SUPREME COURT OF THE UNITED STATES

No. 08–1341

UNITED STATES, PETITIONER *v.* GLENN MARCUS

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

[May 24, 2010]

JUSTICE BREYER delivered the opinion of the Court.

The question before us concerns an appellate court's "plain error" review of a claim not raised at trial. See Fed. Rule Crim. Proc. 52(b). The Second Circuit has said that it must recognize a "plain error" if there is "*any possibility*," however remote, that a jury convicted a defendant exclusively on the basis of actions taken before enactment of the statute that made those actions criminal. 538 F. 3d 97, 102 (2008) *(per curiam)* (emphasis added). In our view, the Second Circuit's standard is inconsistent with this Court's "plain error" cases. We therefore reverse.

I

A federal grand jury indicted respondent Glenn Marcus on charges that he engaged in unlawful forced labor and sex trafficking between "'January 1999 and October 2001.'" *Id.,* at 100; see also 18 U. S. C. §§1589, 1591(a)(1). At trial, the Government presented evidence of his conduct during that entire period. 538 F. 3d, at 100. And a jury found him guilty of both charges. *Ibid.*

On appeal, Marcus pointed out for the first time that the statutes he violated were enacted as part of the Trafficking Victims Protection Act of 2000 (TVPA), which did not

become law until October 28, 2000. §112(a)(2), 114 Stat. 1486. Marcus noted that the indictment and the evidence presented at trial permitted a jury to convict him exclusively upon the basis of actions that he took before October 28, 2000. And for that reason, Marcus argued that his conviction violated the Constitution—in Marcus' view, the *Ex Post Facto* Clause, Art. I, §9, cl. 3. Marcus conceded that he had not objected on these grounds in the District Court. Letter Brief for Appellant in No. 07–4005–cr (CA2), p. 12. But, he said, the constitutional error is "plain," and his conviction therefore must be set aside. *Id.*, at 13.

The Government replied by arguing that Marcus' conviction was for a single course of conduct, some of which took place before, and some of which took place after, the statute's enactment date. 538 F. 3d, at 101. The Constitution, it said, does not forbid the application of a new statute to such a course of conduct so long as the course of conduct continued *after* the enactment of the statute. See, *e.g., United States* v. *Harris*, 79 F. 3d 223, 229 (CA2 1996); *United States* v. *Duncan*, 42 F. 3d 97, 104 (CA2 1994). The Government conceded that the conviction could not rest exclusively upon conduct which took place before the TVPA's enactment, but it argued that the possibility that the jury here had convicted on that basis was "'remote.'" 538 F. 3d, at 102. Hence, the Government claimed, it was highly unlikely that the judge's failure to make this aspect of the law clear (say, by explaining to the jury that it could not convict based on preenactment conduct alone) affected Marcus' "substantial rights." Letter Brief for United States in No. 07–4005–cr (CA2), p. 9. And the Government thus argued that the court should not recognize a "plain error." *Ibid.*

The Second Circuit noted that Marcus had not raised his *ex post facto* argument in the District Court. 538 F. 3d, at 102. The court also recognized that, under Circuit

precedent, the Constitution did not prohibit conviction for a "'continuing offense'" so long as the conviction rested, at least in part, upon postenactment conduct. *Id.*, at 101 (quoting *Harris, supra,* at 229). But, the court held, "even in the case of a continuing offense, if it was *possible* for the jury—wh[ich] had not been given instructions regarding the date of enactment—to convict *exclusively* on [the basis of] pre-enactment conduct, then the conviction constitutes a violation" of the *Ex Post Facto* Clause. 538 F. 3d, at 101. The court noted that this was "true even under plain error review." *Ibid.* In short, under the Second Circuit's approach, "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." *Id.,* at 102 (emphasis added).

The Government sought certiorari. And we granted the writ, agreeing to decide whether the Second Circuit's approach to "plain error" review, as we have set it forth, conflicts with this Court's interpretation of the "plain error" rule. See Fed. Rule Crim. Proc. 52(b).

II

Rule 52(b) permits an appellate court to recognize a "plain error that affects substantial rights," even if the claim of error was "not brought" to the district court's "attention." Lower courts, of course, must apply the Rule as this Court has interpreted it. And the cases that set forth our interpretation hold that an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an "error"; (2) the error is "clear or obvious, rather than subject to reasonable dispute"; (3) the error "affected the appellant's substantial rights, which in the ordinary case means" it "affected the outcome of the district court proceedings"; and (4) "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceed-

ings." *Puckett* v. *United States,* 556 U. S. ___, ___ (2009) (slip op., at 6) (internal quotation marks omitted); see also *United States* v. *Olano*, 507 U. S. 725, 731–737 (1993); *Johnson* v. *United States,* 520 U. S. 461, 466–467 (1997); *United States* v. *Cotton*, 535 U. S. 625, 631–632 (2002).

In our view, the Second Circuit's standard is inconsistent with the third and the fourth criteria set forth in these cases. The third criterion specifies that a "plain error" must "affec[t]" the appellant's "substantial rights." In the ordinary case, to meet this standard an error must be "prejudicial," which means that there must be a reasonable probability that the error affected the outcome of the trial. *Olano, supra,* at 734–735 (stating that, to satisfy the third criterion of Rule 52(b), a defendant must "normally" demonstrate that the alleged error was not "harmless"); see also *United States* v. *Dominguez Benitez*, 542 U. S. 74, 83 (2004). The Court of Appeals, however, would notice a "plain error" and set aside a conviction whenever there exists "any possibility, *no matter how unlikely*, that the jury could have convicted based exclusively on preenactment conduct." 538 F. 3d, at 102 (emphasis added). This standard is irreconcilable with our "plain error" precedent. See, *e.g., Olano, supra,* at 734–735.

We recognize that our cases speak of a need for a showing that the error affected the "outcome of the district court proceedings" in the "ordinary case." *Puckett,* 556 U. S., at ___ (slip op., at 6) (internal quotation marks omitted). And we have noted the possibility that certain errors, termed "structural errors," might "affect substantial rights" regardless of their actual impact on an appellant's trial. See *id.,* at ___ (slip op., at 11) (reserving the question whether "structural errors" automatically satisfy the third "plain error" criterion); *Cotton*, *supra*, at 632 (same); *Johnson, supra*, at 469 (same); *Olano, supra,* at 735 (same). But "structural errors" are "a very limited class" of errors that affect the "'framework within which

the trial proceeds,'" *Johnson, supra,* at 468 (quoting *Arizona* v. *Fulminante*, 499 U. S. 279, 310 (1991)), such that it is often "difficul[t]" to "asses[s] the effect of the error," *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 149, n. 4 (2006). See *Johnson, supra,* at 468–469 (citing cases in which this Court has found "structural error," including *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (total deprivation of counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (lack of an impartial trial judge); *McKaskle* v. *Wiggins*, 465 U. S. 168 (1984) (right to self-representation at trial); *Waller* v. *Georgia*, 467 U. S. 39 (1984) (violation of the right to a public trial); and *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993) (erroneous reasonable-doubt instruction)). We cannot conclude that the error here falls within that category.

The error at issue in this case created a risk that the jury would convict respondent solely on the basis of conduct that was not criminal when the defendant engaged in that conduct. A judge might have minimized, if not eliminated, this risk by giving the jury a proper instruction. We see no reason why, when a judge fails to give such an instruction, a reviewing court would find it any more difficult to assess the likely consequences of that failure than with numerous other kinds of instructional errors that we have previously held to be non-"structural"—for example, instructing a jury as to an invalid alternative theory of guilt, *Hedgpeth* v. *Pulido*, 555 U. S. ___ (2008) *(per curiam)*, omitting mention of an element of an offense, *Neder* v. *United States*, 527 U. S. 1 (1999), or erroneously instructing the jury on an element, *Yates* v. *Evatt*, 500 U. S. 391 (1991); *Carella* v. *California*, 491 U. S. 263 (1989) *(per curiam); Pope* v. *Illinois*, 481 U. S. 497 (1987); *Rose* v. *Clark*, 478 U. S. 570 (1986).

Marcus argues that, like the Second Circuit, we should apply the label "*Ex Post Facto* Clause violation" to the error in this case, and that we should then treat all errors

so labeled as special, "structural," errors that warrant reversal without a showing of prejudice. See Brief for Respondent 27–29. But we cannot accept this argument. As an initial matter, we note that the Government has never claimed that the TVPA retroactively criminalizes preenactment conduct, see Brief for United States 16, and that Marcus and the Second Circuit were thus incorrect to classify the error at issue here as an *Ex Post Facto* Clause violation, see *Marks* v. *United States*, 430 U. S. 188, 191 (1977) ("The *Ex Post Facto* Clause is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government" (citation omitted)). Rather, if the jury, which was not instructed about the TVPA's enactment date, erroneously convicted Marcus based exclusively on noncriminal, preenactment conduct, Marcus would have a valid due process claim. Cf. *Bouie* v. *City of Columbia*, 378 U. S. 347, 353–354 (1964) (applying Due Process Clause to *ex post facto* judicial decisions). In any event, however Marcus' claim is labeled, we see no reason why this kind of error would automatically "affect substantial rights" without a showing of individual prejudice.

That is because errors similar to the one at issue in this case—*i.e.*, errors that create a risk that a defendant will be convicted based exclusively on noncriminal conduct—come in various shapes and sizes. The kind and degree of harm that such errors create can consequently vary. Sometimes a proper jury instruction might well avoid harm; other times, preventing the harm might only require striking or limiting the testimony of a particular witness. And sometimes the error might infect an entire trial, such that a jury instruction would mean little. There is thus no reason to believe that *all or almost all* such errors *always* "affec[t] the framework within which the trial proceeds," *Fulminante*, *supra*, at 310, or "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for

determining guilt or innocence," *Neder, supra,* at 9 (emphasis deleted).

Moreover, while the rights at issue in this case are important, they do not differ significantly in importance from the constitutional rights at issue in other cases where we have insisted upon a showing of individual prejudice. See *Fulminante, supra,* at 306–307 (collecting cases). Indeed, we have said that "if 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 not "structural errors." *Rose, supra,* at 579. No one here denies that defendant had counsel and was tried by an impartial adjudicator.

In any event, the Second Circuit's approach also cannot be reconciled with this Court's fourth "plain error" criterion, which permits an appeals court to recognize "plain error" only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson,* 520 U. S., at 467 (internal quotation marks omitted). In cases applying this fourth criterion, we have suggested that, in most circumstances, an error that does not affect the jury's verdict does not significantly impugn the "fairness," "integrity," or "public reputation" of the judicial process. *Ibid.* (internal quotation marks omitted); *Cotton*, 535 U. S., at 633. The Second Circuit's "any possibility, no matter how unlikely" standard, however, would require finding a "plain error" in a case where the evidence supporting a conviction consisted of, say, a few days of preenactment conduct along with several continuous years of identical postenactment conduct. Given the tiny risk that the jury would have based its conviction upon those few preenactment days alone, a refusal to recognize such an error as a "plain error" (and to set aside the verdict) is most unlikely to cast serious doubt on the "fairness," "integrity," or "public reputation" of the judicial system.

We do not intend to trivialize the claim that respondent here raises. Nor do we imply that the kind of error at issue here is unimportant. But the rule that permits courts to recognize a "plain error" does not "remove" "seriou[s]" errors "from the ambit of the Federal Rules of Criminal Procedure." *Johnson*, *supra*, at 466. Rather, the "plain error" rule, as interpreted by this Court, sets forth criteria that a claim of error not raised at trial must satisfy. The Second Circuit's rule would require reversal under the "plain error" standard for errors that do not meet those criteria. We can find no good reason to treat respondent's claim of error differently from others. See *Puckett,* 556 U. S., at ___ (slip op., at 14) (reviewing the Government's violation of a plea agreement for "plain error"); *Cotton, supra,* at 631–632 (reviewing an indictment's failure to charge a fact that increased defendant's statutory maximum sentence for "plain error"); *Johnson, supra,* at 464 (reviewing the failure to submit an element of the crime to the jury for "plain error"). Hence we must reject the Second Circuit's rule.

For these reasons, the judgment of the Court of Appeals is reversed. As the Court of Appeals has not yet considered whether the error at issue in this case satisfies this Court's "plain error" standard—*i.e.*, whether the error affects "substantial rights" and "the fairness, integrity, or public reputation of judicial proceedings"—we remand the case to that court so that it may do so.

It is so ordered.

JUSTICE SOTOMAYOR took no part in the consideration or decision of this case.