No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL BENANTI, Petitioner,

- vs -

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION OF MICHAEL BENANTI FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A jury convicted petitioner Michael Benanti of a Hobbs Act conspiracy and aiding and abetting charges related to attempted armed bank extortion, armed bank extortion, carjacking, kidnapping, and related firearms charges. On direct appeal, he argued in part that the district court should have excluded much of the evidence at trial because the police violated the Fourth Amendment, and because admission of the evidence violated Fed. Evid. R. 403.

The United States Court of Appeals for the Sixth Circuit rejected Mr. Benanti's appeal. In so doing, it decided important federal questions in a way that conflicts with relevant decisions of this Court. The court of appeals ignored the nexus requirement for search warrant requests complying with the Fourth Amendment. It also ignored the law governing Fed. Evid. R. 403. The court of appeals ruled that the district had indeed erred by allowing testimony the prejudice of which "overwhelmed whatever minimal probative value the testimony had." App. 8a. The court of appeals nevertheless allowed the rule's prohibition to be negated by other overwhelming evidence of guilt in violation of this Court's decisions and other federal law governing harmless error and the related plain-error test. Thus, this petition presents the following question:

1. Whether the Fourth Amendment requires the affidavit supporting a search warrant to show a nexus between the criminal activity at issue and the place to be searched.

2. Whether a violation of a defendant's substantial rights due to unfair prejudice caused by the admission of evidence in violation of Fed. Evid. R. 403 can be deemed to be harmless in light of other evidence of guilt.

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PETITION OF MICHAEL BENANTI FOR A WRIT OF CERTIORARI

Michael Benanti petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

REFERENCES TO OPINIONS BELOW

The opinion of the United States Court of Appeals, App., *infra*, 1a-9a, is not officially reported, but can be obtained online at *United States v. Benanti*, ___ Fed. Appx. ___, 2018 WL 6068569 (6th Cir. Nov. 20, 2018), *reh'g en banc denied*, (Jan. 3, 2019). A relevant earlier opinion from the district court, App., *infra*, 10a-54a, is not officially reported either, but can be obtained online at *United States v. Benanti*, No. 3:15-CR-177, 2016 WL 7079937 (E.D. Tenn. Dec. 5, 2016).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on November 20, 2018. App. 1a-9a. On January 3, 2019, the court denied a rehearing en banc. App. 55a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and federal rule provisions, specifically the Fourth Amendment of the United States Constitution, 28 U.S.C. § 2111, Fed. Evid. R. 403, and Fed. Crim. R. 52, are reprinted in the appendix to this petition. App., *infra*, 56a-59a.

STATEMENT OF THE CASE

On April 19, 2016, a grand jury handed down a superseding indictment charging Michael Benanti with a Hobbs Act conspiracy and other various violations of federal criminal law, including aiding and abetting related to attempted armed bank extortion, armed bank extortion, carjacking, kidnapping, and related firearms violations. Mr. Benanti's pretrial filings included three motions to suppress evidence.

In the first motion, Mr. Benanti argued that his arrest on November 25, 2015 was illegal, as there was no probable cause to arrest him. In the second motion, he argued that the search warrant for a two-story house located at 380 Allison Drive in Maggie Valley, North Carolina was not supported by probable cause. In the third motion, he argued that the constitutional infirmities listed above tainted all other warrants, thus requiring suppression of evidence obtained in those subsequent warrants. This petition concerns the second motion.

An evidentiary hearing was held on these and other motions on June 2, 2016.

As to the motion to suppress the search of the house at 380 Allison Drive, the government did not present evidence, but argued the four corners of the affidavit in support of the warrant.

On November 30, 2016, the district court denied the motion to suppress the illegal arrest. On December 5, 2016, the district court denied the motion to suppress the search of the house at 380 Allison Drive and the motion to suppress all subsequent search warrants. App. 10a-54a. The district court found that the search warrant affidavit demonstrated a sufficient nexus between evidence of the alleged crimes and the target location. "A complex nexus does not automatically amount to a vague or generalized connection." App. 25a.

Mr. Benanti proceeded to trial. On February 14, 2017, a jury found him guilty on all counts of the superseding indictment. On July 18, 2017, the district court sentenced Mr. Benanti to four consecutive life sentences and 155 years to be served consecutively, five years of supervised release, and a restitution obligation of $397,788.88.

Mr. Benanti timely appealed his conviction pursuant to 28 U.S.C. § 1291. He argued four grounds for the appeal: the unconstitutionality of the search of the house at 380 Allison Drive; the unconstitutionality of his arrest; the district court's failure to hold a hearing on his new trial motion; and the unlawful admission of other acts evidence during trial in violation of Fed. Evid. R. 404(b).

On November 20, 2018, the court of appeals affirmed Mr. Benanti's convictions. App. 1a-9a. In its one-paragraph analysis on probable cause to search the house at 380 Allison Drive, the court of appeals failed to follow this Court's substantial basis test. App. 5a. That test requires the reviewing court to determine whether the magistrate judge responsible for issuing the search warrant had a substantial basis for concluding that a search would uncover evidence of wrongdoing. *Illinois v. Gates*, 462 U.S. 213, 236-37 (1983). Instead, the court of appeals created its own "ample basis" test without referring to any of the law of this Court.

The court of appeals also failed to follow this Court's nexus test. App., *id.* That test requires the reviewing court to determine whether there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought. *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978). Instead of following this Court's decisions instructing lower courts to view search warrants as being directed to places and things rather than to persons, the court of appeals reversed this logic in conflict with those decisions.

The court of appeals agreed that other bad acts evidence admitted during trial violated Fed. Evid. R. 403 causing Mr. Benanti unfair prejudice. "This prejudice overwhelmed whatever minimal probative value the testimony had. The admission of this testimony violated Rule 403." App. 8a. Then, in conflict with this Court's decisions and other federal law, the court of appeals deemed these violations to be harmless in light of other evidence of guilt, even though the violations of Rule 403 meant that Mr. Benanti's substantial rights had been affected. The court of appeals

then confused the harmless-error doctrine with plain error, again ignoring the fact that the violations of Rule 403 affected substantial rights. In short, the court below applied the harmless-error doctrine in a situation where the law of this Court and federal statutes prohibit its application.

On January 3, 2019, the court of appeals denied Mr. Benanti's petition for rehearing en banc. App. 55a. This timely petition followed.

REASONS FOR GRANTING THE WRIT

A. The Court Of Appeals Decided An Important Federal Question Regarding The Nexus Requirement For Search Warrant Affidavits In A Way That Conflicts With Relevant Decisions Of This Court.

In several paragraphs, the court of appeals dismissed Mr. Benanti's challenge of the search of a new two-story, three-bedroom house that was part of the Maggie Valley Country Club Estates located at 380 Allison Drive in Maggie Valley, North Carolina, a small, scenic resort town near the North Carolina/Tennessee border. App. 5a. Even though the court of appeals was reviewing de novo the legal question of whether the search warrant affidavit, App. 61a-70a, established probable cause to conduct the search, *United States v. Brooks*, 594 F.3d 488, 492 (6th Cir. 2010), it never cited the Fourth Amendment or any law from this Court. In this lapse, the decision of the court of appeals regarding the nexus requirement for search warrant affidavits conflicts with relevant decisions—indeed two seminal decisions regarding search warrant affidavits—of this Court.

Any analysis of the legality of the search of the house must begin with the Fourth Amendment of the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court reaffirmed the probable cause standard it had articulated over a century and a half earlier in *Locke v. United States*, 7 Cranch. 339, 448 (1813).

> "[T]he term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation. . . . It imports a seizure made under circumstances which warrant suspicion." More recently, we said that "the ***quanta*** . . . of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. *Brinegar* [*v. United States*], . . . 338 U.S. [160,] . . . 173 . . . [(1949)]. Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." *Spinelli* [*v. United States*], . . . 393 U.S. [410,] . . . 419 [(1969)].

Gates, 462 U.S. at 235 (emphasis in original). In *Gates*, the Court also articulated the standard by which a court is to review a search warrant affidavit.

> [T]he traditional standard for review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a "***substantial basis*** for . . . conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. *Jones v. United States*, 362 U.S. 257, 271 . . . (1960). See *United States v. Harris*, 403 U.S. 573, 577–583 . . . (1971).

Gates, 462 U.S. at 236-37 (footnote omitted, emphasis added).

More than just a substantial basis for concluding the search would uncover evidence of wrongdoing, however, is needed. A link or connection—now commonly referred to as a nexus, *see*, *e.g.*, *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004 (en banc)—needs to be made between the evidence of the crime sought and the particular place to be searched.

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is ***a fair probability that contraband or evidence of a crime will be found in a particular place***. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. *Jones v. United States*, *supra*, 362 U.S., at 271.

Gates, 462 U.S. at 238-39 (emphasis added).

Five years before its decision in *Gates*, the Court had elaborated on the nexus requirement. In *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), the Court held the Fourth Amendment does not prevent a state from issuing a warrant to search for evidence simply because the owner or possessor of the place to be search is not reasonably suspected of criminal involvement. It emphasized a key tenet of Fourth Amendment law that the court of appeals below disregarded, namely, that search warrants are proper when they are directed at places, not persons.

> In *Camara v. Municipal Court*, 387 U.S. 523, 534–535 . . . (1967), we indicated that in applying the "probable cause" standard "by which a particular decision to search is tested against the constitutional mandate of reasonableness," it is necessary "to focus upon the governmental interest which allegedly justifies official intrusion" and that in criminal investigations a warrant to search for recoverable items is reasonable "only when there is 'probable cause' to believe that they will be uncovered in a particular dwelling." Search warrants are not directed at

> persons; they authorize the search of "place[s]" and the seizure of "things," and as a constitutional matter they need not even name the person from whom the things will be seized. *United States v. Kahn*, 415 U.S. 143, 155 n. 15 . . . (1974).

Zurcher, 436 U.S. at 554-55. This focus on the place and not the person matters in ascertaining whether a nexus has been established between the evidence of a crime to be sought and the place to be searched.

> The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought.

Zurcher, 436 U.S. at 556 (footnote omitted). The nexus requirement is another key safeguard of Fourth Amendment law the court of appeals overlooked.

As noted above, the court of appeals rejected Mr. Benanti's challenge of the search of a two-story, three-bedroom house located at 380 Allison Drive in Maggie Valley, North Carolina without citing the Fourth Amendment or any decisions from this Court. App. 5a. That in and of itself would not have been a problem—but for the fact that the court of appeals below failed to heed the Court's admonitions that (i) the reviewing court must find the magistrate judge had a substantial basis for concluding a search would uncover evidence of wrongdoing, and (ii) there is reasonable cause to believe that the specific things to be searched for and seized are located on the particular property to which entry is sought. On both requirements the decisions the court of appeals made conflict with decisions of this Court.

First, the court of appeals never applied—indeed never even mentioned—the substantial basis test for reviewing the magistrate judge's issuance of the search warrant. Its perfunctory analysis consisted of the following:

> Here, the affidavit summarized the entirety of the agents' investigation: the two abductions of bank employees in Knoxville, the September 3rd chase in a nearby area, Benanti's arrest shortly after leaving the cabin, the surveillance tools in his possession, and the crumpled note listing the names and addresses of three bank employees. These facts provided ample basis to search the cabin.

App. 5a.

In its haste, the court of appeals got many of the facts wrong. For example, the search warrant affidavit identifies 380 Allison Drive (App. 57a) as the target location; however, the search warrant has two addresses for the target location, 280 Allison Drive (App. 72a) and 380 Allison Drive (App. 71a). The court of appeals referred to the premises to be searched as a cabin, yet the search warrant never uses that word to describe the target location. It describes the target location as "a two story single family dwelling," App. 72a, which is what in fact it is. Mr. Benanti did not have surveillance tool*s* in his possession, but rather a single monocular scope. App. 68a. The crumpled note did not, according to the affidavit, list the names and addresses of three bank employees. Rather, it contained "addresses later identified as bank locations, and the names of individuals later confirmed to be bank employees." App, *id.* The court of appeals then used its own standard by concluding that "[t]hese facts provided ample basis to search the cabin." App. 5a. It never explained whether its newly created "ample basis" test was the same as or different from the Court's substantial basis test. *Gates*, *supra*, 462 U.S. at 236, 238; *Jones*,

supra, 362 U.S. at 271. And this despite some of the facts in the lower court's analysis being wrong.

Getting the facts right is of critical importance. The ten-page search warrant affidavit at issue here might not be the "bare bones" type the Court cautioned against in *Illinois v. Gates*, 462 U.S. at 239. Nevertheless, whatever type of review the court of appeals undertook in this case, it was still limited to the four corners of the affidavit. "When determining whether an affidavit establishes probable cause, we look only to the four corners of the affidavit; information known to the officer but not conveyed to the magistrate is irrelevant." *United States v. Brooks*, *supra*, 594 F.3d at 492 (citing *United States v. Pinson*, 321 F.3d 558, 565 (6th Cir. 2003)). Assuming the court of appeals sought to heed its own law, in this instance it failed to do so with the factual accuracy the law requires.

Second, the court of appeals never mentioned, let alone applied, the nexus requirement that ensures the specific things to be searched for and seized are located on the particular property to which entry is sought. *Zurcher*, 436 U.S. at 556. The nexus requirement ensures that search warrants target locations, not people. The court of appeals reversed that standard in conflict with the Court's decisions.

The facts the court of appeals identified (App. 5a)—two abductions of bank employees in Knoxville, Tennessee, a car chase on September 3, 2015 "in a nearby area," Mr. Benanti's arrest shortly after leaving the target location, the surveillance tool in his possession, and the crumpled note listing bank locations and the names of three bank employees—may arguably serve to tie an individual to a past or future

bank robbery. These facts do nothing, however, to create a nexus between evidence of past criminality and the target location. It would be rather remarkable if they had, since some of the facts the court of appeals identified from the search warrant affidavit describe events that occurred months before the target location was to be occupied on November 16, 2015. App. 66a.

For example, according to the search warrant affidavit, the first abduction occurred on April 28, 2015 (App. 62a) and the second occurred on July 7, 2015 (App. 63a). The car chase occurred on September 3, 2015 (App. 66a). Other times, the court of appeals simply got the facts wrong. For example, the court of appeals stated that the chase occurred "in a nearby area." Nothing in the affidavit says that, but simply that "the North Carolina State Highway Patrol was involved in a vehicle pursuit with a vehicle determined to be stolen from New Hampshire." App. 66a.

The remaining facts the court of appeals highlighted fail to create any nexus whatsoever between evidence of past bank robberies and the target location. The court of appeals assumed Mr. Benanti had resided at the target location. This assumption, however, cannot be squared with the information contained within the four corners of the affidavit. This assumption presumably rests on the search warrant affidavit's caption "In the Matter of the Search of Residence Located 380 Allison Drive, Maggie Valley, North Carolina" (though the affidavit then refers to the target location merely as "the premises"), App. 61a, and the search warrant's similar caption "In the Matter of the Search of Residence Located at 380 Allison Drive,

Maggie Valley, North Carolina" and reference to the target location as "[t]he residence," App. 71a, 72a.

Fact is, the search warrant affidavit never indicates that Mr. Benanti—or anyone else for that matter—ever resided in the two-story house at 380 Allison Drive. According to the affidavit, investigators learned from an employee of Premier Vacation Rentals, an enterprise that rents out houses in Maggie Valley, that "two white males in their 30s began renting cabins from PVR on June 19, 2015. The same two males stayed at 124 Rebel Ridge Road from July 27, 2015-October 25, 2015. The cabin rental was extended to November 15, 2015. The employee said the two males placed a deposit on 'Southern Comfort' to be occupied on November 16, 2015, which has been identified as a nickname for the TARGET LOCATION, another property managed by PVR." App. 66a-67a. The affidavit says nothing about whether the house at 380 Allison Drive was ever rented or ever occupied by the same two males who stayed at the 124 Rebel Ridge Road house.

The affidavit continues by explaining surveillance that law enforcement initiated, but this portion of the affidavit similarly does nothing to create a nexus between evidence of criminality and the target location. The FBI obtained consent to search the house at 124 Rebel Ridge Road, and "processed the scene for trace evidence." App. 67a. The FBI then notified the Haywood County Sheriff's Office "about their actions and the unfolding investigation. HCSO agreed to conduct physical surveillance on the TARGET LOCATION ***when available*** in order to determine if there were any new vehicles arriving or if probable cause for arrest could

take place." App., *id*. (emphasis added). HCSO was apparently not "available" much of the time, since the affidavit is devoid of any information regarding anyone actually living in the house at the target location.

The only substantive surveillance information the affidavit contains is in paragraphs 26 and 27. On November 24, 2015, HCSO investigators observed a maroon Toyota Highlander with a stolen South Carolina license plate leave the target location driven by a white male, who "drove into Maggie Valley and stopped at a gas station. Investigators ceased surveillance after it was returning to the TARGET LOCATION." App 67a. In other words, no one ever observed anyone leaving or entering the house at the target location. According to the affidavit, the surveillance that day did not continue to the point where anyone even saw the car actually return to the target location. On the following day, the HCSO surveillance team "observed a gray Nissan Pathfinder, occupied by two white males leaving the TARGET LOCATION." App. 67a. Again, no one ever saw anyone leave the house at the target location. Further, no one ever saw anyone living in the house.

Beyond the short set of facts quoted above from the opinion from the court below, App. 5a, nothing in the search warrant affidavit explains how a nexus might have been established, and the court of appeals provided no analysis in this regard. The fact that comes closest to linking Mr. Benanti to the target location is his arrest after the vehicle he is riding in leaves the premises. This fact, though, does nothing to clarify the absence of information in the affidavit as to whether Mr. Benanti ever stepped foot inside the target location. As noted above, search warrants are linked

to places, not people. The failure by the court of appeals to acknowledge or analyze in any way the nexus requirement conflicts with this Court's decisions that lay out this important Fourth Amendment safeguard.

B. The Court Of Appeals Decided An Important Federal Question Regarding Substantial Rights In A Way That Conflicts With Relevant Decisions Of This Court.

In the fourth part of its opinion, the court of appeals addressed Mr. Benanti's argument that "the district court erred by admitting evidence that he had frequented a strip club, cheated on his girlfriend, embezzled from his business, and engaged in fraudulent schemes that, he says, were unrelated to the bank robberies." App. 6a. The court of appeals agreed with Mr. Benanti's argument. It concluded that "[much of the detail about Benanti's affair had nothing to do with either asserted purpose. And ***that testimony was unfairly prejudicial***: it described in great detail his liaisons with a stripper whom he paid for sexual favors, while cheating on a girlfriend who was soon to die. ***This prejudice overwhelmed whatever minimal probative value the testimony had. The admission of this testimony violated Rule 403***." App. 7a-8a (emphasis added). Fed. Evid. R. 403 provides:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: ***unfair prejudice***, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Fed. Evid. R. 403 (emphasis added).

The next step the court of appeals took—literally the next sentence of its opinion—conflicted with relevant decisions of this Court and other federal law. It

held that, although the admitted evidence at issue violated Fed. Evid. R. 403 by causing unfair prejudice, that error "did not affect Benanti's substantial rights" because of the harmless-error doctrine. App. 8a. "[T]hat error (plain or not) did not affect Benanti's substantial rights. *See United States v. Ataya*, 884 F.3d 318, 323 (6th Cir. 2018). The government's evidence against Benanti was overwhelming, including not least the testimony of his confederate, Witham." App., *id*.

A violation of Fed. Evid. R. 403 for unfair prejudice is by definition prejudicial and, thus, affects substantial rights. In this instance, the harmless-error doctrine has no role to play. The court of appeals tried to have it both ways by applying the harmless-error doctrine to nullify a violation of Mr. Benanti's substantial rights. By applying the harmless-error doctrine in this way, the decision by the court of appeals conflicts with relevant decisions of this Court, a federal statute, and a federal rule of criminal procedure.

This Court addressed the meaning of Rule 403's "unfair prejudice" standard in *Old Chief v. United States*, 519 U.S. 172 (1997). There, the Court considered the unfair prejudice created by evidence of the names and natures of the defendant's prior offenses.

> The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. See generally 1 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence ¶ 403[03] (1996) (discussing the meaning of "unfair prejudice" under Rule 403). So, the Committee Notes to Rule 403 explain, "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an

> emotional one." Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C.App., p. 860.

Old Chief, 519 U.S. at 180.

This is the same concept the Court articulated in *United States v. Olano*, 507 U.S. 725 (1993), less than four years earlier where it defined "substantial rights."

> This is the same language ["affect substantial rights"] employed in Rule 52(a), and in most cases it means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings. See, *e.g.*, *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255–257 . . . (1988); *United States v. Lane*, 474 U.S. 438, 454–464 . . . (1986) (Brennan, J., concurring in part and dissenting in part); *Kotteakos v. United States*, 328 U.S. 750, 758–765 . . . (1946).

Id., 507 U.S. at 734. The Court echoed this standard in subsequent decisions. *See*, *e.g.*, *United States v. Marcus*, 560 U.S. 258, 262 (2010) ("[i]n the ordinary case, to meet this standard ["affect substantial rights"] an error must be 'prejudicial,' which means that there must be a reasonable probability that the error affected the outcome of the trial") (citing *Olano*, *supra*, 507 U.S. at 734-35; *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)). *See also Puckett v. United States*, 556 U.S. 129, 133-34 (2009) (holding that the plain-error test applies to a forfeited claim, and affirming the opinion below that defined "affected his substantial rights" as "caused him prejudice").

The Court in *Olano* cautiously noted the limits of its holding.

> We need not decide whether the phrase "affecting substantial rights" is always synonymous with "prejudicial." See generally *Arizona v. Fulminante*, 499 U.S. 279, 310 . . . (1991) (constitutional error may not be found harmless if error deprives defendant of the "'basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment

> may be regarded as fundamentally fair'") (quoting *Rose v. Clark*, 478 U.S. 570, 577–578 . . . (1986)). There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed. Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice. Normally, although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the "affecting substantial rights" prong of Rule 52(b).

Olano, 507 U.S. at 735.

Federal law has long recognized that the harmless-error doctrine can be applied only so long as substantial rights are ***not*** violated. For example, 28 U.S.C. § 2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which ***do not affect the substantial rights*** of the parties.

28 U.S.C. § 2111 (emphasis added).

This law is mirrored in Fed. Crim. R. 52(a), which provides:

> (a) Harmless Error. Any error, defect, irregularity, or variance that ***does not affect substantial rights*** must be disregarded.

Fed. Crim. R. 52(a) (emphasis added).

The decision of the court of appeals to use the harmless-error doctrine to nullify a violation of substantial rights is the very error this Court warned of in *Olano*.

> While Rule 52(a) precludes error correction only if the error "does ***not*** affect substantial rights" (emphasis added), Rule 52(b) authorizes no remedy unless the error does "affec[t] substantial rights." See also Note, Appellate Review in a Criminal Case of Errors Made Below Not Properly Raised and Reserved, 23 Miss.L.J. 42, 57 (1951) (summarizing existing law) ("The error must be real and such that it probably influenced the verdict ...").

Olano, 507 U.S. at 735. In other words, under this Court's decisions, a reviewing tribunal is not permitted to use the harmless-error doctrine to "correct" an error when that error affects substantial rights. It is the first part of the quotation above that the court of appeals violated here: it allowed error correction via the harmless-error doctrine where the error affected substantial rights—something federal law prohibits.

By reverting to plain-error review in the last paragraph of its opinion relevant to this point, the court of appeal does not resolve the conflict with decisions from this Court, but instead makes matters worse. "Whether properly admitted or not, that [bad-acts] evidence made no difference to the outcome of Benanti's trial, given the government's other evidence of guilt. *See*, *e.g.*, *United States v. Stephens*, 549 F.3d 459, 464 (6th Cir. 2008). Benanti therefore is not entitled to relief on these grounds." App. 8a. This holding jumbles the harmless-error doctrine with plain-error review.

Fed. Crim. R. 52(b), "the mirror image of Rule 52(a)," *Marcus*, *supra*, 560 U.S. at 270 (Stevens, J., dissenting), provides:

> (b) Plain Error. A plain error ***that affects substantial rights*** may be considered even though it was not brought to the court's attention.

Fed. Crim. R. 52(b) (emphasis added). The plain-error doctrine has four requirements: an error or defect that has not been intentionally relinquished or abandoned; a legal error that is clear or obvious; an error that has affected the appellant's substantial rights; and, if these three prongs are satisfied, the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Puckett v. United States*, *supra*, 556 U.S. at 135 (2009) (citations and quotations

omitted). The main difference as to substantial rights in the application of the harmless-error doctrine (Fed. Crim. R. 52(a)) or of plain-error review (Fed. Crim. R. 52(b)) is that the burden of persuasion shifts from the government to the defendant. *United States v. Dominguez Benitez*, *supra*, 542 U.S. at 82 n.8 (citing *Olano*, *supra*, 507 U.S. at 734-35).

The plain-error approach used by the court of appeals in this instance conflicts with this Court's decisions in at least three ways. First, the court of appeals never engaged in the four-prong analysis plain-error review requires. *See Puckett*, *id*. It instead short-circuited this analysis by finding harmless error due to "the government's other evidence of guilt." App 8a. Second, it again overlooked the fact that the erroneously admitted evidence caused unfair prejudice by operation of Fed. Evid. R. 403, which in turn affected Mr. Benanti's substantial rights. *See Old Chief*, *supra*, 519 U.S. at 180. It also never considered the shift in the burden of persuasion once the analysis of substantial rights shifts to plain-error review. *Dominguez Benitez*, *supra*, 542 U.S. at 82 n.8. Third, it applied the harmless-error doctrine in a context—the error affected substantial rights—where this Court's decisions and other federal law prohibit it from doing so. *See Olana*, *supra*, 507 U.S. at 734-35; *Dominguez Benitez*, *supra*, 542 U.S. at 80; Fed. Crim. R. 52(a).

To support its analysis of erroneously admitted evidence that causes unfair prejudice under Fed. Evid. R. 403, the court of appeals cited *United States v. Ataya*, *supra*, 884 F.3d at 323, and *United States v. Stephens*, *supra*, 549 F.3d at 464. Neither resolves the conflicts created with this Court's decisions.

In *Ataya*, the court of appeals reversed a conviction by way of a plea agreement where the district court failed to inform the defendant of potential immigration consequences. *Ataya* quotes from this Court's opinions in *United States v. Olano* and *United States v. Dominguez Benitez* for the law on substantial rights. The court of appeals, however, neither followed that law here nor even examined how the unfair prejudice created by a violation of Fed. Evid. R. 403 affects substantial rights.

In *Stephens*, the court of appeals held that, during a trial for distribution of powder cocaine and crack cocaine, the admission of the defendant's prior conviction for the distribution of powder cocaine was not reversible error. The portion of the opinion the court of appeals cited included two cases from this Court. The first case, *Kotteakos v. United States*, 328 U.S. 750 (1946), addressed the harmless error statute, which was formerly embodied at now repealed section 269 of the Judicial Code, former 28 U.S.C. § 391. Like Fed. Crim. R. 52(a), that former statute addressed only those errors that did not affect substantial rights. The second case, *Johnson v. United States*, 520 U.S. 461 (1997), followed the four-prong plain-error analysis discussed above, which the court of appeals below did not follow.

C. The Questions Presented Warrant The Court's Review.

The first question—whether a search warrant affidavit must show a nexus between the criminal activity at issue and the place to be searched—reflects the importance of Fourth Amendment safeguards and the reason why the Court has never authorized shortcuts in judicial review of those safeguards. Especially in an era when advances in technology might tempt us to ignore the physical and

geographic limitations placed on physical searches, this case presents the Court with a propitious opportunity to provide a timely reminder to the lower courts that the Fourth Amendment safeguards are timeless protections on illegal searches and seizures. Our Constitution requires no less.

In this instance, the court of appeals failed to follow one of the most important safeguards defining our Fourth Amendment protections. The nexus test requires the reviewing court to determine whether there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought. No shortcuts are allowed for good reason. Completely ignoring the nexus requirement—an unwarranted byproduct of the lower court's truncated Fourth Amendment analysis—is too great a departure from this Court's jurisprudence to be ignored.

Moreover, the Court has been clear that search warrants are directed to places and things rather than to persons. Similar to the nexus requirement, this Fourth Amendment safeguard arises out the amendment's very language, and ensures a consistent, orderly procedure by which law enforcement obtains permission to search particular places for evidence of criminality with appropriate neutral judicial oversight. No court should be permitted to reverse the logic of this requirement, as was done by the court of appeals in this instance.

The second question—whether a violation of a defendant's substantial rights due to unfair prejudice caused by the admission of evidence in violation of Fed. Evid. R. 403 can be deemed to be harmless in light of other evidence of guilt—lands in an

area long seeded with confusion. Justice Stevens's admonitions in this regard should be heeded. In *United States v. Marcus*, 560 U.S. 258 (2010), the Court remanded because the lower court there had devised a plain-error test of its own to assess substantial rights. In dissent, Justice Stevens wrote:

> The Court does not engage the merits of that judgment, but instead remands to the Court of Appeals to apply the test we have devised for evaluating claims of "plain error." That test requires lower courts to conduct four separate inquiries, each of which requires a distinct form of judgment and several of which have generated significant appellate-court dissensus; the test may also contain an exception for "structural errors," a category we have never defined clearly. With great concision, the Court manages to summarize all of these moving parts in about five pages. *Ante*, at 2164 – 2167.
>
> Yet the language of Rule 52(b) is straightforward. It states simply: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." This is the mirror image of Rule 52(a), which instructs courts to disregard any error "that does not affect substantial rights." The Federal Rules thus set forth a unitary standard, which turns on whether the error in question affected substantial rights (either in a particular defendant's case or in the mine run of comparable cases), and they leave it to judges to figure out how best to apply that standard.
>
> In our attempt to clarify Rule 52(b), we have, I fear, both muddied the waters and lost sight of the wisdom embodied in the Rule's spare text. . . . This Court's ever more intensive efforts to rationalize plain-error review may have been born of a worthy instinct. But they have trapped the appellate courts in an analytic maze that, I have increasingly come to believe, is more liable to frustrate than to facilitate sound decisionmaking.
>
> The trial error at issue in this case undermined the defendant's substantial rights by allowing the jury to convict him on the basis of an incorrect belief that lawful conduct was unlawful, and it does not take an elaborate formula to see that. Because, in my view, the Court of Appeals properly exercised its discretion to remedy the error and to order a retrial, I respectfully dissent.

Marcus, 560 U.S. at 269-71 (citing *United States v. Olano*, 507 U.S., *supra*, at 745) (STEVENS, J., dissenting).

The same can be said of this case. The court of appeals tried to have it both ways—finding Mr. Benanti suffered unfair prejudice due to violations of Fed. Evid. 403 during trial, but then ignoring that prejudice through a muddled application of both harmless error and plain error. This case presents an opportunity for the Court to address Justice Stevens's concerns about the muddied waters in this area of the law, and to clarify the law where confusion otherwise reigns.

Thus, for these reasons, the lower court's opinion warrants review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Dennis G. Terez

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