**No. 21-**

IN THE
# Supreme Court of the United States

DENZELL RUSSELL,
*Petitioner,*
v.
UNITED STATES,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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September 13, 2022

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## QUESTIONS PRESENTED

1. Is the Sixth Circuit's application of plain error review under Fed. R. Crim. P. 52(b) in conflict with this Court's decisions?

2. Have the courts of appeals erred in reconfiguring plain error under Fed. R. Crim. P. 52(b) to extend to the government when the history of the plain error doctrine and this Court's decisions suggest it was only ever intended to protect defendants?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Denzell Russell. Respondent is the United States. No party is a corporation.

## RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Ohio, and the United States Court of Appeals for the Sixth Circuit:

*United States* v. *Russell,* No. 20-3756 (6th Cir. Apr. 26, 2022)

*United States* v. *Russell*, No. 20-3756 (6th Cir. Mar. 28, 2022)

*United States* v. *Russell*, No. 20-3756 (6th Cir. Apr. 2, 2021)

*United States* v. *Akeem Farrow, et. al*, No. 1:19-cr-00786 (N.D. Ohio Feb. 26, 2020)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Denzell Russell respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The statement respecting the denial of rehearing en banc is reported at 31 F.4th 1009 (6th Cir. 2022) and is reproduced in the appendix to this petition at Pet. App. 1a–5a. The panel opinion of the Sixth Circuit affirming the district court is reported at 26 F.4th 371 (6th Cir. 2022) and reproduced at Pet. App. 6a–11a. A panel order of the Sixth Circuit denying counsel's request to withdraw is unreported and reproduced in the appendix at Pet. App. 12a–16a. The district court's denial of Mr. Russell's suppression motion is reproduced at Pet. App. 17a–22a. Transcripts from the two-day suppression hearing are reproduced at Pet. App. 23a-104a.

## JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered judgment on March 28, 2022, Pet. App. 6a, and denied Mr. Russell's petition for rehearing en banc on April 26, 2022. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254.

## LEGAL FRAMEWORK

Federal Rule of Criminal Procedure 52(b) 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.

## STATEMENT OF THE CASE

### A. Introduction

The Sixth Circuit affirmed the district court's denial of Denzell Russell's motion to suppress on plain error but also found the district court did not err. This is a misapplication of the plain error doctrine and is in direct conflict with decisions from this Court. To be eligible for plain error relief, this Court has held the party must meet three threshold requirements, the first of which is that there was indeed an error. The Sixth Circuit's misuse of the plain error doctrine presents an important question for this Court's review.

This case also presents an important question of federal law that should be settled by this Court. Specifically, whether the doctrine of plain error review, encapsulated in Federal Rule of Criminal Procedure 52(b), was intended to apply only to defendants. A historical review of the doctrine and the caselaw suggests the rule was only intended to protect the defendant and not to bail the government out of its own errors. This Court has not addressed this question directly. Given that every court of

appeals applies plain error review, this Court should take this opportunity to provide clarity on this important, open question.

**B. Factual Background**

East Cleveland Police Officers conducted a traffic stop of a vehicle drive by Akeem Farrow because the vehicle had only one brake light and Mr. Farrow failed to signal when he made a turn. Pet. App. 12a. In the front passenger's seat was Denzell Russell. Anthony Coleman was in the backseat. When the police approached the vehicle, they observed an open liquor bottle on the back seat next to Mr. Coleman. Mr. Coleman told the officers the liquor bottle was empty and tried to hand it to the officer. Without any indication any of the men were impaired, the officers ordered them out and searched the car. The sole basis for the search of the vehicle was the open liquor bottle. Pet. App. 39a. During the search, law enforcement found two firearms and two bullet proof vests.

Akeem Farrow and Denzell Russell were charged with being felons in possession of firearms. Both filed motions to suppress, challenging the search of the vehicle. At the suppression hearing, the government's attorney argued that "the issues here are fairly simple" and with respect to the search of the vehicle the "only point is whether that bottle of liquor provided probable cause to search for additional items of a criminal offense, additional bottles of liquor." Pet. App. 31a, 100a. At no point did either party raise the issue of Denzell Russell's standing to challenge the search of the vehicle.

The district court denied the motion to suppress, finding the police had probable cause to search the vehicle based on the liquor bottle. Pet. App. 18a-19a. Separately, the court found the police were permitted to do a protective search of the vehicle. Pet. App. 19a. The district court then, sua sponte, found that even if the search was invalid Mr. Russell did not have standing to challenge the search of the vehicle. Pet. App. 19a-20a.

Mr. Russell pled guilty with a conditional plea agreement, preserving his right to appeal the district court's denial of his motion to suppress. Mr. Russell was sentenced to 80 months in prison.

**C. Proceedings on Appeal**

On appeal, Mr. Russell's attorney first filed a brief and motion to withdraw in accordance with *Anders v. California*, 386 U.S. 738 (1967). The Sixth Circuit Court of Appeals denied counsel's motion to withdraw and ordered merits briefing on the question of whether the district court erred in sua sponte raising the standing issue and whether the government had forfeited the standing argument by failing to raise it in the district court. Pet. App. 12a-16a. Merits briefing followed.

Mr. Russell argued law enforcement had no basis for a protective search of the vehicle, the open liquor bottle did not establish probable cause to search the vehicle, and the district court erred in raising the standing issue sua sponte without providing Mr. Russell the opportunity to respond.

The government changed course on appeal. It conceded the open liquor bottle did not give law enforcement probable cause to search the vehicle but argued the search was permissible as a protective measure. The government also argued the district court properly found Mr. Russell lacked standing to challenge the search and did not err in deciding that issue sua sponte. It further argued that if the court of appeals found the government had forfeited the standing issue, it should still prevail on appeal under the Sixth Circuit's application of the plain error standard because it was raising the issue on appeal.

The Sixth Circuit affirmed the district court's denial of the motion to suppress, concluding the government had satisfied plain error under Fed. R. Crim. P. 52(b). Pet. App. 7a. The Sixth Circuit acknowledged plain error "is an odd fit here," because the government is the one attempting to benefit from a forfeited claim and because there is no claim that the district court erred. Pet. App. 8a-9a. The Sixth Circuit concluded the error prong of Rule 52(b) is satisfied without requiring any error on the part of the district court. The Court expressly declined to address the reasonableness of the search or whether the district court erred in raising the standing issue sua sponte. Pet. App. 11a (fn. 1, 4).

Mr. Russell filed a petition for rehearing en banc and argued, among other things, that the Sixth Circuit precedent is in contradiction with this Court's decision in *United States v. Olano*, 507 U.S. 725 (1993), and the plain language of Fed. R. Crim. P. 52(b). It is axiomatic that plain error requires a claim of error.

The Sixth Circuit denied Mr. Russell's petition for en banc and Judge Bush issued a statement respecting the denial of the rehearing en banc. Pet. App. 1a-5a. Judge Bush suggests the Court "should reconsider [the] answer to whether the drafters of Rule 52(b) intended for defendants and the government alike to invoke the plain-error rule." Pet. App. 3a.

## REASONS FOR GRANTING THE PETITION

### I. THE SIXTH CIRCUIT'S APPLICATION OF PLAIN ERROR REVIEW IS IN CONFLICT WITH THIS COURT'S DECISIONS.

Federal Rule of Criminal Procedure 52(b) states: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." To be eligible for plain-error relief, the party must "satisfy three threshold requirements." *Greer v. United States*, 141 S. Ct. 2090, 2096 (2021). See also *United States v. Olano*, 507 U.S. 725 (1993). "*First*, there must be an error. *Second*, the error must be plain. *Third*, the error must affect 'substantial rights,' which generally means that there must be 'a reasonable probability that, but for the error, the outcome of the proceeding would have been different.'" *Id.* (quoting *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904-1905 (2018)).

This Court unambiguously held in *Olano*: "The first limitation on appellate authority under Rule 52(b) is that there indeed be an 'error.'" 507 U.S. at 733. The "error" under Rule 52(b) contemplates a legal error by the district court, not an error of counsel by failing to raise an argument. "If a 'legal rule' was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." *Olano*, 507 U.S. at 733-734.

By applying Rule 52(b)'s plain-error review despite concluding that no error by the district court occurred, the Sixth Circuit's application of this rule is in direct conflict with this Court's precedent. The district court found sua sponte that Mr. Russell did not have standing. Pet. App. 19a-20a. The government argued on appeal that the district court is correct, and Mr. Russell does not have standing. The Sixth Circuit agreed and concluded, "the court didn't err in finding that [Mr.] Russell lacked standing." Pet. App. 11a (fn. 4). Yet, the Sixth Circuit concludes the government prevails on plain error review because Mr. Russell does not have standing. The Sixth Circuit's conclusion ignores the obvious —without error there can be no plain error.

The Sixth Circuit acknowledges that plain error is "an odd fit" in this case. Pet. App. 3a, 8a, 11a. But plain error sans error is more than just an odd fit, it is in direct conflict to this Court's Rule 52(b) construction. There can be no plain error without error. *Olano*, 507 U.S. at 733. The Sixth Circuit's incorrect application of plain error review cannot stand, and this Court should grant review.

### A. THIS ISSUE IS IMPORTANT AND RECURRING AND PRESENTS A PERFECT VEHICLE TO RESOLVE THIS CONFLICT.

Mr. Russell is not aware of any other Circuit Court of Appeals that permits the government to prevail on plain error review when there is no error or even claim of error. The Sixth Circuit's application of plain error review is out of lockstep with its sister circuits and this Court.

The Sixth Circuit's decision in this case is a published, binding opinion and is therefore the governing law in that Circuit. Without this Court's intervention, the Sixth Circuit will continue to misapply plain error review.

This case affords a perfect vehicle to resolving this important question. The Sixth Circuit decision rests entirely on its erroneous application of plain error review. Although other arguments were raised, the Sixth Circuit did not address them. See Pet. App. 11a (fn. 4) (declining to address the question of whether the district court erred in raising the standing issue sua sponte because the government could still prevail on plain error); Pet. App. 11a (fn.1) (noting the government's concession that the open liquor bottle does not provide probable cause to search the vehicle and declining to address the reasonableness of the search arguments because the standing issue is "enough to decide the case.").

This case affords a clear opportunity for resolving the question presented. The issue was preserved, was thoroughly considered by the court below, and is outcome determinative here.

## II. WHETHER PLAIN ERROR APPLIES TO THE GOVERNMENT IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

Plain error review was only ever intended to protect the defendant. Looking to the origins of Rule 52(b), it is clear the drafters intended for the rule to apply only to defendants. The rule, adopted in 1944, was intended to be "a restatement of existing law." See Fed. R. Crim. P. 52(b) 1944 Advisory Committee Notes. "[O]ne member of the advisory committee contemporaneously said that the rule simply 'states the doctrine of plain error.'" Pet. App. 3a (quoting Wendell Berge, *Proposed Federal Rules of Criminal Procedure*, 42 Mich. L. Rev. 353, 381 (1943)).

Historically, there is no evidence the plain error doctrine applied to the government. The plain-error doctrine was meant to protect *defendants* from the "harshness" of the default rule disallowing an issue to be raised in an appellate court that had not been raised in front of the district court. Pet. App. 3a. "If a plain error was 'committed in a manner so absolutely vital to defendants,' the Supreme Court found itself 'at liberty to correct it.'" *Wiborg v. United States*, 163 U.S. 632, 658 (1896). This Court has ruled on a variety of cases relating to the plain error doctrine, prior to the codification of Rule 52(b). See*, e.g., United States v. Atkinson*, 297 U.S. 157 (1936) (declining to apply plain error to government); *Weems v. United States*, 217 U.S. 349 (1910) (applying plain error to defendant); *Crawford v. United States*, 212 U.S. 183 (1909) (same); *Clyatt v. United States*, 197 U.S. 207 (1905) (same); *Wiborg v. United*

*States*, 163 U.S. 632 (1896) (same). None of these cases applied plain error review to the government.

Judge Bush notes that at the time Rule 52(b) was enacted there was no appellate court that applied plain error "to protect the government from the consequences of its errors." Pet. App. 4a. "Likely because, . . . '[i]t is the special deprivation of liberty resulting from a criminal sentence that justifies relieving a defendant of the consequences of a forfeited objection.'" Pet. App. 4a (quoting *United States v. Jackson*, 207 F.3d 910, 923 (7th Cir. 2000) (Wood, J. concurring in part and dissenting in part)). Accord *Olano*, 507 U.S. at 735-36.

Although the circuit courts currently allow for the government to benefit from a plain-error inquiry in the same way that a defendant may, "[n]either Rule 52(b) itself nor the Supreme Court opinions interpreting it seem to embrace that conclusion." Pet. App. 4a. And there is growing support for a return to a defendant-centric rule, the way it was always intended to apply. See, *e.g.,* Pet. App. 4a; *Jackson*, 207 F.3d at 923 (J. Wood concurring in part and dissenting in part) ("It is the special deprivation of liberty resulting from a criminal sentence that justifies relieving a defendant of the consequences of a forfeited objection"); *United States v. Barajas-Nunez*, 91 F.3d 826, 835-836 (6th Cir. 1996) (J. Siler concurring in part and dissenting in part) (finding the purpose of Rule 52(b) and the plain-error standard is to prevent prejudice to the defendant). The United States Court of Appeals for the Armed Forces only applies plain error when the error "prejudiced a substantial right *of the accused*."

*United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011) (emphasis added). See also The Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 859 (Art. 59). Upon examining the history of the plain-error doctrine and Federal Rule of Criminal Procedure 52(b), it is clear that the approach advocated for by these judges was always the intended application of the rule. Not only is the government not the intended beneficiary of this rule, the principles, vocabulary, and public policy do not support a finding that a plain-error inquiry was ever meant to benefit the government.

Simply put, the expansion of the plain error rule to encompass the government is a misapplication of the rule. See Pet. App. 4a. See also *United States v. Barajas-Nunez*, 91 F.3d 826, 835-836 (6th Cir. 1996) (J. Siler concurring in part and dissenting in part). "By applying *Olano*'s defendant-centric requirements to the government's forfeited errors, courts have forced a square peg into a round hole." Pet. App. 3a.

### A. THIS ISSUE IS IMPORTANT AND RECURRING AND PRESENTS A VEHICLE TO RESOLVE THIS OPEN QUESTION.

Federal Rule of Criminal Procedure 52(b) is a legal rule applied at the appellate level in every circuit across the country. Although this Court has examined the rule in a multitude of recent cases, it has never directly addressed the question of whether the rule applies to the government or only the defendant. See*, e.g., Greer v. United States*, 141 S.Ct. 2090 (2021); *Rosales-Mireles v. United States*, 138 S.Ct. 1897 (2018); *Molina-Martinez v. United States*, 578 U.S. 189 (2016); *Henderson v. United*

*States*, 568 U.S. 266 (2013); *United States v. Marcus*, 560 U.S. 258 (2010); *Puckett v. United States*, 556 U.S. 129 (2009); *United States v. Olano*, 507 U.S. 725 (1993).

It is critical for the appellate courts to understand how to correctly apply the rule, and, as such, this Court should clarify whether the plain-error standard is meant to protect only the defendant, as prior case law and Supreme Court language would suggest, or whether the government may also benefit from Rule 52(b).

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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