

No. 08-1341

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GLENN MARCUS

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

REPLY BRIEF FOR THE UNITED STATES

ELENA KAGAN
*Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217
SupremeCtBriefs@usdoj.gov*

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Respondent contends that the mere possibility that his conviction was based on an ex post facto violation affected his “substantial rights” and seriously impaired the “fairness, integrity and reputation of judicial proceedings” (Br. 19); apparently as an alternative argument, he also asserts that ex post facto violations should be noticed “[m]ore freely” than other presumably less serious errors (Br. 27). Neither respondent’s attempt to satisfy this Court’s plain-error standards nor his request for a relaxed application of them has merit. Federal Rule of Criminal Procedure 52(b) provides courts of appeals with a limited authority to correct errors that were forfeited because they were not raised in the district court. Under Rule 52(b), a reviewing court may not reverse unless the defendant carries the burden to show a plain error affecting substantial rights; even then, the court may not notice the forfeited error unless it seri-

ously affected the fairness, integrity, or public reputation of the proceeding. The defendant normally cannot meet that burden when there is no reasonable possibility that, but for the error, the outcome of the proceeding would have been different.

As explained in the opening brief, the court of appeals departed from those principles by holding that, whenever a defendant asserts a forfeited claim based on the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, reversal is required if there is “any possibility, no matter how unlikely, that the jury could have convicted based exclusively on” conduct that pre-dated the enactment of the statute, Pet. App. 10a. The court offered no reason why ex post facto claims should be treated differently from other kinds of claims. Respondent now attempts to do so, but his efforts are unavailing because this Court has made clear that all forfeited claims, no matter how serious, are subject to the same standard of plain-error review.

In this case, respondent was charged with forced labor and sex trafficking based on a course of conduct that took place both before and after the enactment of those statutes. As long as the jury did not rely exclusively on pre-enactment conduct in convicting respondent, his conviction is constitutionally valid. And the concurring judges in the court of appeals correctly concluded that there is no reasonable possibility that the jury relied exclusively on pre-enactment conduct in convicting respondent on the forced-labor count because his pre-enactment and post-enactment conduct were materially indistinguishable. For that reason, the failure of the jury instructions to address this issue did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Respondent attempts to demonstrate that his pre-enactment conduct was different from his post-enactment conduct. His argument is unpersuasive. But more importantly, because the court of appeals did not reach that question, there is no reason for this Court to resolve that record-intensive issue in the first instance. Instead, this Court should reverse the judgment below and remand to allow the court of appeals to apply the correct plain-error standard to this case.

A. Rule 52(b) Precludes A Court Of Appeals From Noticing A Forfeited Error Unless There Is A Reasonable Possibility That It Affected The Outcome Of The Proceeding

1. Rule 52(b) states that “[a] plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.” Fed. R. Crim. P. 52(b). In *United States v. Olano*, 507 U.S. 725 (1993), this Court held that, “before an appellate court can correct an error not raised at trial, there must be (1) ‘error,’ (2) that is ‘plain,’ and (3) that ‘affect[s] substantial rights.’” *Johnson v. United States*, 520 U.S. 461, 466-467 (1997) (brackets in original) (quoting *Olano*, 507 U.S. at 732). When all three requirements are satisfied, “the court of appeals has authority to order correction, but [it] is not required to do so.” *Olano*, 507 U.S. at 735. Instead, a reviewing court “may * * * exercise its discretion to notice a forfeited error” only if a fourth condition is satisfied: “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). As the concurring judges below explained, that fourth requirement cannot be satisfied when there is no reasonable possibility that the error had some effect on the outcome. Pet. App. 14a. And the

government's opening brief demonstrated that this approach is required by this Court's cases. Gov't Br. 12-15.

2. Respondent attempts (Br. 23-27) to reconcile the decision of the court of appeals with this Court's decisions construing Rule 52(b), but his efforts are unavailing. The court below rejected a reasonable-possibility standard, holding instead that "a retrial is necessary 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 concurring judges understood the court's test the same way, explaining that the decision "requires a retrial whenever there is *any* possibility that an improperly instructed jury could have convicted a defendant based exclusively on conduct committed prior to the enactment of the relevant statute." *Id.* at 11a. But respondent cites no authority for the proposition that a defendant asserting a forfeited claim of error may prevail by showing a mere theoretical possibility—rather than a reasonable possibility—that the error affected the outcome. Such an approach would undermine Rule 52(b)'s basic purpose of "reduc[ing] wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004).

Respondent objects (Br. 20) to a reasonable-possibility standard on the ground that there is "no way of knowing what conduct formed the basis for the jury's determination." That criticism would bar any effort to assess prejudice, in this or any other context. A court conducting harmless-error analysis when the jury instructions do not cover an element of the offense must conduct a similar inquiry to ascertain whether, on the

record, a rational jury would have reached the same verdict absent the error. See *Neder v. United States*, 527 U.S. 1, 17-20 (1999). Such a review does not entail speculation but simply analysis of the record “in typical appellate-court fashion.” *Id.* at 19. Of course, courts may encounter cases in which it is difficult to determine the basis for the jury’s decision. If there is genuine uncertainty whether the jury’s verdict was based on entirely pre-enactment conduct, then the defendant will have carried the burden of showing prejudice and will be entitled to relief. But in other cases—including this one—the evidence will be such that, as the concurring judges on the court of appeals put it, the defendant “has no plausible argument as to why the jury would have differentiated between his conduct before and after the enactment of the statute.” Pet. App. 17a.

Relatedly, respondent contends (Br. 22) that a “possibility” test is preferable to a “reasonable possibility” test because it is an objective standard. Contrary to respondents’ suggestion, however, the reasonable-possibility standard is itself an objective test and does not, as respondent suggests, “require the circuit judges to be clairvoyant or attempt to enter the jurors’ minds.” *Ibid.* Instead, it requires (at a minimum) a “plausible explanation as to how relevant pre- and post-enactment conduct differed, thereby demonstrating a reasonable possibility that the jury might have convicted [the defendant] based exclusively on pre-enactment conduct.” Pet. App. 14a (concurring opinion). Requiring reversal whenever there is any theoretical possibility of prejudice—no matter how remote—does not make the plain-error inquiry any more objective; it simply results in reversal of convictions because of unpreserved errors that did not affect the outcome of the proceedings.

3. Respondent offers two additional reasons to bolster his claim that the error in this case necessarily affected his substantial rights and seriously affected the fairness, integrity, and public reputation of judicial proceedings. First, he asserts (Br. 20) that because the indictment referred to a period of time when, “as a matter of law, there could be no offense, the entire indictment is radically flawed” (emphasis omitted). That claim lacks merit. To the extent that respondent’s crimes constituted continuing offenses, the indictment could properly charge a period of time that spanned the enactment of the statute. The only *ex post facto* requirement is that the jury find that at least one of the acts constituting the offense took place after the statute’s effective date. Gov’t Br. 17 n.4. In any event, if an indictment contains a flawed or unsupported theory, the error does not automatically vitiate the entire indictment. So long as the indictment contains a valid theory, the invalid part may be disregarded as “surplusage.” *United States v. Miller*, 471 U.S. 130, 137 (1985) (quoting *Ford v. United States*, 273 U.S. 593, 602 (1927)). Here, the district court could have cured any overbreadth in the indictment’s coverage of pre-enactment conduct by instructing the jury that it had to find that respondent’s conduct, alleged to have begun in January 1999, continued past October 28, 2000. But respondent did not object to that omission.

Second, respondent argues (Br. 20) that upholding a conviction without “advance notice of what conduct is to be avoided” would “shatter[]” public confidence in the judicial system. But respondent overlooks that his trial also involved conduct that took place after enactment of the sex-trafficking and forced-labor statutes, at a time when he had ample notice of “what conduct [was] to be

avoided.” *Ibid.* To the extent that the record reveals no reasonable possibility that the jury relied only on the pre-enactment conduct, it is the reversal of his conviction that would shake public confidence in the judicial system. See *Johnson*, 520 U.S. at 470 (“Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.”) (quoting Roger J. Traynor, *The Riddle of Harmless Error* 50 (1970)); see also *Puckett v. United States*, 129 S. Ct. 1423, 1428 (2009).

4. Respondent also suggests (Br. 34) that the court of appeals should be permitted to develop its own approach to plain-error review because, he says, the application of Rule 52(b) “does not require a uniform national solution.” He relies on *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993), in which this Court stated that courts of appeals could adopt different rules governing the dismissal of appeals by fugitives. But in that case, the Court emphasized that the Federal Rules of Appellate Procedure—which did not address the subject at all—did not “mandate[] uniformity among the circuits in their approach to fugitive dismissal rules.” *Id.* at 251 n.24. Plain-error review, by contrast, is governed by Federal Rule of Criminal Procedure 52(b), and there is no basis for reading that rule to mean one thing in some circuits and something else in others. And none of this Court’s cases construing Rule 52(b) has suggested that courts of appeals are free to disregard this Court’s application of plain-error review and develop their own standards. Respondent’s invitation to create a balkanized system of plain-error review that varies from circuit to circuit should therefore be rejected.

B. No Special Rule Of Plain-Error Review Should Govern Forfeited Ex Post Facto Errors

The effect of the decision below is to create a special rule of plain-error review for forfeited errors involving the Ex Post Facto Clause. As explained in the opening brief (at 19-20), the decision appears to have been based on pre-*Olano* circuit precedent, rather than on a desire to create a special rule for ex post facto claims. Thus, the court of appeals made no effort to explain why ex post facto errors should be treated differently from other kinds of errors. Respondent offers several arguments for treating ex post facto claims differently, but none is persuasive.

1. Respondent emphasizes (Br. 15-18) that the Ex Post Facto Clause embodies fundamental constitutional principles. That is undisputed, but as this Court explained in *Johnson*, “the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure.” 520 U.S. at 466. Accordingly, the Court in that case applied plain-error review to a violation of the Sixth Amendment’s requirement that the jury find every element of the offense. *Id.* at 465-466. Similarly, the Court has applied plain-error review to violations of the Fifth Amendment grand-jury right, which “serves a vital function” and “acts as a check on prosecutorial power.” *United States v. Cotton*, 535 U.S. 625, 634 (2002). It has also applied plain-error review to errors involving Federal Rule of Criminal Procedure 11—the rule that protects *all* of a defendant’s trial rights by ensuring that a guilty plea, which waives those rights, is knowing and voluntary. *United States v. Vonn*, 535 U.S. 55, 58-59 (2002). The concurring judges in the court of appeals correctly observed that, “[w]hile the Ex Post Facto

Clause is certainly fundamental to our notions of justice, it is no more so than the Fifth and Sixth Amendment rights at issue in *Johnson and Cotton*.” Pet. App. 13a (citation omitted).

Respondent contends (Br. 19) that (assuming that the charged crimes were not continuing offenses) the error in this case was particularly harmful because the government presented evidence relating to pre-enactment conduct, and therefore “massive amounts of highly volatile, prejudicial and cumulative evidence infect[ed] every aspect of the trial.” But petitioner did not object to the admission of evidence of pre-enactment conduct. For that reason, any claim of error in the admission of such evidence would itself be subject to plain-error review, and it is far from plain that the admission of that evidence was erroneous. Evidence of respondent’s pre-enactment threatening and “punishment” of his victim, for example, was admissible to establish that when he obtained her labor in the post-enactment period, he did so by “threats of serious harm.” 18 U.S.C. 1589(1); see, e.g., *United States v. Smith*, 464 F.2d 1129, 1134-1135 (2d Cir.), cert. denied, 409 U.S. 1023 and 409 U.S. 1076 (1972); *United States v. Annoreno*, 460 F.2d 1303, 1307 (7th Cir.), cert. denied, 409 U.S. 852 (1972). In any event, even if the admission of evidence of pre-enactment conduct might be prejudicial in some cases, that is not a reason for dispensing, in every case, with the requirement that the defendant establish prejudice.

2. Respondent asserts (Br. 20) that the error in this case was jurisdictional. If that were true, it would make plain-error analysis inapplicable: a party may not waive a lack of subject-matter jurisdiction, and therefore “defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district

court.” *Cotton*, 535 U.S. at 630. But the error in this case was not jurisdictional.

According to respondent (Br. 20), “federal courts have *no jurisdiction* to prosecute an individual for behavior that, at the time it was undertaken, violated no federal law.” That argument rests on an erroneous and overly expansive concept of jurisdiction. This Court has explained that “jurisdiction,” properly understood, refers to “the courts’ statutory or constitutional *power* to adjudicate the case.” *Steel Co. v. Citizens for Better Env’t.*, 523 U.S. 83, 89 (1998). In this case, the district court’s jurisdiction was based on 18 U.S.C. 3231, which vests the district courts with original jurisdiction over “all offenses against the laws of the United States.” As relevant here, the indictment charged that respondent violated 18 U.S.C. 1589 in that he “did knowingly and intentionally provide and obtain, and attempt to provide and obtain, the labor and services of a person * * * by threats of serious harm to, and physical restraint against, that person” as well as through a scheme “intended to cause that person to believe that, if the person did not perform such labor and services, the person would suffer serious harm and physical restraint, which offense included aggravated sexual abuse.” Superseding Indictment 2. Because the indictment alleged an “offense[] against the laws of the United States,” the district court had subject-matter jurisdiction under Section 3231.

Respondent is correct that (assuming that the charged crimes were not continuing offenses) the indictment contained an error: the charged conduct occurred “[i]n or about and between January 1999 and October 2001,” Superseding Indictment 2, but Section 1589 was not enacted until October 2000, see *Victims of Traffick-*

ing and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464. Accordingly, the indictment should have been restricted to the period between October 2000 and October 2001. But this Court has expressly held that “defects in an indictment do not deprive a court of its power to adjudicate a case” and therefore are not jurisdictional errors. *Cotton*, 535 U.S. at 630. “[T]he objection that the indictment does not charge a crime against the United States goes only to the merits of the case.” *Id.* at 631 (quoting *Lamar v. United States*, 240 U.S. 60, 65 (1916) (Holmes, J.)). Accordingly, the error in this case did not affect the jurisdiction of the district court.

3. Respondent next argues (Br. 28) that he need not show prejudice because the error in this case was a “structural” error. That is incorrect. This Court has defined “structural errors” as those fundamental errors that “affect[] the framework within which the trial proceeds.” *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). When properly preserved, a structural error results in reversal without any analysis of prejudice. But on plain-error review, a forfeited claim of structural error does not automatically result in reversal. The Court has reserved the question whether structural errors automatically affect substantial rights, thereby satisfying the third prong of plain-error review. *Puckett*, 129 S. Ct. at 1432. But even when a forfeited error is assumed both to be structural and to affect substantial rights, the defendant still must demonstrate prejudice in order to satisfy the fourth prong of the *Olano* test by showing that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 469-470.

In any event, the error in this case was not structural. This Court has “found structural errors only in a very limited class of cases.” *Johnson*, 520 U.S. at 468; see *id.* at 468-469 (citing cases). “[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis.” *Rose v. Clark*, 478 U.S. 570, 579 (1986). In particular, the omission of one element of the offense from a jury instruction is not a structural error. *Neder*, 527 U.S. at 8-9. The error in this case was analogous: the jury instructions were flawed because they did not inform the jury that it could not convict unless it found unlawful conduct occurring after October 2000. If any rational jury that convicted would in fact have found conduct after October 2000, there would be nothing fundamentally unfair about the conviction. The error was therefore not a structural error.*

4. Finally, respondent asserts (Br. 30) that “[o]ther circuits have endorsed the Second Circuit’s objective approach” to plain-error review of ex post facto claims. In support of the proposition, he relies only on *United States v. Tykarsky*, 446 F.3d 458 (3d Cir. 2006). In that case, the defendant was convicted of violating 18 U.S.C. 2422(b) by attempting to persuade, induce, entice, or coerce an underage person to engage in illegal sexual activity through the Internet. The evidence consisted of a series of emails and instant-messenger conversations, some of which pre-dated and some of which post-dated

* Respondent does not take issue with the government’s suggestion (Gov’t Br. 16-17) that the error is properly viewed as a due process rather than ex post facto error. In any event, the analysis is the same: neither form of error is structural when the error arises because of overbroad jury instructions.

an amendment to the statute that imposed a higher mandatory minimum sentence. On plain-error review, the court of appeals held that the defendant could not be subject to the increased mandatory minimum because there was a “possibility that a reasonable jury could have convicted” based solely on the pre-amendment communications. 446 F.3d at 481. But in stating the test for plain-error review, the court of appeals explained that the defendant “has been prejudiced if there is a *reasonable possibility* that a jury, properly instructed on this point, might have found [him] guilty based exclusively on acts that occurred before the increased penalty took effect.” *Id.* at 480 (emphasis added). That test is consistent with this Court’s cases and inconsistent with the decision below.

Respondent also cites (Br. 32-33) a series of cases involving the right of allocution at sentencing. In some of those cases, the courts of appeals stated that a defendant could establish prejudice from a deprivation of the right of allocution by showing a possibility of a reduced sentence. Those cases are of limited relevance, not only because they involved an error significantly different from that at issue here, but also because the courts did not focus on the distinction between a possibility and a reasonable possibility. In any event, the court in one of the cited cases ultimately denied relief under the fourth prong of *Olano* after conducting the sort of case-specific inquiry that the court of appeals failed to conduct in this case. See *United States v. Pitre*, 504 F.3d 657, 663 (7th Cir. 2007) (concluding that, “on the facts of this case,” the district court’s failure to grant the defendant her right to allocute “did not affect seriously the fairness, integrity or public reputation of her revocation proceedings”).

C. This Court Should Remand To Allow The Court Of Appeals To Apply The Correct Standard Of Plain-Error Review

Because the court of appeals erroneously believed that any possibility of prejudice was sufficient to require reversal, it did not address the question required by the plain-error standard: whether there was a reasonable possibility that the jury convicted based solely on pre-enactment conduct. Respondent argues (Br. 35) that the error in this case was prejudicial because “there were significant differences between the pre-enactment and post-enactment evidence.” The court of appeals did not have an opportunity to consider that argument under a correct standard of plain-error review, and there is no reason for this Court to consider it in the first instance. In any event, the argument lacks merit.

1. Recognizing that it is “a court of review, not of first view,” this Court generally declines to resolve issues that were not passed upon below. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); see *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 494 (2001). Respondent offers no reason why the Court should deviate from that practice in this case. To the contrary, adherence to the Court’s usual practice is particularly appropriate here in light of the fact-intensive nature of respondents’ arguments. Accordingly, after holding that this case is governed by ordinary plain-error principles and that those principles require a showing of prejudice in order for a defendant to obtain reversal based on a forfeited claim of error, this Court should remand to allow the court of appeals to apply the plain-error standard in the first instance.

2. If the Court does consider the merits of respondents' case-specific arguments, it should reject them. Respondent offers three reasons why, in his view, there is a reasonable possibility that the error in this case affected the outcome of his trial. None withstands scrutiny.

First, respondent points out (Br. 35) that the pre-enactment labor of his victim, Jodi, consisted of creating a website, while her post-enactment labor involved maintaining the website by "upload[ing] photographs and click[ing] on certain links." The concurring judges in the court of appeals noted that distinction and correctly observed that it was "immaterial for purposes of the forced-labor statute." Pet. App. 17a n.6. That statute prohibits obtaining "the labor or services of a person" by threats of serious harm or physical restraint. 18 U.S.C. 1589. Respondent identifies no reason why creating a website would be considered "labor or services" but maintaining one would not.

Second, respondent notes (Br. 36) that, shortly after the statute was enacted, Jodi began a full-time job, and therefore, he reasons, the jury might not have believed that she continued to work on the website. But Jodi had also been employed during portions of the pre-enactment period charged in the indictment, see Tr. 97, 294, and in any event, working at a full-time job is not incompatible with working on a website at home. More importantly, there was considerable evidence that, even in the post-enactment period, respondent continued to coerce Jodi and to punish her for unsatisfactory work on the website. Indeed, as the concurring judges on the court of appeals pointed out, "one of the most severe punishments [respondent] imposed on Jodi for her work on the website occurred in April 2001." Pet. App. 17a n.5; see

id. at 28a (describing incident). The Ex Post Facto Clause and the Due Process Clause require only that at least one act constituting the offense take place after the statute's effective date. See Gov't Br. 17 n.4. There is no reasonable possibility that the jury believed that Jodi performed forced labor before October 2000 but performed no acts of forced labor at all after the statute was enacted.

Third, respondent observes (Br. 36) that the pre-enactment period charged in the indictment was nearly twice as long as the post-enactment period. But given the similarity of respondent's conduct during the two periods, the relative length of the periods provides no reason for concluding that the jury would have convicted based solely on pre-enactment conduct.

* * * * *

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

ELENA KAGAN
Solicitor General

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