

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* MARCUSCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

No. 08–1341. Argued February 24, 2010—Decided May 24, 2010

Respondent Marcus was convicted of engaging in forced labor and sex trafficking between January 1999 and October 2001. On appeal, he pointed out for the first time that the federal statutes he violated did not become law until October 2000. Thus, he claimed, the indictment and evidence permitted at trial allowed a jury to convict him exclusively on the basis of preenactment conduct in violation of the *Ex Post Facto* Clause. He conceded that he had not raised this objection in the District Court, but argued that because the constitutional error was plain, his conviction must be set aside. The Second Circuit agreed and vacated the conviction. In doing so, the court held that, even in the case of a continuing offense, retrial is necessary if there is “any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct.” The court noted that this was “true even under plain error review.”

Held: The Second Circuit’s plain-error standard conflicts with this Court’s interpretation of the plain-error rule. An appellate court may recognize a “plain error that affects substantial rights,” even if that error was “not brought” to the district court’s “attention.” Fed. Rule Crim. Proc. 52(b). This Court’s cases interpret this rule such that an appellate court may, in its discretion, correct an error not raised at trial only when the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious; (3) the error affected the appellant’s substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

The standard the Second Circuit applied in this case is inconsistent with the third and fourth of these criteria. To begin, it is irreconcilable with the criterion that the error “affec[t] the appellant’s substan-

Syllabus

tial rights,” *Puckett v. United States*, 556 U. S. ___, ___. This condition requires the error to be prejudicial, meaning that there is a reasonable probability that the error affected the trial’s outcome, not that there is “*any possibility*,” however remote, that the jury could have convicted based exclusively on preenactment conduct.

Nor does this error fall within the category of “structural errors” that may “affect substantial rights” regardless of their actual impact on an appellant’s trial. *Id.*, at ___. Here, a jury instruction might have minimized or eliminated the risk that Marcus would have been convicted based solely on preenactment conduct. A reviewing court should find it no more difficult to assess the failure to give such an instruction than to assess numerous other instructional errors previously found nonstructural, see, *e.g.*, *Hedgpeth v. Pulido*, 555 U. S. ___ (*per curiam*). The Court further rejects Marcus’ argument that the error at issue should be labeled an *Ex Post Facto* Clause violation, and that all such violations should be treated as special, structural errors warranting reversal without a showing of prejudice. As an initial matter, the Government never argued that the statute that criminalized Marcus’ conduct applied retroactively, and Marcus’ claim is thus properly brought under the Due Process, and not the *Ex Post Facto*, Clause. Moreover, we see no reason why errors similar to the one at issue in this case, taken as a class, would automatically affect substantial rights without a showing of prejudice.

In any event, the Second Circuit’s “any possibility,” however remote, standard also cannot be reconciled with the criterion that “the error seriously affec[t] the fairness, integrity or public reputation of judicial proceedings.” *Puckett, supra*, at ___ (internal quotation marks omitted). Under the Second Circuit’s approach, a retrial would be required even where the evidence supporting conviction consists of a few days of preenactment conduct along with several continuous years of identical postenactment conduct. Given the tiny risk that a jury would base its conviction in these circumstances on the few preenactment days alone, such an error is most unlikely to cast serious doubt on the fairness, integrity, or public reputation of the judicial system. Pp. 3–8.

538 F. 3d 97, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, GINSBURG, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion. SOTOMAYOR, J., took no part in the consideration or decision of the case.