No. 08-1341

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

REPLY BRIEF FOR THE UNITED STATES

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In this case, the Second Circuit held that a reviewing court must grant relief on a forfeited ex post facto claim "whenever there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct." Pet. App. 10a. The court further concluded that this standard was satisfied because the government's evidence of pre-enactment conduct, standing alone, would have been legally sufficient to support a conviction. *Id.* at 8a-9a. Respondent denies that this decision conflicts with this Court's established precedent governing plain-error review or with the decisions of other circuits. He also argues that this Court should not grant the petition for a writ of certiorari, vacate the court of appeals' judgment, and remand for further consideration (GVR) in light of *Puckett* v. *United States*, 129 S. Ct. 1423 (2009), because *Puckett* does not alter the existing standards for plain-error review and because "a uniform national rule is not required

for this procedural issue." Br. in Opp. 24. None of those contentions has merit, and the Court should GVR in light of *Puckett* so that the Second Circuit can bring its precedent on plain-error review of asserted ex post facto violations into alignment with this Court's jurisprudence.

A. The Second Circuit's Decision Conflicts With This Court's Decisions

Respondent is correct (Br. in Opp. 12) that the Second Circuit began its discussion by reciting the four-factor test articulated in *United States* v. *Olano*, 507 U.S. 725 (1993). Pet. App. 6a. But the court of appeals' analysis of the plain–error issue (*id.* at 8a-9a) departed from the *Olano* factors in favor of the separate test set forth in *United States* v. *Torres*, 901 F.2d 205 (2d Cir.), cert. denied, 498 U.S. 906 (1990)—which was decided three years before *Olano* and "did not apply [this Court's] current four-part plain error analysis." Pet. App. 14a (concurring opinion). The court did not explain how *Torres*'s approach can be squared with either *Olano* or the Court's subsequent decisions in *Johnson* v. *United States*, 529 U.S. 694 (2000), and *United States* v. *Cotton*, 535 U.S. 625 (2002). Indeed, as the two concurring judges explained (Pet. App. 14a), the Second Circuit has "never directly addressed" that issue in any of its post-*Olano* decisions.

The petition for a writ of certiorari challenges the court of appeals' view, based on *Torres*, that reversal is required "whenever there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct." Pet. App. 10a. Respondent is wrong to assert that the Second Circuit's error in this case "merely consists of the misapplication of a properly stated rule of law," Br. in Opp. 15, and that the issue presented by this petition for a writ of certiorari is "factually intens[ive]," *id.*

at 24. As the petition explained, the relevant legal rules in this context are that: (1) "a defendant may not obtain relief on a forfeited claim 'where there is no reasonable possibility that' the unobjected-to error 'had an effect on the judgment,'" Pet. 11 (quoting Pet. App. 14a (concurring opinion)); and (2) even when a defendant has shown a clear error affecting substantial rights, the court must engage in "an additional, case-specific inquiry" into whether relief is necessary to protect the fairness, integrity, or public reputation of judicial proceedings. Pet. 17. Those are not the rules the panel applied in this case. To the contrary, the panel expressly declined to consider the government's argument that there was only "a 'remote possibility' that the jury relied exclusively on pre-enactment conduct." Pet. App. 10a. The panel also attached no significance to the concurring judges' observation that respondent's conduct with respect to the forced labor count "was materially indistinguishable before and after the enactment of the" relevant statute. *Id.* at 18a. Instead, the panel concluded that respondent's forced labor conviction "*must* be vacated" solely because the government's evidence of pre-enactment conduct would have been legally sufficient to support a conviction. *Id.* at 9a (emphasis added); see *id.* at 8a-10a.[1]

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[1] Contrary to petitioner's contention, the government has never "concede[d]" that the jury's verdict may actually have been based on pre-enactment conduct alone. Br. in Opp. 14 (emphasis omitted); see *id.* at 2, 19. Instead, the government has acknowledged only that the evidence of pre-enactment conduct, standing alone, would have been sufficient to support a conviction. Pet. App. 8a-9a (quoting government's brief). That is not sufficient to support reversal under a proper application of plain-error review. Even if the evidence of pre-enactment conduct would have been sufficient, a conviction should be affirmed if, in light of the post-enactment evidence, there is no reasonable probability that the jury actually relied exclusively on pre-enactment conduct.

Respondent asserts that "a uniform national rule is not required for this procedural issue," Br. in Opp. 24, and that the Second Circuit "did not abuse its discretion" in granting relief in this case, *id.* at 13. But Congress and this Court have determined that a uniform rule is warranted by promulgating Federal Rule of Criminal Procedure 52(b), which, like the rest of the Criminal Rules, "govern[s] the proceedings in *all* criminal proceedings in * * * the United States courts of appeals." Fed. R. Crim. P. 1(a)(1) (emphasis added).[2] And this Court's decisions establish that courts of appeals have no free-standing "discretion" to correct a forfeited error absent compliance with the standards described in this Court's decisions. See, *e.g.*, *Cotton*, 535 U.S. at 631 (stating that a court "may * * * exercise its discretion to notice a forfeited error * * * *only* if" all four requirements set forth in *Olano* are satisfied) (quoting *Johnson* v. *United States*, 520 U.S. 461, 467 (1997)) (emphasis added).

B. The Circuit Conflict Is Real

1. Respondent does not deny that the court of appeals' decision in this case conflicts with the Seventh Circuit's decision in *United States* v. *Julian*, 427 F.3d 471 (2005), cert. denied, 546 U.S. 1220 (2006). Instead, respondent suggests (Br. in Opp. 21 n.21) that *Julian* is irrelevant because it "*predates* the [Seventh Circuit's subsequent] decision in" *United States* v. *Pitre*, 504 F.3d 657 (2007). But

[2] In contrast, this Court's decision in *Ortega-Rodriguez* v. *United States*, 507 U.S. 234 (1993) (see Br. in Opp. 24), involved an issue—whether a criminal defendant who flees while his case is pending forfeits his statutory right to appeal—that was not directly addressed by a statute or federal rule. See *id.* at 244 (noting that the particular fugitive-dismissal rule at issue in that case had been promulgated by the Eleventh Circuit in its "supervisory capacity").

Pitre does not mention, much less disavow, *Julian*, and the error at issue in *Pitre* (a failure to provide a criminal defendant with an opportunity to address the court before a sentence was pronounced) differs significantly from the sort of ex post facto violation that respondent asserts here. See *id.* at 661-663. In addition, *Pitre* ultimately denied relief under *Olano*'s fourth prong after conducting precisely the sort of case-specific inquiry that the Second Circuit should have conducted but failed to undertake here. See *id.* at 663 (concluding that, "on the facts of this case," the district court's failure to grant the defendant her right to allocute "did not seriously affect the fairness, integrity or public reputation of her revocation proceedings").

Respondent also fails to refute the conflict with the First and Fifth Circuits. As the petition for a writ of certiorari explained (see Pet. 13-14), the First Circuit's decision in *United States* v. *Muñoz-Franco*, 487 F.3d 25, cert. denied, 128 S. Ct. 678, 128 S. Ct. 679, and 128 S. Ct. 682 (2007), was not based on the "overwhelming" nature of the government's evidence of post-enactment conduct. Br. in Opp. 23. To the contrary, the *Muñoz-Franco* court denied relief because there was "nothing to *differentiate* [the defendants'] pre-enactment conduct from subsequent conduct" and because it was "*implausible* that the jury would" have credited only the parts of the testimony of a key government witness that dealt with pre-enactment conduct. 487 F.3d at 57-58 (emphases added). The Fifth Circuit likewise did not describe the evidence of post-enactment conduct as "overwhelming" in *United States* v. *Todd*, 735 F.2d 146 (1984), cert. denied, 469 U.S. 1189 (1985). Instead, the court observed that the record "clearly establishe[d] violations of the amended act by the appellants" during the post-enactment period, and noted that "*[m]ost* of the evidence

focused on events that occurred" after that date. *Id.* at 150 (emphasis added).

Even if respondent's characterizations of *Muñoz-Franco* and *Todd* were correct, the conflict would remain. Respondent asserts that those decisions "found that the evidence relating to the defendants' post-enactment conduct was so overwhelming that *no reasonable jury* could have convicted the defendant based solely on pre-enactment conduct." Br. in Opp. 23 (emphasis added). But that is precisely the sort of inquiry—one that looks to the weight of the pre- and post-enactment evidence and seeks to discern what a reasonable jury might and might not have done—that the Second Circuit expressly refused to undertake here. See Pet. App. 10a (declining to consider the government's argument that there was only "a 'remote possibility' that the jury relied exclusively on pre-enactment conduct").

Respondent suggests (Br. in Opp. 23) that this case stands in contrast to *Muñoz-Franco* and *Todd* because here, unlike in those cases, "there were substantial differences between the pre- and post-enactment evidence" and "there is a real possibility that the jury only credited [the victim's] testimony relating to pre-enactment conduct." That claim provides no basis for declining to remand this case so that the Second Circuit can conform its law to this Court's decisions, and then apply the correct standard to the facts. As the petition for a writ of certiorari explained (see Pet. 6-7), the two concurring judges—whose votes were necessary to support the judgment—expressly disagreed with petitioner's assessment of the record. See Pet. App. 11a, 17a-18a (stating that the identification of the proper standard for reviewing respondent's forfeited ex post facto claim "affects the outcome of this appeal" because, with respect to respondent's forced labor conviction,

the "relevant conduct was materially indistinguishable before and after the enactment of the statute"). And petitioner never offered his current account of the evidence in the court below. See Pet. C.A. Letter Br. (Jan. 18, 2008) (filed in response to court's questions concerning ex post facto issues). The court of appeals should thus address those case-specific issues in the first instance.

2. The Second Circuit's decision is also diametrically opposed to the Eleventh Circuit's unpublished decision in *United States* v. *Paulin*, No. 08-13124, 2009 WL 1459700 (May 27, 2009) (per curiam), which was issued after the petition for a writ of certiorari was filed. As in this case, the defendant in *Paulin* was charged with violating the Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. L. No. 106-386, 114 Stat. 1464, the government presented evidence at trial about the defendant's conduct both before and after the effective date of the TVPA, and the defendant argued for the first time on appeal that her conviction violated the Ex Post Facto Clause. *Paulin*, 2009 WL 1459700, at *1. The Eleventh Circuit denied relief under the plain-error standard. Unlike in this case, the *Paulin* court did not ask whether the evidence of pre-enactment conduct, standing alone, would have been legally sufficient to support a conviction. Instead, it affirmed the defendant's conviction because it had "no doubt that the jury would have decided the case the same way if the evidence had been limited to [the defendant's] conduct after * * * the effective date of the TVPA." *Id.* at *2 (internal quotation marks and citation omitted). Although non-precedential, the Eleventh Circuit's approach reinforces the settled principle that plain-error review precludes reversal based only on a theoretical possibility of prejudice. And that rule serves the interests of courts, the community, witnesses,

and victims in avoiding retrials when the error had no effect on the outcome.

C. A GVR In Light Of *Puckett* Is Appropriate

The government agrees with respondent that *Puckett* v. *United States*, 129 S. Ct. 1423 (2009), does not fundamentally change the nature of review under the plain-error standard. See Pet. 7-8 (stating that *Puckett* "reaffirmed several bedrock propositions about the nature of plain-error review"). But the additional conflict between the Second Circuit's decision in this case and this Court's pre-*Puckett* decisions (see Pet. 8-12) does not lessen the appropriateness of a GVR in light of *Puckett*. To the contrary, the Court frequently enters GVR orders in the wake of decisions that could be viewed as simply restating and clarifying pre-existing law. See, *e.g.*, *Knowles* v. *Mirzayance*, 549 U.S. 1199 (2007) (GVR'd in light of *Carey* v. *Musladin*, 549 U.S. 70 (2006), which addressed the standards for determining whether a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" for purposes of 28 U.S.C. 2254(d)(1)); *Barnette* v. *United States*, 546 U.S. 803 (2005) (GVR'd in light of *Miller-El* v. *Dretke*, 545 U.S. 231 (2005), which involved the proper application of *Batson* v. *Kentucky*, 476 U.S. 79 (1986)); *Synder* v. *Louisiana*, 545 U.S. 1137 (2005) (same); *Kandies* v. *Polk*, 545 U.S. 1137 (2005) (same); *Hightower* v. *Schofield*, 545 U.S. 1124 (2005) (same); *Walker* v. *True*, 540 U.S. 1013 (2003) (GVR'd in light of *Wiggins* v. *Smith*, 539 U.S. 510 (2003), which applied the test for ineffective assistance of counsel first stated in *Strickland* v. *Washington*, 466 U.S. 668 (1984)); *Grant* v. *Oklahoma*, 540 U.S. 801 (2003) (same). At any rate, respondent does not attempt to explain how the Second Circuit's "any possibility" standard can be squared with *Puckett*'s

statement that a defendant cannot satisfy his "usual burden of showing prejudice" under the third prong of plain-error review when the defendant "likely would not have" been better off in the absence of the relevant error. See Pet. 17 (emphasis omitted) (quoting *Puckett*, 129 S. Ct. at 1432-1433).

Respondent also notes (Br. in Opp. 20) that "several members of this Court have criticized overly expansive uses of GVR orders." But that controversy has no relevance here. Even the Justices who have objected to certain GVRs have acknowledged that a GVR is appropriate "where an intervening factor has arisen [*e.g.*, new legislation or a recent judgment of this Court] that has a legal bearing upon the decision." *Youngblood* v. *West Virginia*, 547 U.S. 867, 871 (2006) (Scalia, J., dissenting) (citation omitted). *Puckett* is such an "intervening factor" because it was issued more than seven months after the panel's decision in this case. And because there is at least "a reasonable probability" that the panel would reach a different result were this Court to remand for further consideration in light of *Puckett*, a GVR is appropriate. See *Lawrence* v. *Chater*, 516 U.S. 163, 166-167 (1996) (per curiam).[3]

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted, the judgment of the court of appeals

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[3] The government agrees with respondent with respect to one point, however. If the Court were to conclude that the court of appeals' decision conflicts with the decisions of this Court or other circuits, but that this Court's pre-*Puckett* decisions were sufficiently clear to prevent *Puckett* from constituting an "intervening" decision for purposes of granting a GVR, then the Court should grant the petition for a writ of certiorari and schedule the case for full briefing and argument. See Br. in Opp. 25.

should be vacated, and the case should be remanded for further consideration in light of *Puckett* v. *United States*, 129 S. Ct. 1423 (2009). In the alternative, the petition for a writ of certiorari should be granted and the case should be set for full briefing and argument.

Respectfully submitted.

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JULY 2009