No. 20-1369

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

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PETITIONER'S REPLY

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

A unanimous appellate panel ruled that Mohammed Jabateh was sentenced to decades of imprisonment for conduct that simply does not violate the statute under which he was charged, tried, and convicted. The affirmance of that conviction, notwithstanding the lack of statutory foundation, is both unprecedented and indefensible. It rests on an application of the "plain error" rule, Fed.R.Crim.P. 52(b), that conflicts with this Court's cases and with the Constitution itself. His petition should be granted, either with full briefing or with summary reversal, to clarify that Rule 52(b) does not authorize, much less mandate, any such violation of the most fundamental norms of due process.

The Brief in Opposition ("BIO") asserts – but makes no effort to demonstrate – that petitioner was properly convicted under 18 U.S.C. § 1546(a)(¶4). In the alternative, it contends that the plain error rule would call for affirmance of petitioner's lawless imprisonment even if he were not guilty of the charged offense. Both common sense and respect for principle say otherwise.

The government's attempt to prejudice this Court against review of the fundamental issues in the case by extensively detailing the undeniably terrible testimony heard at trial, BIO 2–5, must not be allowed to succeed. As two of this Court's greatest members famously reminded us, "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice

people." *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., with Jackson, J., dissenting). On any fair reading of the statute, petitioner was not guilty of violating the fourth paragraph of § 1546(a). This Court must not let stand the holding of the court below that petitioner should serve 20 extra years' imprisonment because the error in convicting him was not sufficiently "plain." None of the respondent's arguments affords any persuasive reason to deny review.

1. The Brief in Opposition cannot and does not point to a single decision in this Court or in any circuit that affirms, for lack of "plain error," a conviction for conduct the appellate court determines does not violate the indicted statute.

In 1940, this Court stated the practice that Criminal Rule 52(b) was meant to capture upon its adoption in 1944: "[A]ppellate courts 'in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.' See *United States v. Atkinson*, 297 U.S. 157, 160 [(1936)]." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940).[1] *See* Pet. 13–14.

[1] Petitioner has suggested that insofar as this pre-1944 standard is inconsistent with the now-familiar articulation in *United States v. Olano*, 507 U.S. 725, 732 (1993), the Court may wish to reconsider whether that formula is entirely correct. Pet. 14–15. Petitioner's overall position, however, does not depend on such reconsideration. Petitioner has not claimed any sort of "futility exception" to Rule 52(b) to justify making this suggestion now (compare

One of the decisions that this Court expressly reaffirmed and codified in that Rule, according to the original Advisory Committee Note, is *Wiborg v. United States*, 163 U.S. 632, 658–60 (1896), which held that failure to prove the charged offense requires reversal based on plain error.

The government's failure to prove the charged offense, as here, was identified at the time of the Rule's 1944 adoption as a paradigm example of a plain and reversible error. See *Hemphill v. United States*, 312 U.S. 657 (1941) (per curiam) (on confession of error); *Clyatt v. United States*, 197 U.S. 207, 220–21 (1905). Nor can the decision below be reconciled with *Vachon v. New Hampshire*, 414 U.S. 478 (1974) (per curiam) (summarily reversing for the same reason under this Court's own plain error rule). The respondent cites none of these decisions, much less does it try to justify its position, or that of the court below, as consistent with any of them.

The BIO cites no opinion from any other circuit that reached the same conclusion as the court below in a case of conduct found not to violate the charged statute. The reason for this silence should be clear: the court of appeals misapplied Rule 52(b) and this Court's precedent, and broke from the wisdom of other circuits (*e.g.*, *United States v. Makkar*, 810 F.3d 1139, 1144–45 (10th Cir. 2015)[2]) to justify its

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Greer v. United States, 593 U.S. —, 141 S.Ct. 2090, 2099 (2021)), only that the Court, if it grants certiorari, might consider overruling *Olano*, in part, on this basis. *Cf.* BIO 14–15.

[2] Respondent's suggestion that the key factor in the plain error holding of *Makkar* was the government's concession

affirmance of petitioner's illegal convictions and sentence. The petition should be granted.

2. The government's attempt to manufacture a complicating antecedent question in order to claim a "vehicle problem" is not persuasive.

As this Court has most recently explained the second prong of Rule 52(b), an error will be considered "clear or obvious," and thus may be "plain" and reversible, if it is not "subject to reasonable dispute." See *United States v. Marcus*, 560 U.S. 258, 262 (2010) , quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009). The respondent claims (BIO 8–11, 16–17) that there is a substantial threshold dispute in petitioner's case as to the proper construction of 18 U.S.C. § 1546(a) and thus as to whether petitioner's charged conduct violated that statute. On that basis, respondent asserts that this case is an unsuitable vehicle to address the question presented on the meaning and application of the plain error rule. In fact, there is no such genuine controversy about § 1546(a)(¶4). The respondent's contention is baseless.

All the government does to justify its assertion that an issue exists is reiterate in conclusory terms a handful of the many failed arguments it advanced below. For example, respondent asserts that "[t]he plain text of [§ 1546(a)(¶4)] covers the false oral statements petitioner made under oath during his 2011 immigration interview ...." BIO 9. The government presents no discussion of the statute's wording to

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of the conviction's legal invalidity (BIO 14) is patently inaccurate.

explain on what basis it makes this claim (and cites no authority other than its own briefing below), but the Third Circuit opinion demonstrates beyond peradventure that the statute as written does *not* cover oral statements. Pet. Appx. 13a–23a (974 F.3d at 291–96). Respondent does not acknowledge, much less respond to, the court of appeals' meticulous showing. Bare prosecutorial assertions[3] are not what this Court could have meant in *Puckett* by "subject to reasonable dispute."

The government's second attempt to create a "dispute" about the meaning of § 1546(a), BIO 10, is even less "reasonable." The *actus reus* of the offense is that the defendant "make under oath" (or "subscribe as true") a "false statement" that concerns a material fact and that is made "in" a document. The statute does not address oral statements made *on the subject* of (or that attest to or reaffirm under oath) previously filed written statements. *Cf.* BIO 10. As the government admits, the indictment charged that petitioner's illegal action was taken during the 2011 oral interview, not in 2001 when the underlying form was prepared and subscribed. BIO 6. Petitioner engaged

[3] It is possible that the point the government is trying to make (BIO 10) is that it is not necessarily the "statement" that the defendant has "made" or "subscribed," but rather only the "material *fact*" itself, that must (according to respondent's misreading) appear "*in*" the "document." The opinion below shows this to be unreasonable by explaining that the "material fact" clause was added to the original 1924 statute in 1952 as part of a non-substantive recodification (see *United States v. Campos-Serrano*, 404 U.S. 293, 296 & n.6 (1971) (strictly construing another clause of § 1546)). Pet. Appx. 20–21.

in no conduct on the charged date that was prohibited by § 1546(a). A theory that the defendant did something similar to what is made criminal is not the same as a contention that the defendant's conduct was (even arguably) prohibited by that statute.

The government's final effort to conjure up a "dispute" for *Marcus/Puckett* purposes is the least plausible of all. Its fallback position is that "Section 1546(a) would still prohibit petitioner's conduct because petitioner, through his false oral statements, caused an immigration officer to make additional false statements on petitioner's written immigration application," BIO 10 (implicitly invoking 18 U.S.C. § 2(b)), that is: "Using a blue pen, the [immigration] officer made marks [while conducting the 2011 interview] on petitioner's Form I-485 application to reflect the questions that he had reviewed with petitioner and the answers that petitioner had given." BIO 5. But as the court below pointedly noted, rejecting this suggestion, no "causing" theory was comprised (either legally or factually) in the indictment's averments,[4] none was argued at trial,[5] and most important none was submitted to the jury for its decision[6]:

> 'To uphold a conviction on a charge that was neither alleged in an indictment nor

[4] That is, the indictment neither cites 18 U.S.C. § 2(b) nor mentions any writing, much less the causing of any writing, onto the I-485 form by the interviewer on March 11, 2011. CA3Appx74–76a (indictment on Counts 1 and 2), 1293–95a (redacted indictment as presented to the jury).

[5] *See* CA3Appx 1140–43a (prosecutor's closing argument).

[6] *See* CA3Appx1241–46a (jury instructions for Counts 1 and 2).

> presented to a jury at trial offends the most basic notions of due process.' *Dunn v. United States*, 442 U.S. 100, 106 (1979). Even if the evidence is clear that Jabateh caused an immigration officer to include false answers in the immigration form, as the Government now contends, it is long past the time for the Government to add charges to its indictment.

Pet. Appx. 16a–27a n.19. Accord, *McCormick v. United States*, 500 U.S. 257, 269–70 & n.8 (1991); *Chiarella v. United States*, 445 U.S. 222, 226–27 & n.21 (1980). A "reasonable dispute" under *Puckett* cannot be one that requires disregarding this Court's controlling precedent.

In short, the Question Presented, as stated in the petition, squarely arises on the facts of this case. Petitioner's case is not at all a "poor vehicle." BIO 17. It is true that the court of appeals chose to devote many pages to demonstrating conclusively that the government's desperate attempts to save its fundamentally flawed prosecution were utterly without merit on any proper theory of statutory construction. And there is no on-point case under this statute for petitioner to rely on. The undecided question about the second prong of the *Olano* test is whether those circumstances prevent the conviction from being labeled "plain error." The Court should grant the petition to decide that question.

3. The application of the "plain error" rule by the court below is as indefensible as it is unprecedented.

Petitioner's statutory argument against his conviction on the two § 1546(a) counts was "novel," Pet. Appx. 30a, only because in 95 years since this statute was enacted, no federal prosecutors, so far as anyone can determine, had ever tried to misuse it in the same way it was wrongly deployed against petitioner Jabateh. But application of the ordinary rules of statutory interpretation, starting with a careful reading of the text, shows that petitioner was improperly charged and baselessly convicted – and thus illegally sentenced – on those counts. The court below repeatedly referred to its interpretation as the "best reading" of the statute, Pet. Appx. 2a, 19a, 21a, 22a, 26a, 31a, but at no point during the appellate process (including in the court's opinion) was any other plausible construction of the statute advanced.

Each of the government's ever-shifting suggestions, as the court below noted, was "'unmoor[ed]' from the text" and unacceptable. Pet. Appx. 23a, quoting *Maslenjak v. United States*, 582 U.S. —, 137 S.Ct. 1918, 1927 (2017). As the court below stated, "the text of 18 U.S.C. § 1546(a) *cannot* be read to reach the conduct charged by the Government in Counts One and Two ...." Pet. Appx. 12a (emphasis added). If the only interpretation that is grounded in the text shows petitioner's convictions to be erroneous, then the error is "plain" under the central (and

firmly established) "legal norm" that counts in a statutory construction case.[7]

The point is certainly not whether there was some pre-existing "decision from this Court or any court of appeals that plainly required the court of appeals to take the view that petitioner's false oral statements during his 2011 interview fail to qualify as 'false statement[s] with respect to a material fact in' petitioner's application for permanent residency. 18 U.S.C. 1546(a)." BIO 16. The meaning of the statute was "unsettled" (*id., quoting* Pet.Appx. 30a) *only* in the sense that there exists no prior opinion reversing such a conviction.[8] But it equally true that there is no precedent that supports the government's misuse of § 1546(a) in this case. That is because there has apparently never before been such a misguided invocation of this law as occurred here. What was "novel" here was not petitioner's argument but rather the government's egregiously erroneous theory of prosecution on the § 1546(a) counts, which petitioner's counsel (like the trial judge) unaccountably failed to notice or challenge. It was fundamentally unfair of the court of appeals to hold that in this situation the

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[7] Petitioner has suggested reserving the question whether the same "plain error" conclusion would follow if the underlying statutory construction depended on applying the rule of lenity or the canon of constitutional avoidance. Pet. 9, 24 n.16. Here, it does not. As the court below concluded, the plain meaning of § 1546(a) shows that petitioner simply did not commit the charged offense.

[8] The government claims that this is not what the court below meant by saying the issue was "unsettled" or "novel," BIO 11–12, but in fact the court invoked no other basis for its decision than the lack of prior case law.

error cannot be "plain." Yet the court below held that its ruling was compelled by Rule 52(b) as interpreted in decisions of this Court. Pet. Appx. 31a.

The petition articulates that under this Court's consistent cases a conviction that is not encompassed by the charged statute violates due process and cannot be sustained, regardless of the procedural posture of the case. Pet. 18–20, citing *United States* v. *Davis*, 588 U.S. —, 139 S.Ct. 2319, 2325 (2019) (federal direct appeal after remand); *Welch* v. *United States*, 578 U.S. 120, 136 S. Ct. 1257, 1268 (2016) (28 U.S.C. § 2255 motion)[9]; *Montgomery v. Louisiana*, 577 U. S. 190, 203 (2016) (state post-conviction attack); *Davis v. United States*, 417 U.S. 333, 346–47 (1974) (§ 2255); *Fiore v. White*, 531 U.S. 225 (2001) (per curiam) (state prisoner's § 2254 federal habeas petition); and *Vachon v. New Hampshire*, 414 U.S. 478 (1974) (per curiam) (state direct appeal). This unbroken line of authority is of a piece with the early "plain error" cases already cited. All reflect the fundamental due process doctrine of "*nullum crimen sine lege*; *nulla poena sine lege.*" The respondent avoids answering this point on its merits as well, presumably because there is no good answer.

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[9] In *United States v. Frady*, 456 U.S. 152, 164–66 (1982), this Court held that the standard of review under § 2255 imposes a "significantly higher hurdle than could exist on direct appeal," even applying the plain error rule. The respondent utterly fails to explain how it could be, then, that a sentence for conduct that does not violate the charged statute, properly construed, must be corrected under § 2255 (see *Davis* and *Welch*, *supra*) but should be let stand on direct appeal under the plain error rule. *See* Pet. 19.

In response to this most fundamental problem, the government has just two things to say. First, it notes that petitioner did not complain that the court of appeals' application of Rule 52(b) and resulting disposition of the case were inconsistent with due process principles until he submitted his petition for rehearing. BIO 15–16.[10] Until then, he had argued consistently and vociferously that proper application of the plain error rule required reversal. The court below was not deprived of any fair opportunity to address the constitutional dimensions of its mistake, and certainly not in any way that impairs this Court's potential review.

Finally, the respondent dismisses the due process argument by noting that even constitutional issues can be forfeited and frequently fail to qualify as plain error. BIO 16. That is certainly true as far as it goes (see *Greer*, *supra*, 141 S.Ct at 2099–2100), but nevertheless falls short. The government cannot point to a single instance when this Court (or indeed, any circuit other than the court below) has allowed a conviction and sentence to stand based on conduct it has concluded did not violate the statute that was charged and on which the conviction rests. If it is now the position of the Government of the United States of America that Rule 52(b) requires a person in petitioner's position to serve an entirely illegal 20-year sentence because his trial lawyer and the district judge both failed to catch in time the prosecutors' fundamental violation of his due process rights, then that is all the more reason why this Court must grant

[10] This Court's cases cited by respondent for this argument, BIO 16, all arose in procedural postures entirely unlike petitioner's.

the petition and correct the serious error committed by the court below.

The Brief in Opposition fails in each of its attempts to defeat the reasons for issuing a writ of certiorari in this case. The Court should grant the petition.

CONCLUSION

The petition of Mohammed Jabateh for a writ of certiorari should be granted.

Respectfully submitted,

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