No. 20-

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IN THE

SUPREME COURT OF THE UNITED STATES

MOHAMMED JABATEH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner was indicted, tried, convicted and consecutively sentenced to lengthy terms of imprisonment. On direct appeal, the court agreed that his charged conduct was not prohibited by the statute invoked in two of the counts. Yet the court held that this conclusion, while not doubtful as a matter of statutory construction, failed to establish an error that was "plain" within the meaning of Federal Criminal Rule 52(b). The Question Presented is:

Does the plain error rule permit affirmance of a federal criminal conviction and sentence based on conduct that concededly does not violate the charged statute?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Jabateh and respondent United States). There were no co-defendants at trial and no co-appellants.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Mohamed Jabateh petitions this Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the Third Circuit affirming his convictions and sentence for making false statements when seeking to adjust his immigration status.

OPINIONS BELOW

The Third Circuit's precedential opinion (per Matey, J., with Ambro & Fuentes, JJ.), filed September 8, 2020, is Appendix A. It is published at 974 F.3d 281. The United States District Court for the Eastern District of Pennsylvania (Diamond, J.) did not write any pertinent opinion.

JURISDICTION

On September 8, 2020, the United States Court of Appeals for the Third Circuit filed its opinion and judgment affirming petitioner's convictions and sentence. Appx. A. On October 27, 2020, the court of appeals denied a timely application for rehearing. Appx. B. As a result, pursuant to Rules 13.1 and 13.3 and this Court's Order of March 19, 2020, this petition for certiorari is due not later than 150 days thereafter, that is, on or before March 26, 2021. This petition is timely filed on or before that date. Rules 13.1, 13.3, 13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF FEDERAL STATUTE and RULE INVOLVED

Title 18, U.S. Code, provides, in pertinent part:

§ 1546. Fraud & Misuse of Visas, Permits and other Documents

(a) * * * *

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact —

Shall be fined under this title or imprisoned not more than ... 10 years …, or both.

* * * *

18 U.S.C. § 1546(a)(¶4)

The Federal Rules of Criminal Procedure provide, in pertinent part:

Rule 52. Harmless & Plain Error

* * * *

(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.R.Crim.P. 52(b).

STATEMENT OF THE CASE

Following a jury trial, petitioner Mohamed Jabateh, an immigrant from Liberia, was convicted in a federal court on four counts – two under each of two different statutes – for knowingly making false statements under oath in an official interview in 2011 with an officer of the U.S. Customs and Immigration Service. The interview consisted, in pertinent part, of reading petitioner the same questions he had previously answered in a pending application, filed in 2001, to become a lawful permanent resident of the United States. During the sworn oral interview, Mr. Jabateh, who had previously been granted asylum, affirmed the responses he had made in writing and under oath some ten years earlier.

Petitioner's 2011 affirmation of his 2001 statements concerned, in relevant part, his role and actions during the Liberian Civil War of 1989–1997. The government claimed that some of his responses were materially false, either affirmatively or by omission. In a 2016 indictment, it alleged that each of two oral statements had violated both 18 U.S.C. § 1546(a), an immigration fraud statute, and 18 U.S.C. § 1621(a), the general federal perjury statute.

Counts One and Three both claimed that Mr. Jabateh had lied under oath when he answered "no" to the question:

> Have you ever engaged in genocide, or otherwise ordered, incited, assisted or otherwise participated in the killing of any person because of race, religion, nationality, ethnic origin or political opinion?

CA3App75, 77. Counts Two and Four claimed that Mr. Jabateh had lied under oath during the same interview when he answered in the negative:

> Are you under a final order of civil penalty for violating section 274C of the Immigration and Nationality Act for use of fraudulent documents or have you, by fraud or willful misrepresentation of a material fact, ever sought to procure, or procured, a visa, other documentation, or entry into the U.S. or any immigration benefit?

CA3App76, 78. The undisclosed procurement of status by "willful misrepresentation" underlying these last two counts, according to the indictment, was that Mr. Jabateh had obtained asylum (in 1999) by providing materially false and incomplete information.

To further identify the misrepresentations that Mr. Jabateh allegedly made to procure asylum (and then failed to disclose in 2011), Counts Two and Four referred to certain of petitioner's statements and omissions during the application process:

> 29. On or about December 7, 1998, defendant MOHAMMED JABBATEH,[1] a/k/a "Jungle Jabbah," when making application for asylum, referred immigration officials to his personal statement in which he did not reveal his positions in ULIMO and ULIMO-K as a commander or higher ranking officer, or his activities in those positions.
>
> 30. On or about January 11, 1999, during the asylum seeking process, defendant MOHAMMED JABBATEH, a/k/a "Jungle

[1] The indictment mistakenly spells petitioner's surname with two Bs.

> Jabbah," was interviewed by an immigration asylum officer for purposes of determining whether JABBATEH's application should be granted. To this end JABBATEH falsely responded "no" to the following two queries: 1) "[H]ave you ever committed a crime?"; and 2) "[H]ave you ever harmed anyone else?"

CA3 App73–74.[2] Defense counsel did not contest the indictment's application of § 1546(a) to oral statements. He neither moved pretrial to dismiss Counts One and Two nor sought a judgment of acquittal at or after trial on that basis.

Most of petitioner's 10-day trial consisted of testimony from eye witnesses, brought over from Liberia, who described various atrocities and human rights abuses that they said they had observed or suffered during the Civil War some 20 or more years earlier. Several of those witnesses identified petitioner as being the same person they knew during the war as "Jungle Jabbah," a particularly ruthless and cruel commander in the ULIMO-K forces, which fought against other factions along complex and shifting political, ethnic and religious lines. *See generally* Luca Renda, *Ending Civil Wars: The Case of Liberia*, 23 FLETCHER FORUM OF WORLD AFFAIRS 59,

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[2] The indictment does not go on to specify what "crime," under what body of law, petitioner allegedly knew he had in fact committed, nor what sort of non-criminal "harm" to others he should have known to disclose. *Cf*, *Maslenjak v. United States*, 582 U.S. —, 137 S.Ct. 1918, 1927 (2017) (calling attention to similar, but narrower "crime" question in application for naturalization as a "meager basis" for a criminal charge that would give prosecutors "nearly limitless leverage" and would-be citizens "precious little security").

61–66 (Fall 1999) (available on WestLaw at 23-FALL FLFWA 59). Mr. Jabateh denied this behavior and claimed that the witnesses were misidentifying him, either in good faith or deliberately and maliciously.

The jury instructions only alluded indirectly to the statute's requirement that the false statements alleged in Counts One and Two must have been made "in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder." 18 U.S.C. § 1546(a).[3] Trial counsel did not object to the instruction or propose a different one.

The jury returned verdicts of guilty on all four counts. In April 2018, the district court imposed sentence. Notwithstanding a calculated U.S. Sentencing Guidelines range of 15–21 months, and a Commission-suggested upward adjustment of no more than ten levels for aggravated cases involving falsehoods concerning serious human rights violations, *see* USSG § 2L2.2(b)(4)(B) – which in this case would result in a range of 57–71 months – the district court imposed maximum terms on all counts, running consecutively. This was equivalent to a 26-level departure. The total sentence was thus 30 years' imprisonment, consisting of 10 years on each of the

[3] The district court read Count One to the jury, including the averment that March 11, 2011 (the date of Mr. Jabateh's oral interview) was the date when the offense was allegedly committed. CA3App1241. It then instructed the jury that to be guilty, the defendant must have made a false statement "as alleged in the indictment." CA3App1242. The same instruction was given for Count Two. CA3App1243–44.

§ 1546(a) counts and five more on each § 1621(a) perjury count. CA3App1378–79, 1400.[4]

On appeal, the Third Circuit affirmed. App. A. The panel unanimously agreed with petitioner that the invocation of the fourth paragraph of § 1546(a)[5] to support Counts One and Two was legally wrong, because that statute, properly interpreted, concerns only false statements in sworn documents, not oral falsehoods. The panel explored other tools of statutory construction, and examined every argument proffered by the government,[6] but found no basis to hold otherwise. App. 12a–26a.

Yet the court then went on to affirm. The court held that this error – which resulted in petitioner's conviction for two counts of an offense he unambiguously did not commit, and the imposition on that basis of an added 20 years of imprisonment – was not "plain" within the meaning of Fed.R.Crim.P. 52(b). App. 27a–31a. The court of appeals ruled that "a new issue of interpretation, where only a close interpre-

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[4] The district court wrote (but did not publish) an extensive memorandum opinion seeking to explain and justify the sentence. DDE 141 (5/21/2018).

[5] *See* Statute and Rule Involved, *ante*.

[6] Many of the arguments advanced below by the government were specious at best. For example, the prosecutor argued that an "application" might be made orally, while disregarding that the word "application" appears in the statute in a list that concludes with "or other document." Much of the opinion below consists of patiently, but briskly, disposing of such arguments. *E.g.*, App. 15a-16a, citing *Logan v. United States*, 552 U.S. 23, 31 (2007). Moreover, in post-argument supplemental briefing requested by the panel, the government abandoned several of the arguments it had advanced in its appellee brief or at oral argument.

tative inquiry reveals the best reading" of a statute, cannot be a "clear, plain" error "under controlling decisions of Federal [Criminal Procedure] Rule 52(b)." App. 30a-31a. While recognizing that conviction for what is not an offense, like conviction for an offense that is not charged, violates the Constitution, the court concluded that the plain error rule commanded affirmance. Although " '[f]ew constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused.' *Dunn v. United States*, 442 U.S. 100, 106 (1979)," App. 31a, the court held that "the limits on our review prescribed by the Supreme Court in Rule 52(b)" compelled it to affirm petitioner's unconstitutional conviction and sentence. *Id*.

Petitioner sought rehearing *en banc*. He contended that the panel's unprecedented decision was contrary to this Court's cases and to the most fundamental principles of due process in criminal cases. Yet relief was denied. App. B.[7] This petition follows.

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged that federal offenses were committed in the district. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

[7] Petitioner also filed a post-judgment motion in the court below to recall the mandate and reconsider the denial of rehearing in light of a subsequent Third Circuit *en banc* opinion. That motion was summarily denied.

REASONS FOR GRANTING THE PETITION

1. The decision of the court below disregards this Court's precedent and conflicts with the decisions of other circuits.

The court below affirmed petitioner Jabateh's convictions and sentence for two alleged violations of 18 U.S.C. § 1546(a), despite holding that his argument on appeal was correct: the statute does not cover his alleged conduct. Even while recognizing that the result it reached was in violation of the Constitution, the panel nonetheless held in a precedential decision that Fed.R.Crim.P. 52(b) authorizes and requires this result, because the error in applying the statute was not "plain." This shocking and unprecedented holding cannot stand. This Court's intervention is required.

The panel opinion determined that Mr. Jabateh's conduct, as established at trial, did not violate 18 U.S.C. § 1546(a), because the false statements cited in the indictment were made orally, not "in" any immigration "document" as the statute requires. As the opinion states, "Short of re-writing Congress's work, § 1546(a) is not naturally read to apply to oral statements. Indeed, any other reading, including the broad interpretation posited by the Government, is 'unmoor[ed]' from the text" and unacceptable. App. 23a, quoting *Maslenjak v. United States*, 582 U.S. —, 137 S.Ct. 1918, 1927 (2017). There was not even any significant ambiguity in the statute that had to be resolved to reach this conclusion, the opinion further held. App. 31a n.20 (declining to invoke rule of lenity). The sheer number of shifting, mistaken and erroneous arguments advanced by the government below

necessitated a relatively lengthy opinion, but none of those arguments gave the court below pause.

The court of appeals nevertheless held that, even though it violated due process, petitioner's legally baseless conviction and sentence on these counts did not amount to "plain error." The government's error in charging him and the court's error in sentencing him for conduct that did not violate the charged statute were not "plain," that is, were not " 'clear' as we normally understand clarity in legal interpretation," according to the opinion, because the meaning of the statute was "unsettled." App. 30a. By "unsettled," however, the court did not mean that the statute had been given different plausible readings by different courts, or even that the statute's text was unclear. The panel simply meant that case law did not disclose that the same error had been committed previously, much less that it had then been corrected: "there is no instance of any other court considering the ordinary meaning of § 1546," and "there [is no] controlling or persuasively clear 'legal norm' on the meaning of the provision." *Id.*[8] This rationale conflicts with all pertinent precedent and, in any event, presents a question of fundamental justice under the Due Process Clause.

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[8] The court did not explain why the directive to interpret statutes according to the plain meaning of the text is not itself a "legal norm" that applies, even on plain error review. Nor did it discuss how the dearth of case law interpreting the statute was matched by the absence of any evidence the government had ever previously attempted – in more than 50 years since its 1952 recodification in its present form, or in more than 90 years since its original 1924 enactment – to misuse § 1546(a) in this way.

The court below asserted that its conclusion was compelled by "controlling decisions of Federal Rule 52(b)." App. 31a (sic). But it identified no such decisions, and there are none. This Court has never upheld a wholly invalid conviction or sentence on such a basis, and has never interpreted Rule 52(b) to compel such an affirmance. All applicable precedent, including that cited by the panel, points away from this unjust and unconstitutional result.

In truth, this Court has never explored the purpose and scope of the second prong of the plain error rule, under which it is said that the error in question must be found to be "plain." See *Rosales-Mireles v. United States*, 585 U.S. —, 138 S.Ct. 1897, 1904–05 (2018) (summarizing four-part test originating with *United States v. Olano*, 507 U.S. 725, 732 (1993)). But controlling precedent interpreting and applying Fed.R.Crim.P. 52(b) (and this Court's similar Rule 24.1(a)) cannot be reconciled with the result in this case. No case requires that the answer to a question presented on appeal, in order to be declared "plain," must have already been "settled" – in the sense of having been decided in authoritative case law – prior to the appellate decision. It is clear enough that a statute means only what it says, whether or not a panel of judges has previously said so as to *this* statute. Nor does any case hold, or even suggest, that a need to utilize statutory construction techniques will prevent the misapplication of a criminal statute from being recognized as "plain error."

Indeed, all precedent points away from the decision below. In *Henderson v. United States*, 568 U.S. 266 (2013), this Court held that an error's "plainness" is determined as of the time of the appellate

decision, even if the trial court's action was consistent with (or even compelled by) circuit precedent at the time. Notably, the underlying issue in *Henderson* was the legality of a sentence, where that issue turned on the language of a statute. This Court held that reversal on plain error review was appropriate, even though, at the time of sentencing, there were conflicting court decisions, such that the correct answer could not be described as "settled."[9] See also *Johnson v. United States*, 520 U.S. 461 (1997) (same result where new rule was constitutional in nature, rather than statutory). The insistence of the court below that there be judicial precedent supporting the defendant-appellant's position cannot be squared with the reasoning of these decisions.

The application of § 1546(a) to petitioner's oral statements was clearly wrong under any plausible understanding of what it means for statutory error to the "plain." Some of this Court's cases have used the phrase "obvious or readily apparent" as a touchstone for what is "plain" under Rule 52(b). *See*, *e.g.*, *United States v. Young*, 470 U.S. 1, 16 n.14 (1985) (dictum:

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[9] *Henderson* necessarily rejected (because it cannot be squared with) a seemingly blame-focused standard articulated in dictum in one of this Court's earlier opinions. The majority in *United States v. Frady*, 456 U.S. 152 (1982) – distinguishing the scope of review under 28 U.S.C. § 2255 (at issue there) from the *more generous* review allowed under Rule 52(b) –suggested that an error can be called "plain" only if the lower court was "derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *Id.* 163. The trial court in *Henderson* was certainly not "derelict" in following then-controlling circuit precedent. In no subsequent case has this Court invoked that formulation, nor has it ever been relied on to underpin a result.

plainness of error in prosecutor's closing argument accepted; reversal rejected under fourth, discretionary prong in light of defense lawyer's similar and counter-balancing violation). But the outcomes of this Court's cases do not support a literal application of the *Young* formulation, particularly as applied to statutory cases. What is meant by "obvious or readily apparent" in the statutory context cannot be that the error can be perceived on a casual reading, without parsing complex or awkward sentence structure, or with little or no judicial effort or analysis.

This interpretation of Rule 52(b) is confirmed by this Court's seminal plain error cases finding insufficient evidence of the charged crime, which all involve analysis of the statute, followed by a full examination of the record. For example, in *Clyatt v. United States*, 197 U.S. 207, 220–21 (1905), this Court held that the evidence of record failed to prove one element of the particular clause of the peonage statute that was charged. Despite the defendant's failure to object at trial, the Court reversed on the basis of plain error, no matter the depraved nature of the offense or even the defendant's apparent guilt under other clauses of the same statute.

Likewise, in *Wiborg v. United States*, 163 U.S. 632, 658–60 (1896), this Court found the evidence insufficient to prove a charged Neutrality Act offense as to two of three appellants. Upon construing the Act's language and then examining the full trial record, the Court found reversible plain error. As this Court noted in *United States v. Frady*, 456 U.S. 152, 163 n.13 (1982), the original 1944 Advisory Committee Note to Rule 52(b) states that the Rule was intended as "a restatement of existing law," particularly

referencing *Wiborg*. See also *Hemphill v. United States*, 312 U.S. 657 (1941) (per curiam) (accepting Solicitor General's confession of error to hold that sufficiency of the evidence to support a federal criminal conviction can and should be reviewed on appeal as plain error), also cited in Advisory Committee Note. An interpretation of a Rule at odds with the Advisory Committee's Note, such as forms the basis for the holding of the court below, is presumptively erroneous. *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002).

Indeed, based on "existing law" in 1944, it would be reasonable to view the "obviousness" of an asserted plain error as an *alternative*, not a necessary addition, to a finding of a "serious [e]ffect [on] the fairness integrity or public reputation of judicial proceedings." See *United States v. Atkinson*, 297 U.S. 157, 160 (1936) ("if the errors are obvious, *or if* they otherwise seriously affect …") (emphasis added), quoted with approval in *Frady*, 456 U.S. at 163 n.13. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999) ("[W]e are bound to follow Rule 23 as we understood it upon its adoption, and … we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act."). *Olano*'s conjunctive assertion to the contrary was dictum, and arguably mistaken. See Berger, *Moving Toward Law: Refocusing the Federal Courts' Plain Error Doctrine in Criminal Cases*, 67 U. MIAMI L.REV. 521, 544–46 (2013). Indeed, the *Olano* decision expressly endorses *Atkinson*, 507 U.S. at 736, and suggests no intent to overturn it. And the Committee's citation of *Wiborg* shows a commitment to the avoidance of miscarriages of justice as a primary purpose of the rule as codified. Lowry, *Plain Error Rule—Clarifying Plain Error Analysis Under*

Rule 52(b) of the Federal Rules of Criminal Procedure, 84 J. CRIM. L. & CRIMIN. 1065, 1079–80 (1994).[10]

More recently, this Court has used the phrase "clear or obvious, rather than subject to reasonable dispute" in addressing what it means for error to be "plain." See *United States v. Marcus*, 560 U.S. 258, 262 (2010) (failure to instruct on date after which offense conduct must have been continued, thus enabling possible Ex Post Facto violation). But in *Marcus*, the issue was not the "plainness" of the error. The Court's decision turned on *Olano*'s third factor, that is, appellant's showing of a reasonably probable effect on the outcome. The expression used in *Marcus* to explain the second prong was quoted from *Puckett v. United States*, 556 U.S. 129 (2009), which evaluated a prosecutor's unobjected-to violation of a plea agreement. This Court held in *Puckett*, elaborating the third prong of the *Olano* test, that Rule 52(b) demands a showing of an effect on substantial rights, beyond the mere existence of error. In *Puckett*, as in *Marcus*, the "plainness" of the error was not at issue; obviousness was conceded in both cases.

The court below seemed to acknowledge that an error in applying a federal criminal statute can be "plain" at step two of an *Olano* plain-error analysis even when the actions of the district court are seen to be wrong only *after* applying the tools of statutory construction. App. 29a. But the panel then failed to act upon that acknowledgment. *Cf. id*. To remain true to essentials, a conclusion whether the correct construction of a statute is "clear or obvious, rather

[10] Indeed, it would be entirely appropriate, in light of the history of Rule 52(b), to define errors in the narrow category involved here as reversible *per se* on plain error review.

than subject to reasonable dispute," *Puckett*, 556 U.S. at 135, must necessarily be made *after* engaging in such analysis, not by glancing casually at the statute.[11] The unsupported suggestion of the Court below that Rule 52(b) is concerned with what is "obvious, at least at the outset," App. 29a, misses the mark.

Even if the dictum-grounded *Puckett-Marcus* test is to be taken literally, the decision of the court below shows that none of the government's arguments for application of § 1546(a) to petitioner's charged conduct was found, after examination, to offer a "reasonable" interpretation of the statutory language. The panel reached not just what it repeatedly called the "best reading" of § 1546(a), App. 2a, 19a, 21a, 22a, 26a, 31a, but the *only* proper reading, absent "re-writing Congress's work," or adopting an application of the law that would be "'unmoor[ed]' from the text." App. 23a, quoting *Maslenjak*, 137 S.Ct. at 1927. As the court of appeals' analysis shows, the government's interpretation was not only inconsistent with the text but also contrary to the statute's amendment history. App. 13a–24a. The error was therefore "plain" under this Court's characterizations of that requirement.

The erroneous holding of the court below gained support from a misstatement of its standard of review. In articulating the standard for finding reversible plain error based on an insufficiency of evidence to prove a charged offense, the panel quoted and

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[11] The same may not be true, under the plain error rule, as to matters of judgment or degree, such as discretionary trial management rulings, or in the application on appeal of a broadly worded Constitutional provision to a novel set of facts or circumstances.

relied exclusively upon a decision stating that to reverse in that posture, the court must find "a manifest miscarriage of justice—the record must be devoid of evidence of guilt or the evidence must be so tenuous that a conviction is shocking." App. 31a–32a, quoting *United States v. Burnett*, 773 F.3d 122, 135 (3d Cir. 2014) (internal quotation marks and citation omitted). "Such an error requires a defendant to establish that the trial judge and prosecutor were derelict in even permitting the jury to deliberate." *Id*.[12]

The panel overlooked that this stingy formulation of plain error (derived from Fifth Circuit case law) was later abrogated by this Court. See *Rosales-Mireles*, 138 S.Ct. at 1905–07.[13] To the contrary, if, upon close analysis of the record, the evidence turns out to be such that no reasonable juror could properly have found any one or more of the elements of the charged offense (properly construed) beyond a reasonable doubt, then justice ordinarily demands reversal, even on plain error review, as cases such as *Clyatt* have long established.

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[12] As noted above, at 12 n.9, the "derelict" standard references dictum from this Court that has never been applied in practice. That formulation is thus itself a "derelict on the waters of the law." See *Texaco, Inc. v. Short*, 454 U.S. 516, 537 n.33 (1982) (quoting *Lambert v. California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting)).

[13] *Rosales-Mireles*, *Marcus*, *Puckett* and *Henderson* are among the many cases in which this Court has granted certiorari in recent years to clarify discrete aspects of the plain error rule. See also *Molina-Martinez v. United States*, 578 U.S. —, 136 S.Ct. 1338 (2016). Petitioner's case should be another.

This Court should therefore reject the court of appeals' interpretation and application of the plain error rule, as applied to misapplications of the charged statute. Indeed, this result follows for a second reason: the approach taken below invites – and produced in this case – a result that is unconstitutional under this Court's cases.

There is no proposition more fundamental to the due process protection for liberty than "*nullum crimen sine lege*; *nulla poena sine lege*" (no crime can exist or punishment be inflicted without a legal foundation). The leading treatise calls this "basic premise of the criminal law" the "principle of legality." 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.2(b), at 17 (3d ed. 2018). As this Court held in *Montgomery v. Louisiana*, a sentence that the court lacks authority to impose "is not just erroneous but contrary to law and, as a result, void." 577 U. S. 190, 203 (2016). As *Montgomery* came before this Court on review of a state supreme court's decision, its decision was necessarily of constitutional dimension.

This principle has deep roots not only in the Due Process Clause but also in the separation of powers. "Only the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *United States* v. *Davis*, 588 U.S. —, 139 S.Ct. 2319, 2325 (2019) (quoting *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). No court can authorize a criminal conviction and imprisonment for conduct that an applicable statute does not forbid.

Even on federal collateral review, a court "has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule

was announced." *Montgomery*, 577 U.S. at 203; see *Welch* v. *United States*, 578 U.S. —, 136 S. Ct. 1257, 1268 (2016) ("court lacks the power to exact a penalty that has not been authorized by [conviction under] any valid criminal statute"); *Davis v. United States*, 417 U.S. 333, 346–47 (1974) (if "Davis' conviction and punishment are for an act that the law does not make criminal" then "[t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present(s) exceptional circumstances' that justify collateral relief under § 2255.").

If that result is required on collateral review, then necessarily it is mandated on direct appeal, even where plain error applies. See *Frady*, 456 U.S. at 164–66 (standard of review under § 2255 imposes a "significantly higher hurdle than could exist on direct appeal," even applying the plain error rule). It follows, then, from *Welch* and *Davis*, which were § 2255 cases, that the decision below is contrary to this Court's precedent.

There is more. Applying the same fundamental principle to a state conviction as a matter of due process, this Court invoked its own plain error rule (former Rule 40(1); now Rule 24.1(a)) and overturned the conviction in *Vachon v. New Hampshire*, 414 U.S. 478 (1974) (per curiam), where it determined summarily – notwithstanding that petitioner's failure to include the point in her Questions Presented – that proof was lacking of any violation of the cited statute.

Similarly, in *Fiore v. White*, 531 U.S. 225 (2001) (per curiam), this Court summarily reversed the denial of federal habeas corpus relief to a state prisoner whose conviction rested on conduct that the

state supreme court, applying the governing state rules of statutory construction, had *subsequently*, in another defendant's case, determined did not violate the charged statute. Even more clearly on point to the present case, the underlying statutory question in *Fiore* must have been fairly arguable, as Fiore's conviction had been affirmed in a full round of state court appeals against the same statutory challenge (and then by the lower federal courts on habeas), and the other defendant's conviction had been upheld on the same question by the state's intermediate appellate court. But this Court held:

> This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge violate due process. … In this case, failure to possess a permit is a basic element of the crime of which Fiore was convicted. … And the parties agree that the Commonwealth presented no evidence whatsoever to prove that basic element. ….
>
> The simple, inevitable conclusion is that Fiore's conviction fails to satisfy the Federal Constitution's demands. We therefore reverse the contrary judgment of the Third Circuit ….

531 U.S. at 228–29.

In short, the court below interpreted and applied Rule 52(b) in a manner that led it to an unconstitutional result. Surely, any such interpretation of a Rule adopted by this Court is to be avoided if at all possible. *Ortiz*, 527 U.S. at 845–48 (construing class action rule to avoid Due Process questions); see *United States v. Campos-Serrano*, 404 U.S. 293, 295 (1971) (applying constitutional avoidance to uphold a narrow reading of § 1546(a)). And here, as already

discussed, nothing in Rule 52(b), properly understood, or in this Court' cases applying that Rule demanded an affirmance.[14]

Worse yet, had defense counsel noticed the government's grave charging error and advanced a timely objection, there is nothing that the district court (or the government) could have done, in response, to save those counts. Thus, even insofar as the "plainness" factor may serve one of the legitimate purposes of Rule 52(b), fairness to the trial court and to the adverse party (see *Atkinson*, 297 U.S. at 159), that interest would not be supported by an overly strict application of the Rule here. *See* Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 958 (2006) (elaborating fairness considerations served by plain error rule). Instead, the misapplication of Rule 52(b) in this case unnecessarily forces a conflict with the most fundamental underlying principle of our criminal law.

Given the severity and fundamental nature of the error in the decision below, it is unsurprising that it finds no support in the decisions of other circuits. Indeed, all authority in the circuits is to the contrary. Neither of the D.C. Circuit cases cited by the court below – the only out-of-circuit authority it mentioned; *see* App. 30a – supports its decision, as neither was similar to petitioner's. In *United States v. Terrell*, 696 F.3d 1257, 1260–61 (D.C. Cir. 2012), the question was a novel application of the Ex Post Facto Clause in

[14] The interpretation of Rule 52(b) by the court below also risked unnecessarily giving the Rule a substantive rather than a procedural impact, in violation of the Rules Enabling Act. See *Ortiz*, 527 U.S. at 845 (identifying this consideration as a reason to avoid a certain interpretation of Civil Rule 23).

a Guidelines sentencing situation, not an issue of statutory construction, much less one involving the essential legality of the conviction or sentence.

Similarly, *United States v. Nwoye*, 663 F.3d 460 (D.C. Cir. 2011), involved a failure to charge the jury on venue, a constitutional matter which the court held was not error at all. In dictum, that court suggested that an error could not be plain unless found to be so against some "clear legal norm,"[15] but importantly, the prior circuit case it cited for this standard (*In re Sealed Case*, 573 F.3d 844, 851 (2009)), was one in which the D.C. Circuit had found sentencing error to be plain based on statutory language alone, notwithstanding an inter-circuit split on the issue. That is only what is to be expected. After all, the meaning of a statute is found in its text, not in case law.

In this light, insight into the proper application of Criminal Rule 52(b) to cases of erroneous statutory construction may be gained from a decision authored by Justice Gorsuch during his service on the Tenth Circuit. Without objection, the trial court had delivered a jury instruction that misstated the elements of the offense in a Controlled Substances Analogue case. On appeal, the government conceded that the instruction (which it had endorsed below) was erroneous, but "pitche[d] an avid battle on the second [prong of the *Olano* formula], insisting that the instructional error here can't fairly be described as plain." *United States v. Makkar*, 810 F.3d 1139, 1144–45 (10th Cir. 2015). In particular, the govern-

[15] Of course, the basic rules of statutory construction *are* an important type of "legal norm." A "norm" is not the same as a "precedent." *See* note 8 *ante*.

ment argued that because another circuit had once endorsed the view taken by the trial judge, the error could not be said to be "plain." The Tenth Circuit disagreed, holding that the existence of a single supportive precedent could not carry the day.

> The fact other circuits have committed an error can supply 'strong evidence' that it doesn't qualify as a 'plain' one. … But another circuit's commission of an error doesn't necessarily and always 'control' the plain error inquiry. … After all, to err is human—and to plainly err is too. Despite our aspirations (and maybe sometimes our pretenses) we judges can hardly claim to escape that fact of life. ....

Id. 1145. More powerful evidence that the error was "plain," the court found, was the absence of additional decisions over a nine-year period endorsing the stray authority, and the abandonment by the government of its former position. *Id.* Coupled with a fairly sophisticated but ultimately confident statutory construction that confirmed the jury had been prejudicially misinformed of the elements of the offense, a reversal on the basis of plain error was required.

Many other circuits have reversed criminal convictions on plain error review based on statutory construction of the charged offense notwithstanding a lack of controlling precedent, usually in cases involving challenges to the jury instructions. (Those cases are thus less egregious than petitioner's, where the conduct shown by the evidence at trial simply does not make out the charged offense.) *E.g.*, *United States v. Wuliger*, 981 F.2d 1497, 1501 (6th Cir. 1992) (error in defining offense of conviction, as determined following extensive statutory construction, and which

eliminated basis of defense, qualifies for reversal as "plain," because it "strike[s] at the fundamental fairness … of the trial").

The decisions in the circuits where an error, once established, has been found not to be "plain" under Rule 52(b) typically involve matters of judgment or degree, or a proposed novel application of broad constitutional principles, as in the D.C. Circuit cases already discussed. None examines a crime-defining statute where ordinary construction techniques – indeed, mere reference to the ordinary rules of grammar and sentence construction – suffice to rebut the government's arguments against applying the natural reading of its language.[16] In short, no case lends significant support to the decision below, nor has petitioner found a single case similar to the decision below, where the court refused, even on "plain error" review, to reverse a conviction that was concededly entirely invalid.

The Federal Rules of Criminal Procedure, including Rule 52(b), "are to be interpreted to provide for the just determination of every criminal proceeding …." Fed.R.Crim.P. 2. Justice cannot be achieved in a criminal case if the trial court's fundamental error in entering a conviction for what is not an offense under the statute, or in imposing an illegal sentence, whenever discovered, is allowed to stand. Yet in conflict with this Court's authority and the decisions

[16] Whether the construction and application of the plain error rule that petitioner advocates here would apply where a defendant's statutory position can prevail only with the benefit of a tie-breaker doctrine, such as lenity or constitutional avoidance, need not be decided in this case.

of other circuits, the decision of the court below would obviate this time-honored, fundamental principle, if the illegality somehow escapes notice or correction until direct appeal. This Court's review is required to examine and correct that holding.

2. This case offers an excellent vehicle for clarifying the so-far unexplored meaning of "plain" in Federal Criminal Rule 52(b), as applied to purely statutory legal questions.

Nothing in the facts or procedural history of petitioner Jabateh's case stands as a potential obstacle to the resolution of the important question presented. The issue affects only two of his four counts of conviction, but the sentences on those counts were imposed consecutively. Reversal of the decision of the court below on this question alone would reduce his sentence of imprisonment from 30 years to 10.[17] It cannot be doubted that the error affected his substantial rights.

Indeed, the circumstances of petitioner's case serve to isolate the "is it 'plain'" question for analysis in a way that other "plain error" cases in this Court (other than *Johnson* and *Henderson*) have not. First, that there was "error" should be uncontroversial. The substance of the court of appeals' construction of the fourth paragraph of 18 U.S.C. § 1546(a), showing the indicted statute to be inapplicable to the facts underlying petitioner's convictions on Counts One and

[17] Petitioner also challenged the sufficiency of the evidence, as a matter of law, to prove the other two counts, under 18 U.S.C. § 1621. While not disavowing the merit of those arguments, he has not pursued that issue in this Court.

Two, is not subject to reasonable dispute. This Court had no difficulty last year in recognizing § 1546(a) as addressing "immigration-document fraud," not oral falsehoods, even if sworn and material. *Kansas v. Garcia*, 589 U.S. —, 140 S.Ct. 791, 798 (2020). See also *Campos-Serrano*, 404 U.S. 293 (applying strict construction to uphold reversal of conviction under a different clause of § 1546(a)); *cf. Maslenjak*, 137 S.Ct. at 1927 (emphasizing dangers of excessive prosecutorial leeway in defining offenses under cognate statute). Nor should it be open to dispute, on the final, discretionary prong of plain error review, that conviction and imprisonment without any valid statutory basis call powerfully into question the fairness, integrity, and reputation of the courts.

No other aspect of the case presents any impediment to reaching and deciding the question presented. Accordingly, if summary reversal is not granted, petitioner's case affords an excellent vehicle for the elaboration and explication of that important question.

3. The decision below is incorrect.

For many of the reasons outlined under Point 1 of this petition, the court of appeals' application of Rule 52(b) in this case was incorrect. Indeed, the error in the appellate decision is so clear – and so fundamentally at odds with the most basic building blocks of our constitutional criminal law – that a summary reversal, as in *Vachon* and *Fiore*, would be warranted. Alternatively, a decision of this Court rendered after full briefing and argument would contribute powerfully to ensuring that such gross departures from due process will not be repeated, and will be forcefully

negated if they somehow occur. The precedential decision of the court below must be erased from our Nation's jurisprudence.

A sentence based on conduct that does not violate the statute of conviction should never be allowed to stand, no matter when discovered. The Federal Rules of Criminal Procedure do not say otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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