facto violation whether "there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct."

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 538 F.3d 97. The opinion and order of the district court (App., *infra*, 19a-64a) is reported at 487 F. Supp. 2d 289.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2008. A petition for rehearing was denied on December 8, 2008 (App., *infra*, 65a-66a). On February 27, 2009, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and in-

cluding April 7, 2009. On March 26, 2009, Justice Ginsburg further extended the time to May 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Ex Post Facto Clause of the United States Constitution (Art. I, § 9, Cl. 3) provides: "No * * * ex post facto Law shall be passed."

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

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, respondent was convicted of sex trafficking involving children or force, fraud, or coercion, in violation of 18 U.S.C. 1591(a)(1), and forced labor, in violation of 18 U.S.C. 1589. He was sentenced to 108 months of imprisonment. The court of appeals vacated respondent's convictions and remanded for further proceedings. App., *infra*, 1a-18a.

1. In 1998, respondent met a woman named Jodi in an online chat room devoted to bondage, dominance/discipline, submission/sadism, and masochism (BDSM).[1] In October 1998 and again in November 1998, Jodi traveled from her home in the Midwest to Maryland and met respondent, who lived in New York, at an apartment belonging to a woman named Joanna, who was one of respondent's "slaves." In January 1999, Jodi moved

[1] The district court permitted certain witnesses to testify using their first names only. App., *infra*, 2a n.1.

in with Joanna. Following that move, respondent visited Joanna's home every one to two weeks, during which he would engage in violent BDSM activity with Jodi, Joanna, and sometimes other women as well. App., *infra*, 2a-3a.

In October 1999, Jodi's relationship with respondent became nonconsensual. That month, Jodi told respondent that she wanted to terminate her relationship with him. In response, respondent inflicted the most severe "punishment" that Jodi had received to that point. App., *infra*, 3a; see *id.* at 26a-27a (describing incident).

In January 2000, respondent ordered Jodi to move to New York and live with a woman named Rona, another of respondent's "slaves." At respondent's direction, Jodi created a sexually explicit BDSM website called "Slavespace," and she worked between eight and nine hours per day on the website. Respondent received all revenues from the website, which consisted principally of membership fees and advertising. During this period, respondent continued to engage in violent and non-consensual sexual behavior with Jodi. When Jodi told respondent that she wanted to leave, he threatened to send pictures to her family and the media. App., *infra*, 4a.

In March 2001, respondent told Jodi that she would be allowed to leave him, but that she would first have to endure one final punishment. Respondent drove Jodi to the home of a woman named Sherry, where he banged Jodi's head against a ceiling beam, tied Jodi's hands and ankles to the beam, beat and whipped Jodi while she was hanging from the beam, drugged her, and had sexual intercourse with her. Respondent photographed the incident and forced Jodi to write a diary entry about it for his website. Jodi continued to live with Rona until

August 2001, when Jodi moved into her own apartment. At that point, Jodi's interactions with respondent became less frequent, although she remained in contact with him until 2003. App., *infra*, 4a-5a.

2. A grand jury charged respondent with, *inter alia*, sex trafficking involving children or force, fraud, or coercion, in violation of 18 U.S.C. 1591(a)(1), and forced labor, in violation of 18 U.S.C. 1589. App., *infra*, 5a. Both provisions were enacted as part of the Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. L. No. 106-386, 114 Stat. 1464, which became law on October 28, 2000. The superseding indictment, however, charged a course of conduct that occurred "between January 1999 and October 2001." App., *infra*, 5a-6a.

At trial, the government presented evidence about respondent's conduct both before and after the effective date of the TVPA. Respondent did not request an instruction that would have limited the jury's consideration or use of evidence pertaining to periods before the TVPA's enactment, and he likewise failed to raise this issue in his motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29. The jury found respondent guilty on both the sex-trafficking and forced-labor counts. App., *infra*, 6a.

3. The court of appeals vacated respondent's convictions and remanded for further proceedings in a per curiam opinion. App., *infra*, 1a-18a.

a. The court of appeals observed that respondent "argue[d] for the first time on appeal that the TVPA has been applied retroactively in his case in violation of the Ex Post Facto Clause of the United States Constitution." App., *infra*, 6a; see U.S. Const. Art. I, § 9, Cl. 3. The court stated that, "[b]ecause [respondent] failed to

raise this argument before the District Court, it is reviewed for plain error." App., *infra*, 6a; see Fed. R. Crim. P. 52(b).

The court of appeals concluded that "[t]his case * * * clearly implicates the Ex Post Facto Clause" because the jury was permitted to consider evidence of conduct that pre-dated the enactment of the TVPA in reaching its verdict. App., *infra*, 7a. Relying on its decision in *United States* v. *Torres*, 901 F.2d 205 (2d Cir.), cert. denied, 498 U.S. 906 (1990), the court of appeals further stated that, "even under plain error review" (App., *infra*, 8a), a defendant who was convicted after a trial at which evidence of both pre-enactment and post-enactment conduct was presented may obtain relief "whenever there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct." *Id.* at 10a. The court of appeals concluded that that standard was met here because the government had "concede[d]" that the jury heard "evidence * * * that established [that] all of the elements of" the sex-trafficking and forced-labor offenses were present before the effective date of the TVPA. *Id.* at 8a-9a.

b. Judge Sotomayor filed a concurring opinion, which Judge Wesley joined. App., *infra*, 10a-18a. In their view, the panel's conclusions were "compelled by the current law of this circuit." *Id.* at 10a. The concurring judges stated, however, that the Second Circuit's "precedent with regard to plain-error review of ex post facto violations does not fully align with the principles inhering in the Supreme Court's recent applications of plain-error review." *Id.* at 10a-11a. In particular, they emphasized that the *Torres* standard "appears to conflict with [*United States* v. *Cotton*, 535 U.S. 625 (2002)]

and [*Johnson* v. *United States*, 520 U.S. 461 (1997)]." *Id.* at 11a. Under those cases, "where there is no reasonable possibility that an error not objected to at trial had an effect on the judgment, the Supreme Court counsels us against exercising our discretion to notice that error." *Id.* at 14a. The Second Circuit's standard conflicts with that approach, the concurring judges stated, "because it requires a retrial whenever there is any factual possibility that a jury could have convicted a defendant based exclusively on pre-enactment conduct, even if such a scenario is highly implausible." *Ibid.* They also observed that the Second Circuit "has never directly addressed this possible conflict. *Ibid.* The concurring judges stated that "further guidance from the Supreme Court on this issue may be helpful, especially in light of the various plain-error standards applied by our sister circuits for ex post facto violations." *Id.* at 15a n.2 (citing cases).

The concurring judges concluded that the identification of the proper standard for reviewing respondent's forfeited ex post facto claim "affects the outcome of this appeal" with respect to respondent's forced-labor conviction. App., *infra*, 11a. On that count, they stated that "it is 'essentially uncontroverted' that [respondent's] relevant conduct was materially indistinguishable" during the pre-enactment and post-enactment periods and that respondent had offered no "explanation of how his pre- and post-enactment conduct differed in any relevant way." *Id.* at 17a-18a. The concurring judges thus saw "no reasonable possibility that the jury would have convicted [respondent on the forced-labor count] based only on his pre-enactment conduct," and they concluded that the error with respect to that count did not "seriously affect the fairness, integrity, or public reputation

of the judicial proceedings." *Id.* at 18a. Accordingly, those judges would have affirmed respondent's forced-labor conviction under what they believed to be this Court's standard for plain-error review.

4. The government filed a petition for rehearing, which the court of appeals denied. App., *infra*, 65a-66a.

REASONS FOR GRANTING THE PETITION

The Second Circuit has adopted an incorrect approach for determining when a criminal defendant may obtain relief on a forfeited claim that his conviction was based on conduct that preceded the enactment of the relevant statute. The court of appeals concluded that, "even under plain error review," reversal is mandatory "whenever there is *any* possibility, *no matter how unlikely*, that the jury could have convicted based exclusively on pre-enactment conduct." App., *infra*, 8a, 10a (emphases added). As the two concurring judges explained (*id.* at 10a-15a), that "any possibility" standard squarely conflicts with established law on plain error, which makes clear that a defendant who seeks relief on a forfeited claim bears the burden of establishing prejudice and that the defendant cannot prevail when prejudice is extremely unlikely.

The Second Circuit's approach conflicts with the decisions of other courts of appeals, and the correction of its error ultimately could warrant this Court's plenary review. But before this Court resorts to that step, an intermediate course is appropriate. The Court should grant this petition for a writ of certiorari, vacate the court of appeals' judgment, and remand for further consideration (GVR) in light of this Court's intervening decision in *Puckett* v. *United States*, 129 S. Ct. 1423 (2009). *Puckett* reaffirmed several bedrock propositions about

the nature of plain-error review, including the need for a defendant to show prejudice and the role of a reviewing court in determining whether the values of the judicial system warrant reversal. *Puckett* also makes clear that those principles are relevant and controlling in all plain-error cases. Because this Court's decision in *Puckett* "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam), a GVR is warranted.

A. The Court Of Appeals' Decision Conflicts With This Court's Decisions About The Scope Of Review Of Forfeited Claims

1. "'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)). Federal Rule of Criminal Procedure 52(b)—the plain-error rule—"tempers the blow of a rigid application of the contemporaneous-objection requirement," *United States* v. *Young*, 470 U.S. 1, 15 (1985), by "provid[ing] a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court," *Olano*, 507 U.S. at 731. Rule 52(b) thus strikes a "careful balanc[e]" between "our need to encourage all trial participants to seek a fair and accurate trial the first time around [and] our insistence that obvious injustice be promptly redressed." *United States* v. *Frady*, 456 U.S. 152, 163 (1982).

Rule 52(b) imposes three "limitation[s] on appellate authority" to grant relief based on forfeited claims. *Olano*, 507 U.S. at 732. "[B]efore an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affects substantial rights.'" *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997) (quoting *Olano*, 507 U.S. at 732). When all three requirements are satisfied, "the court of appeals has authority to order correction, but is not required to do so." *Olano*, 507 U.S. at 735. Rather, a reviewing court "may * * * exercise its discretion to notice a forfeited error * * * only if (4) the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Johnson*, 520 U.S. at 467 (brackets in original) (citation omitted). Under the plain-error standard, "the tables are turned" from the harmless-error test, and a "defendant who sat silent at trial has the burden to show [both] that his 'substantial rights' were affected" and that the court of appeals' discretionary authority to correct the error should be exercised. *United States* v. *Vonn*, 535 U.S. 55, 62-63 (2002) (quoting *Olano*, 507 U.S. at 734-735).

2. As the concurring judges explained, this Court's decisions establish that Rule 52(b) does not authorize reviewing courts "to notice forfeited errors that did not affect the judgment." App., *infra*, 13a (citing *Johnson*, 520 U.S. at 470). In *Johnson*, the jury instructions in a perjury prosecution omitted the materiality element. 520 U.S. at 464. This Court determined that an error had occurred and that it was plain. *Id.* at 467-468. The Court also assumed for purposes of its decision that the error was "structural" in nature and that it affected the defendant's substantial rights. *Id.* at 468-469. But the Court held that "the [district] court's action in this case

was not 'plain error' of the sort which an appellate court may notice." *Id.* at 463. The Court explained that "the evidence supporting materiality was 'overwhelming,'" and that the defendant "ha[d] presented no plausible argument that the false statement under oath for which she was convicted * * * was somehow not material." *Id.* at 470. The Court determined that, under those circumstances, "there [was] no basis for concluding that the error 'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings'"; to the contrary, the Court stated that "it would be the reversal of a conviction such as this which would have that effect." *Ibid.* (brackets in original).

The Court applied the same analysis in *United States* v. *Cotton*, 535 U.S. 625, 632 (2002), where an indictment omitted a fact (drug quantity) that was necessary to authorize an increase in the defendants' maximum sentence. As in *Johnson*, the Court determined that a plain error had been made, and assumed for purposes of its decision that the error had affected the defendants' substantial rights. *Ibid.* The Court held, however, that "the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings" and thus did not satisfy the fourth prong of the *Olano* test. *Id.* at 632-633. The Court explained that "[t]he evidence that the conspiracy involved at least 50 grams of cocaine base was 'overwhelming' and 'essentially uncontroverted,'" and concluded that "[s]urely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base." *Id.* at 633.

3. In this case, the court of appeals concluded that, under its decision in *United States* v. *Torres*, 901 F.2d 205 (2d Cir.), cert. denied, 498 U.S. 906 (1990), it was

required to grant relief on respondent's forfeited ex post facto claim so long as there was "*any* possibilility, *no matter how unlikely*, that the jury could have convicted based exclusively on pre-enactment conduct." App., *infra*, 10a (emphases added).[2] That standard is plainly inconsistent with the framework established in *Olano* and this Court's decisions in *Cotton* and *Johnson*, which make clear 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." *Id.* 14a (concurring opinion).

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[2] It is not clear that the error in this case is properly viewed as an ex post facto violation. The indictment charged, and the government's proof showed, a course of conduct that began before the enactment of the forced-labor statute and continued thereafter. Criminal statutes are presumed not to have retroactive effect, see *Johnson* v. *United States*, 529 U.S. 694, 701-702 (2000), and the government has not argued in this case that the TVPA criminalizes conduct that occurred before its enactment. If the TVPA does not criminalize respondent's pre-enactment conduct, it would not be an "ex post facto Law" (U.S. Const. Art. I, § 9, Cl. 3). But if the jury relied on non-criminal, pre-enactment conduct in reaching its verdict, then respondent may have been found guilty of a non-crime, which would appear to violate the Due Process Clause. See *Burge* v. *Butler*, 867 F.2d 247, 250 (5th Cir. 1989) (sentencing a defendant under a statute that did not apply to his crime because his conduct occurred before the statute's effective date violated due process).

The proper characterization of the error in this case, however, does not affect the plain-error analysis. In either case, the jury would have been given the option of finding respondent guilty on both a valid theory (post-enactment violation) or an invalid theory (pre-enactment violation). This Court's recent decision in *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008) (per curiam), makes clear that such alternative-theory errors are susceptible to harmless-error analysis, and they are susceptible to plain-error analysis as well. Accordingly, the panel's decision to apply an "any possibility" standard here is wrong, regardless of how the error is characterized.

As the concurring judges observed, the Second Circuit has "never directly addressed" the conflict between its decision in *Torres* and the decisions of this Court. App., *infra*, 14a. *Torres* was decided more than three years before *Olano*, more than seven years before *Johnson*, and more than 12 years before *Cotton*. In addition, the court of appeals "had no occasion to evaluate whether the *Torres* standard comports with *Johnson* and *Cotton*" in either *United States* v. *Harris*, 79 F.3d 223 (2d Cir.), cert. denied, 519 U.S. 851 (1996), or *United States* v. *Monaco*, 194 F.3d 381 (2d Cir. 1999), cert. denied, 529 U.S. 1028, and 529 U.S. 1077 (2000), because it concluded in both of those cases "that there was no error even under the *Torres* 'any possibility' standard." App., *infra*, 15a (concurring opinion).

In *Torres*, the Second Circuit stated that "errors of constitutional magnitude will be noticed more freely under the plain error rule than less serious errors." 901 F.2d at 228. This Court has made clear, however, that "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Johnson*, 520 U.S. at 466. The Court has repeatedly reaffirmed the "longstanding rule 'that a constitutional right may be forfeited,'" *Cotton*, 535 U.S. at 634 (quoting *Yakus*, 321 U.S. at 444), and it has applied the analysis outlined in *Olano* even to the violation of constitutional rights that "serve[] a vital function" and "act[] as a check on prosecutorial power," *ibid.*; accord *Johnson*, 520 U.S. at 466.

B. The Court Of Appeals' Decision Conflicts With The Decisions Of Other Courts Of Appeals

As the concurring judges explained, the courts of appeals have applied "various plain-error standards

* * * for ex post facto violations." App., *infra*, 15a n.2. As interpreted by the panel in this case, the Second Circuit's decision in *Torres* requires reversal "whenever there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct." *Id.* at 10a. The panel also concluded that that standard is satisfied whenever the evidence of pre-enactment conduct would have been legally sufficient to support a conviction, regardless of how "remote" the possibility "that the jury relied exclusively on pre-enactment conduct" in reaching its verdict. *Ibid.*; see *id.* at 8a-9a. Three other courts of appeals have refused to grant relief on forfeited claims that would have satisfied this standard.

1. In *United States* v. *Muñoz-Franco*, 487 F.3d 25 (1st Cir.), cert. denied, 128 S. Ct. 678, 128 S. Ct. 679, and 128 S. Ct. 682 (2007), the defendants argued for the first time on appeal that they were entitled to reversal of a bank fraud conviction because the jury "could have convicted them entirely on the basis of conduct that occurred prior to th[e] date" on which the statute was enacted. *Id.* at 54. The First Circuit agreed that the district court's failure to instruct the jury that it "must find that the conduct continued past the enactment date of the bank fraud statute" had been error and that the error was plain. *Id.* at 56.

The First Circuit then turned to the third and fourth prongs of the *Olano* test. The court declined to grant relief based on the forfeited error because it concluded that "no reasonable jury would have convicted [the defendants] based exclusively on conduct that occurred prior to the enactment date." *Muñoz-Franco*, 487 F.3d at 57. The court saw "nothing to differentiate [the defendants'] pre-enactment conduct from subsequent con-

duct," and concluded that it was "implausible that the jury would find [the] testimony [of certain key government witnesses] compelling only for events that occurred prior to" the statute's effective date. *Id.* at 57-58.[3] In this case, in contrast, the court of appeals rejected, as foreclosed by *Torres*, the government's argument "that [it] should not vacate [respondent's] convictions because it was a 'remote possibility' that the jury relied exclusively on pre-enactment conduct," App., *infra*, 10a, and it declined to attach significance to the fact that respondent's conduct with respect to the forced-labor count "was materially indistinguishable before and after the enactment of the [TVPA]," *id.* at 18a (concurring opinion).

2. In *United States* v. *Julian*, 427 F.3d 471 (7th Cir. 2005), cert. denied, 546 U.S. 1220 (2006), the question was whether the defendant was subject to an enhanced maximum penalty, which turned on whether his involvement in a conspiracy continued after the effective date

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[3] *Muñoz-Franco* observed that "other circuits have taken varying approaches to applying [the third and fourth] prongs of the plain error test in assessing a claimed ex post facto violation," but stated that it "need not settle on a rule" because it concluded that the defendants lost even under "[t]he plain error analysis used by the Second * * * Circuit[]." 487 F.3d at 56-57. But, unlike the Second Circuit panel in this case, *Muñoz-Franco* did not apply the *Torres* "any possibility" standard because it concluded that *Torres* "did not explicitly apply [plain error] review." *Id.* at 57 n.34. But see App., *infra*, 8a (panel majority stating that the *Torres* standard applies "even under plain error review"). Instead, *Muñoz-Franco* applied the test proposed by the concurring judges in this case—that is, whether "there [i]s a 'reasonable possibility' that the jury convicted [the defendants] solely on the basis of pre-enactment conduct." *Muñoz-Franco*, 487 F.3d at 57; accord App., *infra*, 14a (concurring opinion) (stating that a defendant must "demonstrat[e] a reasonable possibility that the jury might have convicted him or her based exclusively on pre-enactment conduct").

of a penalty-increasing statute. The Seventh Circuit concluded that, by not asking the jury to make that determination, the district court had violated the defendant's Sixth Amendment right to a jury trial, *id.* at 481-482, but it denied relief under the fourth prong of the plain-error test, *id.* at 483. The evidence in *Julian* was sufficient to support the conclusion that the defendant was a member of the conspiracy before the effective date of the penalty-increasing statute, *id.* at 481-483, and thus would have satisfied the test applied by the Second Circuit in this case. App., *infra*, 8a-10a. The Seventh Circuit denied relief in *Julian*, however, because it concluded that "no *reasonable* jury would have found that [the defendant] withdrew from the conspiracy prior to" the effective date of the penalty-increasing statute. 427 F.3d at 483 (emphasis added).

3. Like *Julian*, *United States* v. *Todd*, 735 F.2d 146 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985), involved the applicability of a penalty-increasing statute to a conspiracy that began before the statute's effective date. *Id.* at 149. In denying relief on the defendants' forfeited ex post facto claim, the court of appeals emphasized that all but two of the alleged overt acts "occurred during the effective period of the amendments," and it determined that "the record * * * clearly establishe[d] violations of the amended act * * * during the relevant time period." *Id.* at 150. Unlike the court of appeals in this case, the *Todd* court did not inquire whether the pre-enactment evidence alone would have been legally sufficient to support a conclusion.

C. The Court Of Appeals Should Be Permitted To Reconsider Its Decision In Light Of This Court's Intervening Decision In *Puckett* v. *United States*

For the reasons explained above, the Second Circuit's decision in this case conflicts with the decisions of this Court and other courts of appeals. Although this Court's plenary review may ultimately be warranted, the appropriate course at this point would be to grant certiorari, vacate the court of appeals' judgment, and remand for reconsideration in light of this Court's intervening decision in *Puckett* v. *United States*, 129 S. Ct. 1423 (2009).

1. In *Puckett*, this Court held that a forfeited claim that the government breached a plea agreement is subject to plain-error review under Federal Rule of Criminal Procedure 52(b). At the outset, the Court reaffirmed that the plain-error standard applies whenever a party has forfeited a claim by failing to raise it in the district court, *Puckett*, 129 S. Ct. at 1428, and that relief under that standard requires four showings: (1) an error, (2) that is obvious, (3) that affects substantial rights, and (4) that warrants relief as a matter of discretion, which should be exercised "only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 1429 (brackets in original) (quoting *Olano*, 507 U.S. at 736). The Court stated that, "in the ordinary case," an effect on substantial rights "means [that the defendant] must demonstrate that [the error] 'affected the outcome of the district court proceedings." *Ibid.* (quoting *Olano*, 507 U.S. at 734). *Puckett* also emphasized that "[a]ny unwarranted extension of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice" and that "the creation of an unjusti-

fied exception to the Rule would be [e]ven less appropriate." *Ibid.* (brackets in original) (citations omitted).

In elaborating on the third and fourth components of plain-error review, *Puckett* made two further points that underscore the error in the Second Circuit's analysis in this case. First, in discussing whether the defendant could carry his "usual burden of showing prejudice," *Puckett*, 129 S. Ct. at 1432, this Court rejected the view that it is enough for a defendant to show a speculative or theoretical possibility that he might have been better off in the absence of the error. Rather, the Court explained, "[t]he defendant whose plea agreement has been broken by the Government will not always be able to show prejudice," such as where the defendant "obtained the benefits contemplated by the deal anyway" or where the defendant "*likely would not have* obtained those benefits in any event." *Id.* at 1432-1433 (emphasis added). *Puckett* thus makes clear that a defendant who shows only that he *may* have been, but *likely* was not, prejudiced cannot carry his burden under the third prong of the *Olano* test. That conclusion is directly contrary to the Second Circuit's view that respondent was entitled to reversal of his convictions here "*no matter how unlikely*[] that the jury could have convicted based exclusively on pre-enactment conduct." App., *infra*, 10a (emphasis added).

Second, *Puckett* made clear that, regardless of whether a defendant has been able to satisfy the third prong of plain-error review, the fourth prong requires an additional, case-specific, inquiry. See 129 S. Ct. at 1433 ("The fourth prong is meant to be applied on a case-specific and fact-intensive basis."). Here, in contrast, the court of appeals proceeded directly from a finding of error (that is, a violation of the Ex Post Facto

Clause) to a conclusion that "a retrial [was] necessary," App., *infra*, 10a, without conducting any analysis of whether a failure to grant relief would seriously affect the fairness, integrity, or public reputation of judicial proceedings. Most notably, the court 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 or to consider respondent's failure "to offer any explanation of how his pre- and post-enactment conduct differed in any relevant way." *Id.* at 17a (concurring opinion). The Second Circuit thus failed to exercise discretion in the appropriate manner that *Puckett* reaffirmed.

2. Although they recognized the error in circuit law, the concurring judges felt bound to follow the Second Circuit's own previous decisions rather than those of this Court. App., *infra*, 18a (stating that respondent's conviction on the forced-labor count "should not be vacated," but joining in the per curiam opinion "because the *Torres* standard remains the law of this circuit"). The Second Circuit's general rule is that "one panel * * * cannot overrule a prior decision of another panel." *Consub Del. LLC* v. *Schahin Engenharia Limitada*, 543 F.3d 104, 109 (2d Cir. 2008). But the Second Circuit recognizes an exception for situations where "there has been an intervening Supreme Court decision that casts doubt on [its] controlling precedent." *Ibid.*

Puckett is an "intervening" decision because it was decided more than seven months after the panel's decision in this case. Although *Puckett* addressed the proper manner of conducting plain-error review in a different context, the Court's decision in that case, at a minimum, "casts doubt on" the panel's conclusion that respondent was not required to show any actual prejudice

in order to obtain relief, as well as the panel's failure to conduct any separate analysis under the fourth prong of the *Olano* test. As a result, there is at least "a reasonable probability" that the panel would reach a different result if this Court were to remand for further consideration in light of *Puckett*. *Chater*, 516 U.S. at 166-167.

Giving the panel an opportunity to revise its analysis in this case would serve an important purpose. To be sure, the kind of error at issue here may arise only infrequently and the need for this Court's clarification may not be as pressing as for some other plain-error issues, such as the one resolved in *Puckett*. But plain-error issues are of great systemic consequence, and the existence of a flawed approach to plain-error review in one context holds the potential to destablize plain-error doctrine more broadly. In recent years, this Court frequently has been required to explicate plain-error analysis in criminal cases. See *Puckett*, *supra*; *United States* v. *Dominguez-Benitez*, 542 U.S. 74 (2004); *Vonn*, *supra*; *Cotton*, *supra*; *Johnson*, *supra*; *Olano*, *supra*.

This Court should attempt to correct the Second Circuit's erroneous approach to plain-error review through a GVR rather than by plenary review. A "GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit [this Court's] plenary review." *Chater*, 516 U.S. at 168. The Second Circuit's decision in this case is out of step with the decisions of this Court and those of other circuits; two members of the panel called for correction of the error, yet the full court declined to rehear the case en banc; and an intervening decision of this Court reaffirms core plain-error principles that the circuit's current pre-

cedent ignores. In these circumstances, a GVR might well result in the panel concluding that the principles most recently reaffirmed in *Puckett* require a departure from the approach announced in *Torres* and applied in this case. That ruling would eliminate the need for this Court to expend its own scarce resources by hearing and resolving this case on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *Puckett* v. *United States*, 129 S. Ct. 1423 (2009).

Respectfully submitted.

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