No. 08-1341

In The
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

GLENN MARCUS,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals properly exercised its discretion to notice a critical violation of the Ex Post Facto Clause, under the plain error doctrine of Fed. R. Crim. P. 52(b), where the relevant criminal statutes were not enacted until nearly two years *after* most of the acts charged in the indictment occurred -- *and*, the government *concedes* that the jury *could* have convicted the defendant exclusively on the conduct that took place before the statutes' enactment -- therefore there existed a *possibility* that the constitutional error affected the judgment.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Ex Post Facto Clause contained within Article I, § 9, Clause 3 of the United States Constitution provides, in pertinent part, that no "ex post facto Law shall be passed."

The Due Process Clause embodied within the Fifth Amendment to the United States Constitution provides, in relevant part, that no person shall be "deprived of life, liberty, or property, without due process of law."

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

STATEMENT OF THE CASE

The predominant question that looms so large over the landscape of this case involves a sexual relationship between two adults that the government claims was illegal. However, the statutes making their conduct unlawful were not enacted until two years after the commencement of their relationship. Thus, for a significant period there was *no federal law* prohibiting their activity.

As a consequence, the court of appeals properly found that the Respondent was entitled to a new trial because his convictions in the Eastern District of New York for Forced Labor and Sex Trafficking were obtained in violation of the Ex Post Facto Clause of the United States Constitution.

The central sequence of events that frame the salient issues goes all the way back to 1998 when the Respondent, Glenn Marcus, who was 44 years old, became involved in a prolonged intimate relationship with a 29-year-old college graduate, referred to as "Jodi."[1]

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[1] The district court directed that the government's witness be referenced solely by her first name (Pet. App. 21a).

The Conduct that Occurred Before the Enactment of the Federal Statutes

In the fall of 1998, Jodi met Glenn Marcus through a website that catered to people, like her, who were attracted to an alternative lifestyle that involved a number of unique sexual preferences, commonly known as bondage, dominance/discipline, submission/sadism, and masochism ("BDSM") (Tr.72-73, 228).

In October of 1998, Jodi flew from the Midwest to Maryland and began a sexual relationship with Glenn Marcus, which included a variety of sadomasochistic activities (Tr.76, 78, 253-54). Jodi then returned to Maryland in November for another long weekend, where they engaged in similarly intense sexual acts (Tr.77).

To facilitate this relationship, in January of 1999, Jodi moved to Maryland where she shared an apartment with another woman, Joanna, who also was attracted to the BDSM lifestyle (Tr.266, 270). The women regularly drove to New York to bring Glenn Marcus to Maryland to engage in these sadomasochistic encounters (Tr.87).

In October 1999, Jodi claims she wanted to leave Marcus after a more extreme session of BDSM (Tr.106-08, 300). But, she did not end their relationship at that time. At Christmas, she flew back to the Midwest to celebrate the holidays with her family -- as she did every year -- and then returned to Maryland to continue the sadomasochistic association with Marcus (Tr.135, 312-13).

Joanna eventually removed Jodi from their apartment because Jodi broke into Joanna's bedroom and stole some of her property (Tr.132). As a consequence, in January of 2000, Jodi moved to New York City to live, *rent-free*, with one of Glenn Marcus' friends (Tr.327-29).

While in New York, Jodi worked, from her home, on a BDSM website called "Slavespace.com" (Tr.143, 148-49, 323).[2] In addition, she continued her long-term BDSM relationship with Glenn Marcus, seeing him approximately once a week (Tr.153). All this conduct occurred *before* the enactment of the criminal statutes at issue in this prosecution.

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[2] The website only earned "several hundred" dollars each month from its advertisers and member section (Tr.153).

The Conduct that Occurred After the Enactment of the Statutes

On October 28, 2000, the Trafficking Victims Protection Act of 2000, which prohibits Sex Trafficking and Forced Labor, was enacted. Shortly after the laws went into effect, Jodi began working outside of the apartment in a corporate office, earning more than $40,000 a year (Tr.331-32). Despite commuting from Queens to Manhattan each day in her *fulltime employment*, at trial Jodi claimed that she also worked *8 to 10 additional hours each day* at home on the BDSM website (Tr.332-33).

Jodi alleged that in March of 2001, she again wanted to sever her relationship with Glenn Marcus (Tr.159). She stated Marcus would let her leave, if she allowed him to "punish" her one last time (Tr.160). Days later, she met him at a friend's house where they engaged in extreme BDSM activity (Tr.161-66).

In August of 2001, Marcus' friend asked Jodi to move out (Tr.172). Therefore, in September of 2001, Jodi moved into her own apartment, and created her own BDSM website (Tr.172, 338, 342). This ended Jodi's relationship with Glenn Marcus, as charged in the indictment.

For several more years Jodi periodically saw Marcus and engaged in consensual sadomasochistic activities (Tr.173, 176, 340). Jodi also voluntarily posed in sexually explicit photographs for the Slavespace website (Tr.350, 364, 410). Jodi concedes that she never told anybody, other than Marcus, that she was unhappy during the relationship (Tr.208, 334).[3]

The Indictment

In 2004, a dispute arose between Jodi and Glenn Marcus over the use of her photographs on their website. After Marcus refused to remove the sexually explicit photographs -- which he believed he owned -- from the website, Jodi consulted an attorney. The attorney told her to go to the FBI. After discussions with the FBI Jodi claimed, for the first time, that her conduct was not consensual (Tr.179, 352).

As a consequence, on February 9, 2007, Glenn Marcus was eventually charged in the United States District Court for the Eastern District of New York with "Sex Trafficking." The indictment alleged that, between January 1999 and October 2001, Glenn Marcus knowingly and intentionally caused Jodi to "engage in a commercial sex act" -- referring to the photographs posted on their

[3] Jodi continued to socialize with Glenn Marcus. She went on camping trips with him, together with his adult daughter, and son-in-law, who is a former prosecutor (Tr.340, 363; PSR ¶ 59). She also invited Marcus' daughter to her home for a "family" dinner (Tr.634-35).

website -- through force, fraud and coercion, in violation of 18 U.S.C. § 1591.[4] (A.26-27).

Marcus was also charged with "Forced Labor" because Jodi claimed that during the same time period she worked on the website, under threat of serious harm and physical restraint, in violation of 18 U.S.C. § 1589.[5] (A.27).

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[4] 18 U.S.C. § 1591(a), the Sex Trafficking statute, provides that,

> Whoever knowingly ... in or affecting interstate or foreign commerce ... recruits, entices, harbors, transports, provides, or obtains by any means a person ... knowing that force, fraud, or coercion ... will be used to cause the person to engage in a commercial sex act [shall be guilty of a crime].

[5] 18 U.S.C. § 1589, entitled "Forced Labor," states, in pertinent part, that

> Whoever knowingly obtains the labor or services of another person ... by threats of serious harm to, or physical restraint against, that person or another person [shall be guilty of a crime].

The Jury Deliberated for Seven Days

The trial commenced on February 12, 2007. The prosecution relied primarily on Jodi's testimony, which included conduct that preceded the enactment of the statutes by more than two years. The prosecution then called Agent Austin Berglas, who testified that Jodi sought the FBI's assistance in taking down some photographs of her that were posted on a specific website -- *not* because she was the victim of any Forced Labor or Sex Trafficking (Tr.421). The defense called Glenn Marcus' daughter, as well as Jodi's roommate in New York, and two experts relating to BDSM.

The jury *deliberated for seven days* before eventually finding Glenn Marcus guilty of both the Sex Trafficking and Forced Labor charges (A.378).[6] The district court then sentenced Marcus, who has no prior criminal history, to a non-guideline sentence of *nine years imprisonment* (A.379-80).[7]

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[6] Glenn Marcus was found *not guilty* of a third count, which charged him with transmitting "obscene" pictures on the Slavespace website, in violation of 18 U.S.C. § 1462 (A.27-28).

[7] The Respondent was remanded after sentence was imposed. He remained incarcerated at FCI Fort Dix for 16 months, until January 7, 2009, when, pursuant to a stipulation that was so-ordered by the court of appeals, Glenn Marcus was released on bail secured by his parents' home. He is currently on home confinement and subject to electronic monitoring.

The Court of Appeals Found that this Case "Clearly Implicates the Ex Post Facto Clause"

On appeal, Glenn Marcus engaged new counsel who argued, for the first time, that the convictions violated the Ex Post Facto Clause because the Sex Trafficking and Forced Labor statutes were not enacted until *two years after* Jodi and Marcus began their unorthodox sexual relationship.

The Second Circuit agreed that the case implicated the Ex Post Facto Clause and stressed that the undisputed facts showed (1) the indictment charged Marcus with violating the statutes before they were even enacted; (2) the government presented evidence at trial of conduct that occurred *before* the statutes' enactment; (3) and the district court never instructed the jurors not to consider the proof of conduct that occurred before the enactment of the laws in question (Pet. App. 7a). Most significantly, the government also conceded in the circuit court that the jury could have found Glenn Marcus guilty based solely on conduct that occurred *before* the laws were enacted (Pet. App. 9a).

The court of appeals, exercising its discretion under Rule 52(b), vacated both convictions because they violated the Ex Post Facto Clause and remanded the case for a new trial. Thereafter, it denied the government's petition for rehearing (Pet. App. 9a, 65a).

SUMMARY OF THE ARGUMENT

The court of appeals properly invoked its discretion, under Fed. R. Crim. P. 52(b), by granting a new trial in the face of a constitutional violation of the Ex Post Facto Clause that, although not raised at trial, *could* have affected the jury's verdict since, as the government concedes, the jury could have found Marcus guilty under both statutes "solely" for conduct that occurred before their enactment (Pet. App. 7a-9a).

Rule 52(b) endows circuit courts with the authority to consider a plain error, which affects defendants' substantial rights, even though it was not brought to the lower court's attention. And, the decision to correct an unpreserved error lies "within the sound discretion of the court of appeals." *United States v. Olano*, 507 U.S. 725, 732 (1993). The exercise of that discretion may be warranted when there is (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) that seriously affects the fairness, integrity or public reputation of judicial proceedings. *Id*. at 732, 736.

Here, there is no dispute about this standard, which was properly applied by the Second Circuit (Pet. App. 6a). Nevertheless, the government urges that the court of appeals "departed from" the principles enunciated in *Olano* by granting a new trial for an ex post facto violation without showing that the error seriously affected the fairness, integrity or public reputation of the proceeding (Pet. Br. 8).

Glenn Marcus was convicted of violating two federal statutes over a period of nearly three years. However, neither criminal statute was even enacted until almost two years after the time charged in the indictment!

As a consequence, it is difficult to imagine an error that is more plain or of greater amplitude -- and so worthy of review under Rule 52(b) -- than indicting, trying, convicting and sentencing a defendant for conduct which, when committed, was not a crime.

The government essentially concedes that Glenn Marcus is entitled to a new trial on his conviction for Sex Trafficking because of the ex post facto violation (Pet. Br. 8-9).[8] Nonetheless, it urges that his conviction for Forced Labor should be reinstated, and he should suffer the brutality of a nine-year sentence of imprisonment, because it was merely possible -- not probable -- that the jurors relied exclusively on pre-enactment conduct (Pet. Br. 9, 12, 16).

Therefore, the prosecution maintains that before a circuit court can notice an ex post facto error, under the plain error doctrine, it must be "reasonably possible" that the conviction was based entirely on conduct that preceded the criminal statute's enactment.

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[8] The concurring judges from the Second Circuit noted that "Marcus' relevant conduct differed materially before and after October 2000, such that there is a reasonably possibility that the jury may have convicted him [of Sex Trafficking] based exclusively on pre-enactment conduct" (Pet. App. 15a-16a).

However, a conviction that was possibly based on a violation of the Ex Post Facto Clause seriously affects the fairness, integrity and public reputation of the judicial proceedings. The venerable maxim *nulla peona sine lege*, which dates back in time to the ancient Greeks, provides that there shall be no punishment without a law authorizing it. In fact, this fundamental principle has been described as "one of the most 'widely held value-judgment[s] in the entire history of human thought.'"[9]

That great safeguard against constitutional infringements is rendered impotent if a circuit court is stripped of its power to grant a new trial where, as here, the government *concedes* that the defendant *could* have been convicted of conduct that was not unlawful at the time of its occurrence.

Moreover, there is simply no need or basis for imposing national restrictions on how circuit judges may exercise their discretion. Courts of appeals have always been allowed broad discretion in how they supervise litigation within their own circuit. Thus, even if some courts may differ slightly in their review of ex post facto claims for plain error, an ironclad rule of restriction is not required for this procedural issue.

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[9] *Rogers v. Tennessee*, 532 U.S. 451, 467-68 (2001) (Scalia, J., dissenting), quoting J. Hall, *General Principles of Criminal Law* 59 (2d ed. 1960).

But, even if a uniform rule were necessary, then a constitutional violation of this stature -- involving the *conviction of a person for conduct that is not barred by any law* -- certainly should fall well within that "special category of forfeited errors that can be corrected regardless of their effect on the outcome" of the case, as contemplated by the Court in *Olano*. 507 U.S. at 735.[10]

Therefore, where conduct spans a time period -- part of which occurred *before* a statute was enacted and part of which occurred *after* its enactment -- and the government concedes that the defendant *could* have been convicted exclusively on pre-enactment conduct -- the most reasonable and just approach is to grant a new trial to ensure a sense of certainty that a person can only be convicted for acts that actually violate the law.

In addition, this constitutional error was "structural" in nature and certainly rose far above the level of a mere "instructional" error. A grand jury returned an indictment charging conduct that was not criminal. Thus, the indictment itself is fatally flawed because it accuses the defendant of acts that were not unlawful.

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[10] In *Calder v. Bull*, 3 Dall. 386, 390 (1798), Justice Chase famously identified four types of laws to which the Ex Post Facto Clause extends. The very first category covers our case and involves "[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal."

The defendant was then tried for conduct that violated no law. The trial was overwhelmed by evidence of acts that were not illegal. The jurors ultimately convicted the defendant of conduct that violated no statute. And, he was then sentenced to imprisonment for nine years for behavior during a time period for which there was no law. Finally, *there was no jurisdiction in the federal court to try a defendant on conduct that violated no federal law*!

One of the most cherished policies of our nation has always been an abiding belief that a government of a strong and free people does not need the conviction of Glenn Marcus, which was obtained through the most oppressive of all the tools of tyranny -- an ex post facto law. As a consequence, the Court should affirm the judgment of the court of appeals.

ARGUMENT

AN APPELLATE COURT HAS THE DISCRETION TO NOTICE A CONSTITUTIONAL VIOLATION OF THE EX POST FACTO CLAUSE WHERE IT IS POSSIBLE THE ERROR AFFECTED THE JUDGMENT

An abhorrence of ex post facto laws is ranked as one of the most fundamental principles of constitutional law. The heritage of this critical provision is deeply rooted in the need to protect individuals against arbitrary, vindictive and oppressive government.[11] This is because the "creation of crimes after the commission of the fact," or the "subjecting of men to punishment for things which, when they were done, [violated] no law," have always been the "favorite and most formidable instruments of tyranny."[12]

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[11] The exalted status of the Ex Post Facto Clause is evidenced by the fact that the Framers not only barred the federal government from enacting retroactive legislation, but also found it sufficiently serious to bar the *states* from passing such laws. *See* U.S. Const. art. I, § 9 (barring the passage of federal ex post facto laws); U.S. Const. art. I, § 10 (prohibiting states from enacting ex post facto laws).

[12] The Federalist No. 84, p. 511 (Alexander Hamilton) (C. Rossiter ed. 1961).

The Ex Post Facto Clause, more than any other constitutional provision, guarantees the fairness and legitimacy of the judicial process. Alexander Hamilton described the proscription against ex post facto laws as one of the three "great[est] securities to liberty" contained in the Constitution.[13] And, James Madison emphasized that ex post facto laws are "contrary to the first principles of the social compact, and to every principle of sound legislation."[14] As such, the Ex Post Facto Clause stands as a "majestic bulwark in the framework of our Constitution."[15]

Through this provision, and the Due Process Clause, the Framers sought to make certain that all people have fair warning of conduct that is proscribed by law. As a consequence, this Court has consistently denounced statutes that subject individuals to punishment in direct defiance of the Ex Post Facto Clause.[16]

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[13] *Id.* Hamilton also included the establishment of the ancient writ of habeas corpus and the prohibition of titles of nobility among those securities of liberty.

[14] The Federalist No. 44, p. 282 (James Madison)(C. Rossiter ed. 1961).

[15] *Dobbert v. Florida*, 432 U.S. 282, 311 (1977) (Stevens, J., dissenting).

[16] *See*, *e.g.*, *Stogner v. California*, 539 U.S. 607 (2003) (state law which permitted prosecution for sex-related child abuse within one year of the victim's report to the police -- even though the offenses were time-barred -- was unconstitutional); *Carmell v. Texas*, 529 U.S. 513 (2000) (an amendment of a statute authorizing convictions for certain sexual offenses based solely on the victim's testimony, where

However, not all ex post facto violations are detected during the trial proceedings. Even though they lurk on the record, as exemplified by this case, occasionally the judge, prosecutor and defense counsel overlook them. Instead, they may be identified for the first time on appeal, when appellate counsel conducts a more meticulous review of the statute's history and the defendant's conduct. It is this type of natural oversight that Rule 52(b) was enacted to remedy.[17]

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previously corroborating evidence had been required, violates the Ex Post Facto Clause); *Miller v. Florida*, 482 U.S. 423 (1987) (application of revised sentencing guidelines to crimes that occurred before the effective date of the revision violated the Ex Post Facto Clause); *Weaver v. Graham*, 450 U.S. 24 (1981) (statute that reduced the amount of good time which could be earned by prisoners violated the Ex Post Facto Clause when applied to defendants whose crime occurred before its effective date); *Rabe v. Washington*, 405 U.S. 313 (1972) (conviction based on an unforeseeable judicial construction of a state obscenity law violated the Ex Post Facto Clause). This list is illustrative only.

[17] Rule 52(b) specifically provides that, on appeal, a "plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

In *United States v. Olano*, 507 U.S. 725, 732 (1993), this Court formulated the standards necessary to qualify for the benefits of plain error review: a defendant must establish (1) error (2) that is plain and (3) which affects substantial rights. Moreover, whether to review an unpreserved issue for plain error resides in the *sound discretion* of the circuit court. *Olano*, 507 U.S. at 732. But, such discretion is only appropriate if the error (4) "seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* at 736. Here, we urge, it certainly did.

A Conviction that Could be Based on a Violation of the Ex Post Facto Clause Seriously Affects Substantial Rights as well as the Fairness, Integrity and Public Reputation of the Judicial Proceedings

The main debate that encircles this conviction focuses on the fourth *Olano* factor, which addresses the impact of a plain error.[18] Significantly, the fairness, integrity and reputation of judicial proceedings are seriously undermined by ex post facto violations for the following five constitutional reasons:

First, at trial a defendant is overcome by testimony and exhibits relating to conduct that occurred *before* the law was enacted. Therefore, without the ex post facto protections, massive amounts of highly volatile, prejudicial and cumulative evidence infects every aspect of the trial. This certainly implicates the fairness of the judicial proceedings as well as the defendant's substantial rights.

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[18] The government notes that the "sole question presented is the standard for plain-error review of an asserted ex post facto claim, not the determination of whether an ex post facto violation occurred" (Pet. Br. 17 n.4). Furthermore, the government acknowledges that "the case can be resolved on *Olano*'s fourth prong" (Pet. Br. 16 n.3).

Second, a jury's verdict is bound by the crime as alleged in the indictment. Thus, where the indictment expressly charges the defendant with criminal conduct during a *period of time for which, as a matter of law, there could be no offense*, the *entire indictment* is radically flawed.

Third, there is absolutely no way of knowing what conduct formed the basis for the jury's determination. If a defendant could have been convicted of conduct that violates no law, the integrity of the judicial system is seriously undermined.

Fourth, the public is entitled to advance notice of what conduct is to be avoided. However, the public's confidence is shattered by a judicial system that allows individuals to be tried for crimes for which there was no notice or warning.

Finally, the federal courts have *no jurisdiction* to prosecute an individual for behavior that, at the time it was undertaken, violated no federal law. After all, it is well established that there is no jurisdiction in federal court to try criminal charges based on common law and *all federal crimes must be based on a statute enacted by Congress*.[19]

All of these factors and considerations apply to Glenn Marcus' convictions for Forced Labor and Sex Trafficking, which included nearly two years of conduct that preceded the existence of any federal statute!

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[19] *See*, *e.g.*, *United States v. Hudson*, 7 Cranch 32 (1812).

A violation of the constitutional Ex Post Facto Clause -- which could have resulted in the defendant's conviction for conduct that was not made illegal by a specific law -- is neither minor nor inconsequential. As a consequence, a prosecution contaminated by ex post facto violations does, in every respect, affect substantial rights and seriously undermine the integrity of the judicial proceeding.

The Court of Appeals Correctly Granted a Retrial to a Defendant Whose Conviction, Concededly, Could Have Resulted from an Ex Post Facto Violation

The Second Circuit granted a retrial because the jurors *could* have relied exclusively on pre-enactment conduct when they convicted Glenn Marcus. Since a criminal conviction can expose individuals to the cruel reality of prison, including a life sentence, or even the death penalty, the rationale underlying the court of appeals' approach to plain error is manifestly simple and fair: a defendant should not be subjected to a criminal conviction if it is *possible* that the jurors, who deliberated his fate, made their decision exclusively on conduct that occurred when there was no law rendering that conduct criminal.

Nevertheless, the government argues that the circuit court's discretion should be limited to those instances where there is a "*reasonable possibility*" that the jurors relied solely on conduct occurring before the statute's enactment. However, the burden of "reasonable possibility" is virtually insurmountable for defendants because there is no mechanism to discover what evidence the jurors relied upon in reaching their verdict.

In sharp contrast, the "possibility" test, adopted by the Second Circuit, is an *objective standard,* which does not require the circuit judges to be clairvoyant or attempt to enter the jurors' minds.

The Court of Appeals' Decision Comports With this Court's Standards

The government suggests that the Second Circuit deviated from the standards established by this Court in *Olano* and its descendents. In particular, the government argues that a defendant may not obtain relief on a "forfeited claim" which is "instructional" in nature when "the outcome *would have been the same* absent the error" (Pet. Br. 13-14) (emphasis supplied).

However, the court of appeals, which appropriately construed the *Olano* test (Pet. App. 6a), did *not* depart from this Court's standards. Instead, it acknowledged that Marcus' case "clearly implicates the Ex Post Facto Clause" (Pet. App. 7a). This is particularly true where the government *concedes* that the outcome *could* have been different (Pet. App. 8a-9a).

The cases cited by the government are readily distinguishable and do not involve constitutional issues of the magnitude presented by this unique ex post facto violation.

For example, in *Olano* alternate jurors, who should have been discharged when the jury retired to consider its verdict, were allowed in the jury room during deliberations in violation of a statute.[20] The Court found that there was no occasion to notice the plain error because the presence of alternates in the jury room did not affect substantial rights, especially since they were specifically instructed not to participate in deliberations. 507 U.S. at 737.

In striking contrast, in Marcus' case the Second Circuit addressed a *constitutional* issue of considerable scale and consequence. Moreover, the bulk of the evidence received against Marcus related to a *two-year period* before the criminal statutes were even enacted! Certainly, this enormous volume of vivid and graphic proof had a much more acute impact on the jurors than the silent, and carefully instructed, alternates in *Olano*.

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[20] Fed. R. Crim. P. 24(c) provides, in relevant part, that "the court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew."

In *Johnson v. United States*, 520 U.S. 461 (1997), relied upon by the government, the defendant was charged with knowingly making a false material declaration under oath before a grand jury. At trial, the judge instructed the jurors that materiality was a question of law for him to decide. Therefore, the judge, *rather than the jurors,* determined that the defendant's statements were material. However, prior to the defendant's appeal, the law changed drastically, making materiality a question for the jury, not the judge, to resolve.

This Court found that the fourth prong of the *Olano* test, needing to justify plain error analysis, was *not* satisfied in *Johnson* where the evidence supporting the "materiality" element of the perjury conviction was "*overwhelming*" and "*essentially uncontroverted*" at trial. 520 U.S. at 469-70 (emphasis supplied). No "miscarriage of justice" would have resulted from not correcting the error since there was *no* possibility that the outcome of the trial would be affected by the error.

Similarly, in *United States v. Cotton*, 535 U.S. 625 (2002), the defendant was not prejudiced by the indictment's failure to allege the quantity of drugs involved in the conspiracy, since the evidence at trial concerning that missing element, was "essentially uncontroverted," as well as "overwhelming." 535 U.S. at 633.

Here, unlike *Johnson* and *Cotton*, the government *concedes* that the error *could* have affected the outcome of the trial. In fact, Marcus' trial was flooded with *two full years of highly volatile evidence relating to sadomasochistic and related conduct before the statutes*, forbidding such conduct, *were even enacted*. Moreover, the proof relating to the post-enactment behavior only consisted of 11 months!

The government's reliance on *United States v. Paulin*, 329 Fed. Appx. 232 (11th Cir. 2009) (per curiam and unpublished), is also misplaced. There, the indictment clearly specified that the defendant was only charged for her conduct *after* the enactment of the Trafficking Victims Protection Act.[21] Although other offenses in the *Paulin* indictment dated back to 1999, the prosecution was careful to limit the commencement of the Forced Labor count to October 29, 2000 -- the very day after that criminal statute became effective![22] In stark contrast, the indictment returned against Glenn Marcus charged misconduct that covered a period of nearly two years *before* the statute was enacted!

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[21] 329 Fed. Appx. at 234.

[22] *See* Paulin Indictment at 4, *United States v. Maude Paulin*, Docket No. 07-Cr-20263 (S.D.Fl.).

And, in *Paulin*, there also was "no doubt" that the jurors would have decided the case the same way if the pre-enactment evidence had been excluded.[23] Here, it bears repeating, the government admits that the jurors could have convicted Marcus exclusively on his conduct before the Forced Labor statute was enacted.

Constitutional Ex Post Facto Violations Are Entitled to be Noticed More Freely than Less Serious Errors

In *Olano*, the Court emphasized that *prejudice may be presumed* for certain brands of egregious plain error. 507 U.S. at 735. In light of the high ranking of the Ex Post Facto Clause, we urge that this critical form of constitutional violation falls within the special category of flagrant errors that should be corrected regardless of their effect on the outcome. Thus, the potency of this error, which is of a constitutional proportion, should be presumed to be prejudicial especially because of the difficulty encountered by a defendant in being able to show he has suffered harm.

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[23] *Id.* Similarly, in *United States v. Munoz-Franco*, 487 F.3d 25, 57 (1st Cir.), cert. denied, 552 U.S. 1042 (2007), the court saw "nothing to differentiate [the defendants'] pre-enactment conduct from subsequent conduct."

The government tries to blunt the sharpness of this acute constitutional violation by trying to label it an "instructional" error (Pet. Br. 8, 12). However, a prosecution that breaches the ex post facto law -- and allows an individual to be indicted for *conduct that was not unlawful* when it was performed -- certainly raises the gravest constitutional concerns, and seriously affects the fairness, integrity and public reputation of the judicial process, as well as the entire structure of the trial itself.

Such a violation of the Ex Post Facto Clause is a "structural" error because it affects the "framework within which the trial proceeds, rather than simply an error in the trial process itself." *Johnson*, 520 U.S. at 468. It fits squarely within the types of errors that have qualified as structural by this Court. *See*, *e.g.*, *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (erroneous reasonable-doubt instruction to jury); *Waller v. Georgia*, 467 U.S. 39 (1984) (the right to a public trial).

Certainly, an error that involves prosecuting a person for conduct that does not violate any law is, in every respect, as serious and fundamental as those cases in which the Court concluded the error was structural. Nothing could be more devastating.

Here, the constitutional violation grievously affected Glenn Marcus' substantial rights, as well as the fairness of the judicial proceedings. He was indicted for conduct that violated no law. Then two years of torrential proof poured through the opening created by the ex post facto violation.

Thus, significant public policy concerns arise in the face of the government's disturbing suggestion that fundamental, constitutional errors -- even those that affect the framework within which the trial proceeds -- should not be entertained under the mantle of plain error.[24]

Where a defendant has been charged with conduct that occurred before the enactment of a federal statute -- and the government concedes that he could have been convicted based exclusively on his pre-enactment conduct -- such a constitutional violation of the Ex Post Facto Clause falls within the special category of forfeited errors that can be corrected regardless of their effect on the outcome of the trial. Furthermore, such an error should be presumed prejudicial if the defendant cannot make a specific showing of prejudice.

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[24] In *Puckett v. United States*, 129 S. Ct. 1423, 1428 (2009), cited by the government, the Court only addressed whether Rule 52(b)'s plain error test applies to unpreserved claims where the government failed to fulfill its obligations under a plea agreement. There, the Court concluded that Rule 52(b) does, indeed, apply to unpreserved breach of contract claims. *Id.* The Court determined that since a breach of a plea deal is not a structural error, such a claim is subject to harmless error review and prejudice must be shown. *Id. at 1432.*

The Third Circuit Has Applied the Second Circuit's Standard

Other circuits have endorsed the Second Circuit's objective approach, which accords circuit judges the discretion to vacate a conviction where, but for the ex post facto violation, the outcome *could* have been different. For example, in *United States v. Tykarsky,* 446 F.3d 458, 481 (3rd Cir. 2006), cert. denied, 129 S. Ct. 1929 (2009), the Third Circuit reversed the defendant's conviction where there was a "*possibility* that a reasonable jury could have convicted Tykarsky based solely" on his pre-enactment conduct (emphasis supplied).

The Third Circuit continued that the "most that can be said here is that it is *improbable*, rather than *impossible*, as a factual matter, that the jury convicted Tykarsky exclusively" on his pre-enactment acts. 446 F.3d at 482 (emphasis modified). That, however, was sufficient to persuade the court that the defendant's substantial rights were affected. As a consequence, the Third Circuit found plain error and vacated the defendant's sentence even though the bulk of the conduct occurred after the statute was enacted.

The court in *Tykarsky* used the word "reasonable" to modify the term "jury" rather than the term "possibility." 446 F.3d at 481. Therefore, the relevant consideration related to the reasonableness of the *jurors*, not the possible effect on the outcome. Courts presume that "reasonable jurors" are properly instructed and will fairly consider all of the evidence. *Schlup v. Delo*, 513 U.S. 298, 329 (1995). Thus, a reviewing court should consider whether it was *possible* that reasonable jurors, properly instructed, would have convicted the defendant based exclusively on pre-enactment conduct.[25]

[25] The Third Circuit noted that a defendant "has been prejudiced if there is a reasonable possibility that a jury, properly instructed on this point, might have found [the defendant] guilty based exclusively on acts that occurred before the increased penalty." *Tykarsky*, 446 F.3d at 481-82. However, as noted by the concurring judges of the Second Circuit, "the Third Circuit has applied our standard ... examining whether there is *any possibility* that the jury could have convicted the defendant based exclusively on pre-enactment conduct" (Pet. App. 15a) (emphasis supplied).

Prejudice is Presumed Where There is "Any Possibility" of a Different Outcome

Even where the consequences are less severe than an ex post facto violation, several circuits have found that prejudice should be presumed if there is "*any possibility*" of a different outcome. For example, the Seventh Circuit holds that where a defendant's right to allocute was violated, a reviewing court "should presume prejudice when there is any *possibility* that the defendant would have received a lesser sentence had the district court heard from [her] before imposing sentence."[26] The Eleventh Circuit also applies the "possibility" of prejudice standard for plain error review where a defendant was not given an opportunity to allocute.[27]

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[26] *United States v. Pitre*, 504 F.3d 657, 662 (7th Cir. 2007) (emphasis supplied), quoting *United States v. Luepke*, 495 F.3d 443, 451 (7th Cir. 2007) (noting the division among the circuits on whether a court of appeals ought to presume prejudice when a violation of the right to allocution is established); *see also United States v. Adams*, 252 F.3d 276, 288 (3rd Cir. 2001) (presuming prejudice where the defendant's right of allocution was violated).

[27] *See, e.g.*, *United States v. Carruth*, 528 F.3d 845, 847 n. 4 (11th Cir. 2008).

The courts adopt this approach to accommodate the "*immense practical difficulty facing a defendant who otherwise would have to attempt to prove that a violation affected a specific sentence*."[28] Thus, "[t]hat the right to allocution, properly afforded, *could* have had such influence is the most we reasonably can expect a defendant to demonstrate."[29]

The same rationale supports the need for courts of appeals to have the discretion to grant a new trial where there is any possibility that an ex post facto violation influenced the jury's verdict. This is, of course, because it is impossible for defendants to know what evidence influenced the verdict.

Cases like *Adams, Carruth, Luepke* and *Pitre* add enormous force to our claim since, unlike an ex post facto violation, which is deeply rooted in the very heart of the Constitution, a defendant's right to allocute has no constitutional foundation. All the imperatives for greater discretion are even more evident when the Ex Post Facto Clause is breached.

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[28] *Luepke*, 495 F.3d at 451 (emphasis supplied).

[29] *Id.* (emphasis in original).

A National Approach is Not Required

In addition, courts of appeals are allowed broad territorial discretion in how they supervise litigation within their circuits. Thus, even if some courts may differ slightly in their review of plain error claims, reconsideration of the Second Circuit's approach is not warranted because a uniform national rule is not required for this procedural issue.

The choice of which procedural approach to adopt does not require a uniform national solution. For example, in *Ortega-Rodriguez v. United States*, 507 U.S. 234, 251 n.24 (1993), this Court recognized that uniformity among the circuits is not necessary in their approach to fugitive dismissal rules. The Court also noted "so long as all circuit rules meet the threshold reasonableness requirement ... they may vary considerably in their operation."

As a consequence, the Court declined to require a uniform rule for the determination as to when pre-appeal flight would warrant dismissal of an appeal. Instead, the Court left that question to the discretion of the "various courts of appeals." *Id.* The circuit courts should not be further constrained in their discretion to review constitutional errors for plain error.

The Relevant Pre-Enactment and Post-Enactment Conduct Was Markedly Different in the Current Case

Finally, the Second Circuit granted a retrial because, as conceded by the government, Glenn Marcus could have been convicted of Sex Trafficking and Forced Labor for acts that occurred before those statutes were ever enacted.[30]

Here, there were significant differences between the pre-enactment and post-enactment evidence. For example, Jodi claimed that she *created* the website called Slavespace.com *before* the Forced Labor statute was enacted at the end of October 2000 (Tr.134, 143). The creation of a website obviously involved considerable effort. In marked contrast, she testified that she merely uploaded photographs and clicked on certain links during the period after the statute was in effect (Tr.148-49).

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[30] Glenn Marcus has, throughout these proceedings, always maintained his innocence because of the consensual nature of the long-term relationship. Therefore, it is difficult for defense counsel to speculate whether the jurors relied on evidence elicited at trial occurring before or after the enactment of the Trafficking Victims Protection Act. Nevertheless, without waiving any of Marcus' arguments relating to the insufficient evidence, for purposes of the Court's evaluation under the Ex Post Facto Clause, it was certainly possible for the jury to base its Sex Trafficking *and* Forced Labor verdicts *solely on pre-enactment conduct.*

In addition, the record established that days *after* the Forced Labor statute went into effect *Jodi began a full-time job in an office* outside of the apartment (Tr.331-33). Therefore, there is both a possibility *and* a reasonable possibility that the jurors only credited Jodi's claim of working 8 to 10 hours a day on the website *before* the law became effective (Tr.333).

Finally, the *pre-enactment period of conduct charged in the indictment was nearly twice as long as the post-enactment phase*! A substantial number of exhibits were introduced at trial that related solely to the pre-enactment period -- and, considerable testimony was devoted to this period as well. Thus, under any approach adopted for review -- such as the Fifth Circuit, which considers when the majority of the acts charged in the offense occurred[31] -- Glenn Marcus certainly would be entitled to a new trial under those quantitative standards.[32]

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[31] *See, e.g.*, *United States v. Todd,* 735 F.2d 146, 150 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985).

[32] The Solicitor General appears only to contest the Second Circuit's grant of a new trial for the *Forced Labor* conviction (Pet. Br. 8-9). Therefore, the government is apparently in agreement with the circuit court that, regardless of what happens to the Force Labor conviction, Glenn Marcus is still entitled to a new trial on the Sex Trafficking count. In that circumstance, because of the nature of the interlocking proof and influence the evidence of one charge would have on the other, a retrial is warranted on both counts.

In sum, here, there was an error, that was plain, which affected Glenn Marcus's substantial rights. The constitutional violation also seriously affected the fairness, integrity and public reputation of the judicial proceedings. Therefore, there is no reason to disturb the decision of the court of appeals. Certainly, a miscarriage of justice would result if defendants could be subjected to criminal convictions under these facts.

No system of criminal justice can survive if its effectiveness comes to depend on its citizens' abdication, through unawareness, of their constitutional rights. This is why the doctrine of plain error achieves paramount importance. It protects citizens against the terrible consequences of such unconscious defaults.

We know from experience that illegitimate and unconstitutional practices get their first footings by silent approaches and slight deviations from established legal modes and procedures. The main means of correcting these incursions into our great established rights is by a just construction of the plain error doctrine embodied in Rule 52(b). If we were ever to confine the circuit courts' discretion so that they could not correct constitutional errors of this magnitude, this would inevitably lead to a gradual depreciation of these cherished rights. And, if that were to happen, we would all be the losers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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Respectfully submitted,

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