

No. 26-
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IN THE

SUPREME COURT OF THE UNITED STATES

MOHAMMED JABATEH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

=====

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

On direct appeal, the Third Circuit agreed with petitioner that his conduct was not a crime under the plain meaning of the statutory text underlying two of the four counts of conviction. But the circuit also held that the plain-error rule required it to affirm petitioner's unlawful convictions and 20-year consecutive sentence, because the court deemed its statutory holding not "obvious." On review of the denial of petitioner's subsequent, timely motion to vacate under 28 U.S.C. § 2255, the circuit relied on the "relitigation bar" to rule that its prior plain-error determination categorically prohibited collateral relief from the unconstitutional convictions and sentence. The Question Presented is:

Is collateral relief under 28 U.S.C. § 2255 from an unconstitutional conviction prohibited by a "relitigation bar," where on direct appeal the court held that the defendant's conduct did not come within the clear text of the charged statute, yet affirmed on the basis that its conclusion was not "obvious" under the plain error rule, even where § 2255's "procedural default" doctrine would be overcome by the government's waiver of that defense and the petitioner's "actual innocence"?

Summary reversal is suggested.

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.

RELATED PROCEEDINGS

United States v. Jabbateh [sic], No. 16-CR-88 (E.D.Pa.), judgment of sentenced entered 5/23/2018

United States v. Jabateh, No. 18-1981 (CA3) (direct app.), judgment of affirmance entered 9/8/2020

Jabateh v. United States, No. 20-1369 (S.Ct.), petition for writ of certiorari denied 10/4/2021

United States v. Jabateh, No. 16-CR-88 (E.D.Pa.) (motion to vacate), order denying petition entered 10/21/2024

United States v. Jabateh, No. 24-3184 (3d Cir.) (appeal from denial of §2255), judgment of affirmance entered 3/25/2026

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

Mohammed 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 the denial of § 2255 relief from his convictions and sentence for making false statements when seeking to adjust his immigration status.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Third Circuit affirming the denial of petitioner’s motion to vacate sentence under 28 U.S.C. § 2255 was entered on March 25, 2026, accompanied by a non-precedential opinion (per Phipps, J., with Krause & Roth, JJ.), which is available at 2026 WL 822512. Appx A, 1a–9a. The memorandum opinion of the U.S. District Court for the Eastern District of Pennsylvania (Diamond, J.) denying § 2255 relief is available at 2024 WL 4535453 (Oct. 21, 2024). App. B, 10a–20a. The Third Circuit’s precedential opinion on direct appeal (per Matey, J., with Ambro & Fuentes, JJ.), filed September 8, 2020, is Appendix C, 21a–65a. It is published at 974 F.3d 281.

JURISDICTION

On March 25, 2026, the United States Court of Appeals for the Third Circuit filed its opinion and judgment affirming the denial of § 2255 relief from petitioner’s unlawful convictions and sentence. Appx. A, 21a. A timely petition for rehearing was denied on May 1, 2026. Appx. D, 66a. On August 28, 2026,

under No. 26A102, Justice Alito granted petitioner’s application for a second extension of time, to and including September 28, 2026, for the filing of a petition for a writ of certiorari. 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 CONSTITUTIONAL PROVISION,
FEDERAL STATUTES and RULE INVOLVED**

The Fifth Amendment to the United States Constitution provides, in pertinent part, that “No person shall ... be deprived of ... liberty ... without due process of law”

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

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

(a) * * * *

[¶4] 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)

Title 28, U.S. Code, provides, in pertinent part:

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, ... or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) ... If the court finds ... that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

28 U.S.C. § 2255.

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

On direct appeal, the Third Circuit held that petitioner was improperly prosecuted, convicted, and sentenced, on two of four counts, for making false oral statements to a federal agency, where the text of the applicable statute covers only written statements. But the court of appeals held that this violation did not amount to “plain error” because the court’s holding, although based entirely on the clear language of the statute (coupled with a detailed refutation of the government’s many attempts at counter-argument), was not “obvious” under Fed.R.Crim.P. 52(b). App. C, 21a–51a. Later, reviewing the denial of petitioner’s subsequent motion to vacate his illegal sentences, the court held that the “plain error” affirmance on appeal triggered a “relitigation bar” under 28 U.S.C. § 2255, obviating any application of the ordinary “cause and prejudice” test. App. A, 10a. Petitioner would have overcome that hurdle, had the government ever raised it (which it did not), given his “actual innocence.”

Following a jury trial, petitioner Mohammed Jabateh, a refugee from Liberia, was convicted 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 2011 interview, petitioner orally affirmed certain responses he had made in writing and under oath some ten years earlier.

For making two related sworn false oral affirmations in that interview, Mr. Jabateh was indicted in four counts, one for each statement under each of two statutes, 18 U.S.C. §§ 1546(a)(¶4) and 1621. He was convicted at trial and sentenced consecutively to four maximum terms. The two counts under § 1546 at issue here (Counts One and Two of the indictment) yielded sentences totaling 20 years, which petitioner is now serving, having already fully served the other ten years of his aggregate sentence for the § 1621 perjury convictions, which are not challenged.

Most of petitioner's ten-day trial consisted of testimony from eye witnesses, brought by the government to Philadelphia from Liberia, who described various atrocities and human rights abuses that they said they had observed or suffered during that nation's Civil War some 20 or more years earlier. Several of those witnesses identified petitioner as being the 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, 61–66 (Fall 1999) (available on WestLaw at 23-FALL FLFWA 59). The questions as to which he was accused of lying concerned his role and conduct during the war. At trial, Mr. Jabateh denied committing any such abuses and claimed that the witnesses were misidentifying him, either in good faith or deliberately and maliciously. The jury convicted on all counts.

The fourth paragraph of § 1546(a), invoked in Counts One and Two of petitioner’s indictment, applies only to sworn false statements made “in any application, affidavit, or other document required by the immigration laws.”¹ Trial defense counsel never contested the indictment’s misapplication of § 1546(a) to oral statements. He neither moved pretrial to dismiss those counts under Fed.R.Crim.P. 12(b) nor sought a judgment of acquittal at or after trial on that basis under Rule 29. This grave prosecutorial overreach – bringing charges under a facially inapplicable statute for conduct already properly charged in other counts, for no apparent purpose other than to triple the potential penalties – likewise went unaddressed by the trial judge.

On direct appeal, represented by new counsel, Mr. Jabateh challenged his two convictions under § 1546(a) as invalid under the statute’s plain language. The court of appeals agreed, holding that “the text, context, and history of § 1546(a) show that the best reading of the statute applies only to material, false statements made in a document under oath ..., not false statements made orally under oath about that document.” *United States v. Jabateh*, 974

¹ See Statutes Involved, *ante*, for full text.

F.3d 281, 297 (3d Cir. 2020); App. C, 46a. Nevertheless, the Third Circuit held that in the absence of judicial precedent, convictions under an inapplicable statute (and resulting sentences of twenty additional years’ unauthorized imprisonment) did not necessarily amount to reversible “plain error.” Although “[f]ew constitutional principles are more firmly established than a defendant’s right” not to be convicted unless all the elements of the charged offense are proven, App. 51a, the court held that “the limits on our review prescribed by the Supreme Court in [cases under] Rule 52(b)” compelled it to affirm petitioner’s unconstitutional convictions and sentence. *Id.*²

Petitioner filed a timely motion to vacate the illegal sentences under 28 U.S.C. § 2255. The district court denied his petition, holding that an error that is not “plain” for purposes of appeal cannot support § 2255 relief. App. B, 10a–19a. It further held that trial defense counsel was not ineffective for failing to apprehend the mismatch, on two of the indictment’s four counts, between his client’s alleged conduct and the terms of the charged statute. *Id.*, 19a–20a.

A motions panel of the court of appeals granted Mr. Jabateh a certificate of appealability, but the merits panel proceeded to affirm. App. A, 6a–7a. The court below relied on the plain error disposition of petitioner’s direct appeal, even though that rule is inapplicable to litigation under § 2255. The court held

² Mr. Jabateh filed for rehearing on the basis that a long line of authority, both in this Court and in the circuit itself, refuted that misapplication of the plain error rule (*see* note 4 *post*), but rehearing was denied, as was certiorari. *See* 595 U.S. —, 142 S.Ct. 73 (2021).

that the direct appeal affirmance triggered the “relitigation bar,” ignoring that that court-made doctrine applies when the issue presented under § 2255 had been either waived or the subject of an adverse merits ruling on direct appeal, the opposite of what occurred here. The panel ignored that the government itself had waived the potentially applicable “procedural default” doctrine under § 2255 jurisprudence by failing to invoke it, and never addressed that rule.

The court of appeals also affirmed the district court’s rejection of petitioner’s ineffective assistance claim. Disregarding the “party presentation rule,” it relied on a rationale not invoked below or by the government on appeal, and which is unsupported by the record or logic. The panel claimed that since petitioner’s oral statements had, after all, been made “under oath,” as also required by § 1546(a), it was excusable that counsel apparently overlooked the further statutory element that they have been made “in [a] document.” App. 8a–9a.

The Third Circuit denied a timely petition for rehearing. App. D, 66a. This petition for a writ of certiorari 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 and § 2253, as made applicable by *id.* § 2255(d).

REASONS FOR GRANTING THE PETITION

In affirming the denial of collateral relief from an entirely unlawful and unconstitutional sentence of twenty years' imprisonment, the court below disregarded this Court's longstanding precedent requiring such convictions to be vacated whenever challenged in a properly filed, first application under 28 U.S.C. § 2255. The court of appeals likewise misapplied or disregarded all of the applicable procedural doctrines, including, in particular, the "relitigation bar" and the procedural default ("cause and prejudice") rule. In doing so, the court below perpetuated a grave injustice, in violation of the Constitution and laws of the United States. There is no coherent argument to the contrary. For this reason, a summary reversal would be warranted.

Barring summary relief, this petition for certiorari should be granted on the regular docket to ensure understanding of and compliance with this Court's precedent and to establish consistency among the circuits in similar cases.

1. The decision of the court below misapplies and disregards all of this Court's governing precedent.

The court below allowed petitioner Jabateh's convictions to stand, in the face of a timely, first motion under 28 U.S.C. § 2255, despite recognizing that 18 U.S.C. § 1546(a)(¶4), the statute under which he was charged, convicted and sentenced, does not cover his alleged conduct. The opinion properly notes that § 2255(b) commands that on timely motion a district court must ("shall") grant relief from

“sentences that are not authorized by law.” App. 5a.³ And as the opinion acknowledges:

The Supreme Court has explained that a “conviction and continued incarceration ... violate due process” when the conduct being punished is not prohibited by a “criminal statute, as properly interpreted.” *Fiore v. White*, 531 U.S. 225, 228 (2001); see Wayne R. LaFare, 1 *Substantive Criminal Law* § 1.2(b) (3d ed. 2025) (summarizing a “basic premise of the criminal law” that “conduct is not criminal unless forbidden by law”); *Davis v. United States*, 417 U.S. 333, 346–47 (1974) (explaining that where “punishment [is] for an act that the law does not make criminal[,] ... such a circumstance inherently results in a complete miscarriage of justice” justifying “collateral relief under [§] 2255” (quotation omitted)).

App. 5a (bracketed insertions original).

Against that statutory and constitutional backdrop, surely the law would demand a very clearly applicable and powerfully justified procedural limitation before a court could deny relief from a wholly unlawful conviction or sentence. See, e.g., *Jones v.*

³ The opinion asserts that § 2255(b) “prohibits sentences that are not authorized by law.” App. 5a. That statement is not accurate. Section 2255 is a remedial not a substantive provision. See Statutes Involved, *ante*. What *prohibits* petitioner’s illegal convictions and sentence is the Due Process Clause of the Fifth Amendment. Section 2255(b) directs the district court to vacate such sentences on collateral attack when called to the court’s attention in a properly filed motion.

Hendrix, 599 U.S. 465 (2023) (express statutory restriction on second or successive petitions). Yet the court below points to none. Instead, it relies on § 2255’s ordinary “relitigation bar,” which applies (subject to certain exceptions) when an issue has been raised and determined *against* the defendant on direct appeal. See *Davis v. United States*, 417 U.S. 333, 345–47 (1974) (issue decided adversely by Circuit on direct appeal, but conduct later held by this Court not to violate statute; § 2255 allowed); *cf. Kaufman v. United States*, 394 U.S. 217 (1969) (issue that could have been but was not raised on direct appeal).

Here, the pertinent legal issue – the inapplicability of the charged statute – was decided on appeal *in petitioner’s favor*. As this Court held in *Davis*:

If ... [the petitioner’s] conviction and punishment are for an act that the law does not make criminal[, 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.

417 U.S. at 346–47, quoting *Hill v. United States*, 368 U.S. 424, 428 (1962). This rule is so strong that a defendant whose conduct did not violate the charged statute, properly construed, is entitled to § 2255 relief even after voluntarily pleading guilty. See *Bousley v. United States*, 523 U.S. 614, 619 (1998). Summary reversal is warranted, as the decision of the court below is flatly contrary to this Court’s precedent.

Under the Third Circuit’s application of the relitigation bar in petitioner’s case, the defendant is worse off for having raised a valid and important issue on direct appeal than if he had not. If he had not

appealed, that “procedural default” would be overcome by his “actual innocence” of the charged offense, *Bousley*, 523 U.S. at 624, a circumstance this Court properly deems a “complete miscarriage of justice.” *Id.* 626 (Stevens, J., concurring), quoting *Davis*, 417 U.S. at 346. Similarly a § 2255 movant like Mr. Jabateh is put in a worse position under the decision below than a state prisoner habeas petitioner, where the limitation on relitigation applies only to federal claims adjudicated *adversely on the merits* in state court. See 28 U.S.C. § 2254(d)(1). The relitigation bar, properly understood and applied, imposes the same restriction, not more.

The relitigation bar, in other words, generally refers to *issues* decided on appeal *adversely* to the defendant-appellant. See *Reed v. Farley*, 512 U.S. 339, 358 (1994) (Scalia, J., concurring in the judgment) (“claims will ordinarily not be entertained under § 2255 that have already been rejected on direct review”). In short, a defendant cannot use a § 2255 motion to get a second bite at an issue he lost on direct appeal. Here, the primary “issue” or “claim” – that is, what conduct was covered by the charged statute – was decided on direct appeal in petitioner’s favor. Only the separate “issue” of whether his unlawful convictions amounted to “plain error,” and in particular whether the correct statutory construction was “obvious” within the meaning of this Court’s jurisprudence under Rule 52(b), was decided adversely. Petitioner did not seek to relitigate that latter question, which is separate from the merits, under § 2255.

“Plain error” cases are not the only circumstance in which an defendant might lose on direct appeal and

yet preserve the issue presented for post-conviction review. Another example is the case where a defendant advances an issue of ineffective assistance of counsel on direct appeal and loses, not on the merits but for lack of a sufficient record to evaluate that claim. *Cf. Massaro v. United States*, 538 U.S. 500, 508–09 (2003) (issue noted but not decided). That defendant would not be barred from advancing his ineffective assistance issue again under § 2255, because he is not “relitigating” a claim the appellate court decided against him. Likewise here, petitioner did not seek to relitigate any point decided adversely to him on appeal. To the contrary, he relied emphatically on the *favorable* (and correct) appellate holding that an essential element of the charged offense was missing in his case.

Petitioner does not dispute the basic proposition “that § 2255 does not permit relitigation of issues presented and decided on direct appeal.” App. 6a. See *United States v. Frady*, 456 U.S. 152, 165 (1982). But none of the cases cited by the court below, nor any other, concerned a case, where the court of appeals decided a statutory issue in the appellant’s favor on the merits, and that defendant now seeks § 2255 relief because of the constitutional implications of the appellate ruling. As is evident from this Court’s cases, the relitigation doctrine applies only “as a general rule,” and “ordinarily,” *Foster v. Chapman*, 578 U.S. 488, 519 (2016) (Alito, J., concurring). See App. 6a & n.2. The leading case, *Davis v. U.S.*, *ante*, established one such exception. Here, the relitigation bar is wholly inapplicable, as the issue that entitles petitioner to § 2255 relief (the proper, textual construction of § 1546(a)) was decided in his favor on appeal.

Surely, this is not an “ordinary” case in the sense referenced in Justice Alito’s *Foster* concurrence.

Petitioner’s conduct, as established at trial, did not violate § 1546(a), the court recognized on direct appeal, because the false statements identified in the indictment were made orally, not “in” any immigration “document” as the statute’s plain language requires. App.C, 32a–34a, 974 F.3d at 291–92. But the appellate court held that this fundamental deficiency in the prosecution did not amount to “plain error” under Fed.R.Crim.P 52(b), because the discrepancy was not “plain” in the sense of being “obvious.” App. 47a–51a. For purposes of his § 2255 motion and appeal, Mr. Jabateh did not challenge that ruling, however dubious; he accepted it as the binding law of the case.⁴ There is no relitigation bar here.

⁴ Notwithstanding its status as “law of the case,” the direct appellate court’s interpretation of Fed.R.Crim.P. 52(b) was wrong. This is confirmed by this Court’s seminal plain error cases finding insufficient evidence of the charged crime, which all involve antecedent 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

In effect, the Third Circuit’s analysis treats the appellate plain error decision as controlling over any subsequent § 2255 litigation, even to the point of superseding the procedural rules, as developed by this Court, that do govern under § 2255. Most notably, in *Frady* – unmentioned by the court below – this Court held that the doctrine of “procedural default,” *not* the criteria of the “plain error” rule, governs a court’s decision under § 2255 of an issue that could and should have been, but (as here) was not raised at trial. See 456 U.S. at 164–67. In that case, this Court held that because § 2255 requires a defendant to show a greater degree of prejudice than even the plain-error standard requires for relief on direct appeal from an erroneous but unobjected-to jury instruction, *Frady* was not entitled to relief.

By contrast, Mr. Jabateh’s direct appeal failed under the plain error rule not for lack of prejudice –

(cont'd)

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) affirms 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 the 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 in petitioner’s direct appeal, is presumptively erroneous. *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002).

far from it, given his wholly illegal 20-year consecutive sentence – but because the appellate panel deemed the statutory text argument he advanced, while correct, to be insufficiently “obvious” to qualify as “plain” under Rule 52(b). Even assuming the latter dubious determination was correct, it has no proper bearing on the case under § 2255. When appropriately applied, the plain error rule “grants the courts of appeals the latitude to correct particularly egregious errors on [direct] appeal regardless of a defendant’s trial default.” *Fradley*, 456 U.S. at 163. Instead, the court of appeals’ misapplication of Rule 52(b) in this § 2255 case unnecessarily forces a conflict with the most fundamental underlying constitutional principles of our criminal law.

It is true that the “procedural default” doctrine can often impose an impediment to § 2255 relief as daunting as the “plain error” rule does on direct appeal or even more so. But as this Court has recognized, “procedural default” is an affirmative defense in habeas corpus and § 2255 litigation. *E.g.*, *Gray v. Netherland*, 518 U.S. 152, 165–66 (1996) (“[P]rocedural default is an affirmative defense [T]he Commonwealth would have been obligated to raise procedural default as a defense, or lose the right to assert the defense thereafter.”). Here, perhaps recognizing that the doctrine’s exception for “actual innocence” applies to petitioner, the government never invoked “procedural default” in response to Mr. Jabateh’s § 2255 motion, either in the district court or even on appeal. The court below likewise did not raise it. See *Trest v. Cain*, 522 U.S. 87 (1997) (limited discretion of habeas court to raise procedural default *sua sponte*). So that potential defense was waived.

Nor was the Third Circuit’s reading of § 1546(a) on direct appeal any sort of “new rule,” such that its application on collateral attack could be questioned, as suggested by the court below in a footnote. *See* App.6a–7a n.2. An authoritative construction of the statute under which the defendant was prosecuted, even if newly announced, is not a “new rule.” If a newly addressed statutory construction question were properly characterized as a “new rule,” it would not be retroactive. But this Court’s cases establish that it is. A new and authoritative construction of a criminal statute, whether or not “obvious,” is not only directly applicable to that defendant in his own appeal but is also inherently and always fully retroactive and applicable to others, including on collateral attack. *Welch v. United States*, 578 U.S. 120, 134 (2016); *Fiore v. White*, 531 U.S. 225 (2001) (per curiam); *Bousley*, 523 U.S. at 619; *cf. Davis*, 417 U.S. at 341–43 (intervening change in Circuit law concerning a statutory prerequisite to conviction under charged statute).

The court below sought to bolster its erroneous decision by twice remarking that the oral statements for which Mr. Jabateh was prosecuted were made under oath, as the statute requires for prosecution. App. 3a & n.1 (quoting § 1546(a)(¶4) in full), 8a & n.4. But this is entirely immaterial. The “oath” element (emphasized in the panel’s footnote) was never at issue. Unless each and every element of the charged offense is established, no crime has been proven, and none can be punished. *E.g., Vachon v. New Hampshire*, 414 U.S. 478 (1974) (per curiam). Here, the missing element is that the false statement, even though sworn, have been made “in a ... document ...” That other elements of the offense were satisfied is of no moment.

The only question decided adversely to petitioner on direct appeal was plain-error “obviousness.” Mr. Jabateh did not seek to “relitigate” that point in his motion under 28 U.S.C. § 2255, because obviousness is immaterial under that provision. What counts under § 2255 is that the issue raised implicate a constitutional or otherwise fundamental right. See *Davis*, 417 U.S. st 346 (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)) (“‘a fundamental defect which inherently results in a complete miscarriage of justice,’ and ... ‘present[s] exceptional circumstances where the need for the remedy afforded by the writ ... is apparent’”). Even the court below (App.5a) correctly acknowledged that petitioner’s due process challenge satisfied that standard. By relying on a mistaken application of the relitigation bar to inject the inapplicable standards of the plain error rule into petitioner’s § 2255 appeal, the court grossly deviated from this Court’s cases, warranting summary reversal.

Absent that action, the Court should grant full review to decide the fundamental issue whether the governing procedural rules permit (much less require) a wholly unlawful 20-year sentence – for conduct that does not violate the charged statute – to stand, in the face of a timely challenge under § 2255, because that illegality (having been inexcusably overlooked at trial by all concerned) *was* challenged on direct appeal and found not to be sufficiently “obvious” to qualify as plain error.

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 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. The decision of the court below is well-suited for summary reversal.

For the reasons outlined under Point 1 of this petition, the court of appeals' application of the "relitigation bar" to petitioner's § 2255 motion was manifestly incorrect. Indeed, the errors in the appellate decision below are so clear – and so fundamentally at odds with the most basic building blocks of our constitutional criminal law and of federal post-conviction procedure – 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 – and from the rules of post-conviction litigation that control when such issues can be raised collaterally – will not be repeated, and will be forcefully negated if they somehow occur.

The decision of the court below appears to be unique in its confusion of a plain error disposition on appeal with the circumstances under which the "relitigation bar" properly applies to post-conviction review. Just as the court below did not cite any prior § 2255 case arising in an equivalent procedural posture, so petitioner has not located any other case where the central legal point on § 2255 was decided in the movant's favor on direct appeal, but relief had

been denied there for a reason unique to the direct appellate process, such as the “plain error” rule.

The very uniqueness of the lower court’s decision makes it more likely to disrupt Congress’s carefully reticulated statutory structure governing post-conviction relief, as explicated by this Court. Even though the opinion is marked “not precedential,” it is readily available to legal researchers. Accordingly, as the only case to expressly tackle the question it purports to answer, it will surely be invoked by other courts, despite all its errors, to undercut post-conviction review following appeals that have substantive merit but fail under the “plain error” standard.

As this Court discussed in *Fradley*, many if not most such cases will not present circumstances warranting post-conviction relief, once the properly applicable rules are correctly applied. But some, as here, will demand a different outcome.

Accordingly, to enforce the rules of practice and procedure governing motions under 28 U.S.C. § 2255, both statutory and court-made, where the lower court has clearly misapplied them, petitioner’s case would appear to justify a summary reversal. This Court has regularly rendered such decisions in recent years in equivalently clear cases under *id.* § 2254, both for and against the habeas applicant. See, e.g., *Whitton v. Dixon*, 608 U.S. 493 (2026) (*per curiam*); *Klein v. Martin*, 607 U.S. 213 (2026) (*per curiam*); *Clark v. Sweeney*, 607 U.S. 7 (2025) (*per curiam*); *Andrew v. White*, 604 U.S. 86 (2025) (*per curiam*).

The petition should be granted and the judgment of the court below summarily reversed. Petitioner is entitled to relief under § 2255 from his wholly unlawful convictions and sentences on Counts One

and Two, notwithstanding the adverse “plain error” disposition of his direct appeal.

CONCLUSION

The petition for a writ of certiorari should be granted and the denial of relief under 28 U.S.C. § 2255 from petitioner’s unlawful and unconstitutional convictions should be reversed.

Respectfully submitted,

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