

No. 08-1341

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GLENN MARCUS

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES

ELENA KAGAN

*Solicitor General
Counsel of Record*

THOMAS E. PEREZ

Assistant Attorney General

MICHAEL R. DREEBEN

Deputy Solicitor General

ERIC D. MILLER

*Assistant to the Solicitor
General*

JESSICA DUNSAY SILVER

TOVAH R. CALDERON

Attorneys

*Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217*

QUESTION PRESENTED

Whether the court of appeals departed from the Court's interpretation of Rule 52(b) of the Federal Rules of Criminal Procedure by adopting as the appropriate standard for plain-error review of an asserted ex post facto violation whether "there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct."

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provision and rule involved	2
Statement	2
Summary of argument	7
Argument:	
An appellate court may not notice a forfeited ex post facto error unless the defendant can establish a reasonable possibility that it affected the outcome of the proceeding	9
A. Rule 52(b) precludes a court of appeals from noticing a forfeited error unless there is a reasonable possibility that the error affected the judgment	9
B. The forfeited error in this case is subject to ordinary plain-error principles	15
C. This Court should remand to allow the court of appeals to apply the correct standard of plain- error review	21
Conclusion	23

TABLE OF AUTHORITIES

Cases:

<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991)	11, 18
<i>Burge v. Butler</i> , 867 F.2d 247 (5th Cir. 1989)	17
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	12
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)	22
<i>Fahy v. Connecticut</i> , 375 U.S. 85 (1963)	12
<i>Hedgpeth v. Pulido</i> , 129 S. Ct. 530 (2008)	17

IV

Cases—Continued:	Page
<i>Johnson v. United States</i> , 520 U.S. 461 (1997)	<i>passim</i>
<i>Johnson v. United States</i> , 529 U.S. 694 (2000)	16
<i>Luce v. United States</i> , 469 U.S. 38 (1984)	10
<i>Neder v. United States</i> , 527 U.S. 1 (1999)	11, 16
<i>Puckett v. United States</i> , 129 S. Ct. 1423 (2009)	11, 14, 18, 19
<i>United States v. Brown</i> , 555 F.2d 407 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978)	17
<i>United States v. Busche</i> , 915 F.2d 1150 (7th Cir. 1990) . .	10
<i>United States v. Campanale</i> , 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976)	17
<i>United States v. Cotton</i> , 535 U.S. 625 (2002)	6, 12, 13, 18, 19
<i>United States v. Dixon</i> , 551 F.3d 578 (7th Cir. 2008), cert. granted <i>sub nom. Carr v. United States</i> , No. 08-1301 (Sept. 30, 2009)	17
<i>United States v. Dominguez Benitez</i> , 542 U.S. 74 (2004)	10, 11
<i>United States v. Frady</i> , 456 U.S. 152 (1982)	10
<i>United States v. Julian</i> , 427 F.3d 471 (7th Cir. 2005), cert. denied, 546 U.S. 1220 (2006)	21
<i>United States v. Muñoz-Franco</i> , 487 F.3d 25 (1st Cir.), cert. denied, 128 S. Ct. 678, 128 S. Ct. 679, and 128 S. Ct. 682 (2007)	20
<i>United States v. Olano</i> , 507 U.S. 725 (1993)	7, 9, 10, 11, 14
<i>United States v. Paulin</i> , 329 Fed. Appx. 232 (11th Cir. 2009)	20

Cases—Continued:	Page
<i>United States v. Torres</i> , 901 F.2d 205 (2d Cir.), cert. denied, 498 U.S. 906 (1990)	5, 20
<i>United States v. Tykarsky</i> , 446 F.3d 458 (3d Cir. 2006)	21
<i>United States v. Vonn</i> , 535 U.S. 55 (2002)	10, 12
<i>United States v. Young</i> , 470 U.S. 1 (1985)	9, 14, 19
<i>Wainwright v. Sykes</i> , 433 U.S. 72 (1977)	10
<i>Yakus v. United States</i> , 321 U.S. 414 (1944)	9
Constitution, statutes and rules:	
U.S. Const.:	
Art. I, § 9, Cl. 3 (Ex Post Facto Clause)	2, 4, 7, 8, 16, 17
Amend. V (Due Process Clause)	1
Sex Offender Registration and Notification Act, 42 U.S.C. 16901 <i>et seq.</i>	17
Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, Div. A, § 112(a)(2), 114 Stat. 1466	4
18 U.S.C. 1462	4
18 U.S.C. 1589	2, 4
18 U.S.C. 1591(a)(1)	2, 4
18 U.S.C. 2250(a)	17
Fed. R. Crim. P.:	
Rule 11	12
Rule 29	12
Rule 52(a)	11
Rule 52(b)	<i>passim</i>

VI

Miscellaneous:	Page
Roger J. Traynor, <i>The Riddle of Harmless Error</i> (1970)	19

In the Supreme Court of the United States

No. 08-1341

UNITED STATES OF AMERICA, PETITIONER

v.

GLENN MARCUS

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 538 F.3d 97. The opinion and order of the district court (Pet. App. 19a-64a) is reported at 487 F. Supp. 2d 289.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2008. A petition for rehearing was denied on December 8, 2008 (Pet. App. 65a-66a). On February 27, 2009, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 7, 2009. On March 26, 2009, Justice Ginsburg further extended the time to May 7, 2009. The petition for a writ of certiorari was filed on May 1, 2009, and was

granted on October 13, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Ex Post Facto Clause of the United States Constitution (Art. I, § 9, Cl. 3) provides: “No * * * ex post facto Law shall be passed.”

Federal Rule of Criminal Procedure 52(b) provides: “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, respondent was convicted of sex trafficking, in violation of 18 U.S.C. 1591(a)(1), and forced labor, in violation of 18 U.S.C. 1589. He was sentenced to 108 months of imprisonment. The court of appeals vacated respondent’s convictions and remanded for further proceedings. Pet. App. 1a-18a.

1. In 1998, respondent met a woman named Jodi in an online chat room devoted to sexual practices involving bondage, domination, and sadomasochism.¹ In October 1998 and again the next month, Jodi traveled to Maryland from her home in the Midwest. While there, she met respondent, who lived in New York, at an apartment belonging to a woman named Joanna, who was one of what respondent called his “slaves.” In January 1999, Jodi moved in with Joanna. Thereafter, respondent visited Joanna’s home every one to two weeks to engage in

¹ The district court permitted certain witnesses to testify using only their first names. Pet. App. 2a n.1.

violent sexual activity with Jodi, Joanna, and sometimes other women as well. Pet. App. 2a-3a.

In October 1999, Jodi told respondent that she wanted to end her relationship with him. In response, respondent subjected her to a “punishment” that involved severe physical abuse. From then on, Jodi’s relationship with respondent was nonconsensual. Pet. App. 3a; see *id.* at 26a-27a (describing incident).

In January 2000, respondent ordered Jodi to move to New York and live with a woman named Rona, another of respondent’s “slaves.” At respondent’s direction, Jodi created a sexually explicit website called “Slavespace,” and she worked between eight and nine hours per day on the website. Respondent received all of the resulting income, which consisted principally of membership fees and advertising revenue. Respondent continued to engage in violent, nonconsensual sexual behavior with Jodi, and he punished her severely when he was dissatisfied with her work. When Jodi told respondent that she wanted to leave, he threatened to send pictures to her family and the media. Pet. App. 4a; see *id.* at 28a-29a.

In March 2001, respondent told Jodi that he would allow her to leave him, but that she would first have to endure an additional punishment. Respondent drove Jodi to the home of a woman named Sherry, where he struck Jodi’s head against a ceiling beam, tied her hands and ankles to the beam, beat and whipped her while she was hanging from the beam, drugged her, and had sexual intercourse with her. Respondent photographed the incident and forced Jodi to write about it for his website. Jodi continued to live with Rona until August 2001, when Jodi moved into her own apartment. At that point, Jodi’s interactions with respondent became less fre-

quent, although she remained in contact with him until 2003. Pet. App. 4a-5a.

2. A grand jury returned an indictment charging respondent with distribution of obscene materials through an interactive computer service, in violation of 18 U.S.C. 1462; sex trafficking, in violation of 18 U.S.C. 1591(a)(1); and forced labor, in violation of 18 U.S.C. 1589. Pet. App. 5a-6a & n.4. The latter two statutes were enacted as part of the Trafficking Victims Protection Act of 2000 (TVPA), Pub. L. No. 106-386, Div. A, § 112(a)(2), 114 Stat. 1466, which became law on October 28, 2000. The superseding indictment, however, charged a course of conduct that occurred “between January 1999 and October 2001.” Pet. App. 5a-6a.

At trial, the government presented evidence about respondent’s conduct both before and after the effective date of the TVPA. Respondent did not object to the introduction of evidence pertaining to periods before the TVPA’s enactment, nor did he request an instruction that would have limited the jury’s consideration of such evidence. He likewise failed to raise the issue in his motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29. The jury found respondent not guilty of the obscenity offense, but guilty of both the sex-trafficking and the forced-labor offenses. Pet. App. 6a & n.4.

3. The court of appeals vacated respondent’s convictions and remanded for further proceedings. Pet. App. 1a-18a.

a. The court of appeals observed that respondent “argue[d] for the first time on appeal that the TVPA has been applied retroactively in his case in violation of the Ex Post Facto Clause of the United States Constitution.” Pet. App. 6a; see U.S. Const. Art. I, § 9, Cl. 3.

The court stated that, “[b]ecause [respondent] failed to raise this argument before the District Court, it is reviewed for plain error.” Pet. App. 6a; see Fed. R. Crim. P. 52(b).

The court of appeals concluded that “[t]his case * * * clearly implicates the Ex Post Facto Clause” because the jury was permitted to consider evidence of conduct that pre-dated the enactment of the TVPA. Pet. App. 7a. Relying on its decision in *United States v. Torres*, 901 F.2d 205 (2d Cir.), cert. denied, 498 U.S. 906 (1990), the court stated that “if it was *possible* for the jury—who had not been given instructions regarding the date of enactment—to convict *exclusively* on pre-enactment conduct, then the conviction constitutes a violation of the Ex Post Facto Clause.” Pet. App. 8a. The court added that such a possibility requires vacatur of a conviction, “even under plain error review.” *Ibid.* Applying that standard, the court concluded that *Torres* required vacatur because it was possible that the jury relied solely on pre-enactment conduct. The court explained that the jury heard “evidence * * * that established [that] all of the elements of” the sex-trafficking and forced-labor offenses were present before the effective date of the TVPA. *Id.* at 9a. The court rejected the government’s argument that vacatur was not warranted because the possibility that the jury relied solely on pre-enactment conduct was “remote,” reasoning that it must vacate “whenever there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct.” *Id.* at 10a.

b. Then-Judge Sotomayor filed a concurring opinion, which Judge Wesley joined. Pet. App. 10a-18a. In their view, the panel’s decision was “compelled by the current law of this circuit,” but the Second Circuit’s “precedent

with regard to plain-error review of ex post facto violations does not fully align with the principles inhering in the Supreme Court’s recent applications of plain-error review.” *Id.* at 10a-11a. In particular, they emphasized that the *Torres* standard “appears to conflict with” *United States v. Cotton*, 535 U.S. 625 (2002), and *Johnson v. United States*, 520 U.S. 461 (1997). Pet. App. 11a. Under those cases, “where there is no reasonable possibility that an error not objected to at trial had an effect on the judgment, the Supreme Court counsels us against exercising our discretion to notice that error.” *Id.* at 14a. The Second Circuit’s standard conflicts with that approach, the concurring judges stated, “because it requires a retrial whenever there is any factual possibility that a jury could have convicted a defendant based exclusively on pre-enactment conduct, even if such a scenario is highly implausible.” *Ibid.*

The concurring judges stated that, applying the correct plain-error test, under which a court should affirm if there is not a “reasonable possibility” that the jury convicted exclusively on pre-enactment conduct, they would order a retrial on respondent’s sex-trafficking count. Pet. App. 15a-17a. With respect to the forced-labor conviction, however, they concluded that the identification of the proper standard for reviewing respondent’s forfeited ex post facto claim “affects the outcome of this appeal.” *Id.* at 11a. The concurring judges reasoned that respondent’s “relevant conduct was materially indistinguishable” with respect to the forced-labor conviction during the pre- and post-enactment periods, and that respondent had not “offer[ed] any explanation of how his pre- and post-enactment conduct differed in any relevant way.” *Id.* at 17a-18a. Because that was so, the concurring judges saw “no reasonable possibility

that the jury would have convicted him based only on his pre-enactment conduct.” *Id.* at 18a. Accordingly, they would have affirmed respondent’s forced-labor conviction under what they believed to be this Court’s standard for plain-error review. *Ibid.*

4. The government filed a petition for rehearing en banc, which the court of appeals denied. Pet. App. 65a-66a.

SUMMARY OF ARGUMENT

The court of appeals applied an incorrect standard for determining whether respondent’s forfeited claim of error under the Ex Post Facto Clause warrants relief on plain-error review. Its judgment should therefore be reversed and the case remanded for application of the correct standard.

Rule 52(b) of the Federal Rules of Criminal Procedure provides courts of appeals with a limited authority to correct errors that were forfeited because they were not raised in the district court. It states that “[a] plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.” This Court has held that, under Rule 52(b), “before an appellate court can correct an error not raised at trial, there must be (1) ‘error,’ (2) that is ‘plain,’ and (3) that ‘affect[s] substantial rights.’” *Johnson v. United States*, 520 U.S. 461, 466-467 (1997) (brackets in original) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). If those requirements are satisfied, the court may exercise its discretion to notice the error, but only if the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Olano*, 507 U.S. at 736 (brackets in original) (citation omitted).

Under Rule 52(b), a reviewing court cannot reverse unless the defendant carries the burden to show a plain error affecting substantial rights. But even if a reviewing court assumes or finds that the defendant has made this showing, the court may not notice the forfeited error unless it seriously affected the fairness, integrity, or public reputation of the proceeding. The defendant normally cannot meet that burden when there is no reasonable possibility that, but for the error, the outcome of the proceeding would have been different. Indeed, on the fourth prong of plain-error review, an appellate court considering the type of instructional error alleged here could appropriately decline to exercise its discretion to reverse even when such a reasonable possibility exists—for example, when the circumstances nonetheless indicate that the error did not actually affect the outcome.

The court of appeals departed from those principles by holding that, whenever a defendant asserts a forfeited claim based on the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, reversal is required if there is “any possibility, no matter how unlikely, that the jury could have convicted based exclusively on” conduct that pre-dated the enactment of the statute, Pet. App. 10a. The court offered no reason why ex post facto claims should be treated differently from other kinds of claims, and it could not have done so. To the contrary, this Court has made clear that all forfeited claims, no matter how serious, are subject to the same standard of plain-error review.

The concurrence in the court of appeals correctly concluded that there is no reasonable possibility that the jury relied exclusively on pre-enactment conduct in convicting respondent on the forced-labor count because his

pre-enactment and post-enactment conduct was materially indistinguishable. The failure of the instructions to address this issue therefore did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. Because the court of appeals did not reach that issue, however, this Court should reverse the judgment below and remand to allow the court of appeals to apply the correct plain-error standard to this case.

ARGUMENT

AN APPELLATE COURT MAY NOT NOTICE A FORFEITED EX POST FACTO ERROR UNLESS THE DEFENDANT CAN ESTABLISH A REASONABLE POSSIBILITY THAT IT AFFECTED THE OUTCOME OF THE PROCEEDING

A. Rule 52(b) Precludes A Court Of Appeals From Noticing A Forfeited Error Unless There Is A Reasonable Possibility That The Error Affected The Judgment

1. “No procedural principle is more familiar to this Court than that a constitutional right,’ or a right of any other sort, ‘may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.’” *United States v. Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). Federal Rule of Criminal Procedure 52(b)—the plain-error rule—“tempers the blow of a rigid application of the contemporaneous-objection requirement,” *United States v. Young*, 470 U.S. 1, 15 (1985), by “provid[ing] a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court,” *Olano*, 507 U.S. at 731. The rule thus strikes a “careful balanc[e]” between “our need to encourage all trial participants to seek a fair and accurate trial the first time

around [and] our insistence that obvious injustice be promptly redressed.” *United States v. Frady*, 456 U.S. 152, 163 (1982).

Rule 52(b) protects important values in the judicial system. It promotes finality and judicial economy by requiring claims of error to be raised in the trial court—where they can be examined with the benefit of fresh recollections and errors can be corrected on the spot—in order to receive full consideration on appeal. See *United States v. Vonn*, 535 U.S. 55, 73 (2002) (“[T]he value of finality requires defense counsel to be on his toes, not just the judge.”); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (contemporaneous-objection rule “encourages the result that [trial] proceedings be as free of error as possible”). It “reduce[s] wasteful reversals by demanding strenuous exertion to get relief for unpreserved error.” *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004). And it diminishes opportunities and incentives for gamesmanship by discouraging a party from silently acquiescing in error in the trial court and then using that error—“pull[ing] the ace out of his sleeve,” *United States v. Busche*, 915 F.2d 1150, 1151 (7th Cir. 1990)—to gain reversal on appeal should the trial outcome be unsatisfactory. *Vonn*, 535 U.S. at 73; *Luce v. United States*, 469 U.S. 38, 42 (1984); *Wainwright*, 433 U.S. at 89.

To achieve those objectives, Rule 52(b) imposes three “limitation[s] on appellate authority” to grant relief based on forfeited claims. *Olano*, 507 U.S. at 732. The rule states that “[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). In *Olano*, this Court held that, “before an appellate court can correct an error not raised at trial, there

must be (1) ‘error,’ (2) that is ‘plain,’ and (3) that ‘affect[s] substantial rights.’” *Johnson v. United States*, 520 U.S. 461, 466-467 (1997) (brackets in original) (quoting *Olano*, 507 U.S. at 732). When all three requirements are satisfied, “the court of appeals has authority to order correction, but [it] is not required to do so.” *Olano*, 507 U.S. at 735. Instead, a reviewing court “may * * * exercise its discretion to notice a forfeited error” only if a fourth condition is satisfied: “the error ‘seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.’” *Johnson*, 520 U.S. at 467 (brackets in original) (citation omitted).

2. In referring to “substantial rights,” Rule 52(b) uses the same language as Rule 52(a), which states that “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.” Fed. R. Crim. P. 52(a). “[I]n most cases,” this Court has explained, that language “means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings.” *Olano*, 507 U.S. at 734.²

When a defendant seeks relief based on a forfeited claim of error, it is the defendant who bears the burden of showing prejudice. *Olano*, 507 U.S. at 734-745; see *Dominguez Benitez*, 542 U.S. at 83 (on plain-error review, a defendant who seeks reversal for a violation of

² If properly preserved, certain errors that “affect[] the framework within which the trial proceeds”—*i.e.*, “structural” errors—result in reversal without regard to an assessment of prejudice. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). In the plain-error context, this Court has reserved the question whether structural errors automatically affect substantial rights. *Puckett v. United States*, 129 S. Ct. 1423, 1432 (2009). In any event, structural errors are a “very limited” category of errors, which does not include jury-instruction errors that occur within “the trial process itself.” *Neder v. United States*, 527 U.S. 1, 8 (1999) (citations omitted).

Federal Rule of Criminal Procedure 11 at his guilty-plea colloquy “must show a reasonable probability that, but for the error, he would not have entered the plea”); *Vonn*, 535 U.S. at 62 (on plain-error review, “the tables are turned” and the defendant must show an effect on his substantial rights). In the harmless-error context, this Court has held that, to determine whether a constitutional error was prejudicial, the reviewing court must ask “whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction.” *Chapman v. California*, 386 U.S. 18, 23 (1967) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). Thus, to show that a forfeited constitutional error had an effect on substantial rights, a defendant must show at least a reasonable possibility that, but for the error, the outcome of the proceeding would have been different.

3. Even when an error affects substantial rights under *Olano*’s third prong (or is assumed to do so), *Olano*’s fourth prong limits reversal to cases in which the error seriously impairs the fairness or reliability of the proceedings. In cases involving instructional error, this Court’s decisions in *Johnson*, *supra*, and *United States v. Cotton*, 535 U.S. 625 (2002), make clear that a reviewing court should not exercise its discretion to correct the error when, for example, the relevant evidence is “overwhelming” and “essentially uncontroverted.” Pet. App. 14a (concurring opinion); see *id.* at 11a-13a.

In *Johnson*, the jury instructions in a perjury case omitted the element of materiality. 520 U.S. at 464. This Court determined that an error had occurred and that it was plain. *Id.* at 467-468. The Court also assumed for purposes of its decision that the error was “structural” in nature and that it affected the defendant’s substantial rights. *Id.* at 468-469. But the Court

held that the error nevertheless did “not meet the final requirement of *Olano*.” *Id.* at 469. The Court explained that “the evidence supporting materiality was ‘overwhelming’” and that the defendant “ha[d] presented no plausible argument that the false statement under oath for which she was convicted * * * was somehow not material.” *Id.* at 470. Under those circumstances, the Court held, “there [was] no basis for concluding that the error ‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’”; to the contrary, the Court stated that “it would be the reversal of a conviction such as this which would have that effect.” *Ibid.* (second brackets in original).

The Court applied a similar analysis in *Cotton*, where an indictment omitted a fact (drug quantity) that was necessary to authorize an increase in the defendants’ maximum sentence. 535 U.S. at 632. The Court accepted the government’s concession of obvious error, and it assumed for purposes of its decision that the error had affected the defendants’ substantial rights. *Ibid.* The Court held, however, that “the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings” and thus did not satisfy the fourth part of the *Olano* test. *Id.* at 632-633. The Court explained that “[t]he evidence that the conspiracy involved at least 50 grams of cocaine base was ‘overwhelming’ and ‘essentially uncontroverted,’” and concluded that “[s]urely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base.” *Id.* at 633 (citation omitted).

Johnson and *Cotton* make clear that reversal of a conviction based on a forfeited claim of instructional error is unwarranted, under *Olano*’s fourth prong, when

the outcome would have been the same absent the error. And in *Puckett v. United States*, 129 S. Ct. 1423 (2009), the Court again emphasized that, regardless of whether a defendant is able to satisfy the first three parts of the plain-error test, the fourth component—*i.e.*, whether the error seriously affects the fairness, integrity or public reputation of judicial proceedings—“is meant to be applied on a case-specific and fact-intensive basis.” *Id.* at 1433; see *ibid.* (emphasizing “that a ‘*per se* approach to plain-error review is flawed’”) (quoting *Young*, 470 U.S. at 17 n.14).

Because Rule 52(b) applies to many different types of forfeited errors, many different considerations may be relevant to an assessment of whether a forfeited error seriously affected the fairness, integrity, or public reputation of the proceedings. See *Puckett*, 129 S. Ct. at 1433. And because the fourth prong of the *Olano* test imposes an independent barrier to relief on plain-error review even when the other three prongs of the test are satisfied, see *Olano*, 507 U.S. at 737, it may require more from a defendant than simply showing an effect on substantial rights under the relatively modest “reasonable possibility” standard. Instead, a court of appeals has discretion to determine in a particular case that such an error did not seriously affect the fairness, integrity, and public reputation of judicial proceedings, because, for example, the thrust of the parties’ evidence and arguments shows that the instructional error did not actually affect the outcome. See *Young*, 470 U.S. at 16 (declining to reverse, on plain-error review, when although the prosecutor’s remarks were erroneous and inappropriate, they “were not such as to undermine the fairness of the trial and contribute to a miscarriage of justice”); accord *Olano*, 507 U.S. at 736-737.

In this case, the concurring judges in the court of appeals correctly reasoned that, at a minimum, reversal based on a forfeited error should not occur when “there is no reasonable possibility that [the] error * * * had an effect on the judgment.” Pet. App. 14a. That standard is consistent with the recognition in *Johnson* and *Cotton* that when “overwhelming” and “essentially uncontroverted” evidence was introduced on an element that the jury was not asked to find, the verdict is so unlikely to have been different that “the error does not seriously affect the fairness, integrity, or public reputation of the judicial proceedings.” *Ibid.*

B. The Forfeited Error In This Case Is Subject To Ordinary Plain-Error Principles

The court of appeals believed that it was required to grant relief on respondent’s forfeited ex post facto claim so long as there was “*any possibility, no matter how unlikely*, that the jury could have convicted based exclusively on pre-enactment conduct.” Pet. App. 10a (emphases added). It therefore proceeded directly from a finding of error to a conclusion that “a retrial [was] necessary.” *Ibid.* The court of appeals’ approach fails to apply the framework established in *Olano* and conflicts with this Court’s decisions in *Johnson*, *Cotton*, and *Puckett*. Those decisions make clear that, even if an effect on substantial rights is established or assumed, a defendant may not obtain relief on a forfeited claim unless he can show that the error altered the outcome and therefore seriously affected the fairness, integrity, or public reputation of judicial proceedings. Such an effect is not established at least when, as in this case, no “reasonable possibility” exists that the jury could have con-

victed based solely on pre-enactment conduct. Pet. App. 14a (concurring opinion).³

The court of appeals did not attempt to reconcile its decision with ordinary principles of plain-error review. Instead, as the concurring judges noted, the panel followed circuit “precedent with regard to plain-error review of ex post facto violations.” Pet. App. 10a. But neither Rule 52(b), nor any of this Court’s cases interpreting it, provides a basis for creating a special plain-error rule applicable only to ex post facto claims.

1. As an initial matter, the error in this case may not be an ex post facto violation. The indictment charged, and the government’s proof showed, a course of conduct that began before the enactment of the forced-labor statute and continued thereafter. Criminal statutes are presumed not to have retroactive effect, see *Johnson v. United States*, 529 U.S. 694, 701-702 (2000), and the government has not argued in this case that the TVPA criminalizes conduct that occurred before its enactment. If the TVPA does not criminalize pre-enactment conduct, it is not an “ex post facto Law” (U.S. Const. Art. I, § 9, Cl. 3). But if the jury had relied exclusively on

³ The court of appeals’ apparent assumption that the error affected “substantial rights,” even if the possibility that the jury relied exclusively on pre-enactment conduct was “remote,” Pet. App. 10a, is also flawed. The omission to instruct the jury that it could not rely entirely on pre-enactment conduct is a trial error, rather than a structural error. See *Neder*, 527 U.S. at 8. Thus, when a defendant asserts a forfeited claim of error of the type at issue here (*i.e.*, the failure of the jury to make a necessary finding), he has the burden to establish some likelihood that the omission affected the outcome to satisfy the third prong of *Olano*. See pp. 11-12, *supra*. But as in *Johnson* and *Cotton*, the Court need not reach that issue because the case can be resolved on *Olano*’s fourth prong, as recognized by the concurring judges below. Pet. App. 11a (concurring opinion).

non-criminal, pre-enactment conduct to reach its verdict, then respondent was found guilty of a non-crime, which would appear to violate the Due Process Clause. See, e.g., *Burge v. Butler*, 867 F.2d 247, 250 (5th Cir. 1989) (finding a due-process violation when a defendant was sentenced under a statute that did not apply to his crime because his conduct occurred before the statute's effective date).⁴

The proper characterization of the error in this case, however, does not affect the plain-error analysis. Under either view, the jury was given the option of finding respondent guilty on either a valid theory (a post-enactment violation) or an invalid theory (a wholly pre-enactment violation). This Court held in *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008) (per curiam), that such alternative-theory errors are susceptible to harmless-error analysis. They are susceptible to plain-error analysis as well, and

⁴ A prosecution for a course of conduct that straddles the effective date of a statute does not violate the Ex Post Facto Clause, or the Due Process Clause, “as long as at least one of the acts [constituting the offense] took place” after the statute’s effective date. *United States v. Dixon*, 551 F.3d 578, 585 (7th Cir. 2008), cert. granted *sub nom. Carr v. United States*, No. 08-1301 (Sept. 30, 2009); accord *United States v. Brown*, 555 F.2d 407, 416-417 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); *United States v. Campanale*, 518 F.2d 352, 364-365 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). Thus, only if a jury relied exclusively on pre-enactment conduct would its verdict present a constitutional issue. *Dixon* applied that principle in rejecting an ex post facto challenge to a prosecution under 18 U.S.C. 2250(a), the criminal provision of the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 *et seq.*, when one element of the violation occurred after SORNA became applicable to the defendant. This Court has granted review of that holding. This case does not involve that issue, however, because the sole question presented is the standard for plain-error review of an asserted ex post facto claim, not the determination of whether an ex post facto violation occurred.

therefore, as explained below, the court of appeals' decision to apply an "any possibility" standard here was wrong regardless of how the error is characterized.

2. This Court has made clear that all forfeited claims, no matter how serious, are subject to the same standard of plain-error review. "[T]he seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Johnson*, 520 U.S. at 466; see *Cotton*, 535 U.S. at 634 (plain-error review applies to the violation of the Fifth Amendment grand-jury right, which "serves a vital function" and "acts as a check on prosecutorial power"); *Puckett*, 129 S. Ct. at 1433. Indeed, in both *Johnson* and *Cotton*, this Court assumed without deciding that the error alleged was "structural" in nature—*i.e.*, that it was a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself"—and that it affected the defendants' substantial rights without any showing of prejudice under *Olano*'s third prong. *Johnson* 520 U.S. at 468 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)); accord *Cotton*, 535 U.S. at 632. Nonetheless, this Court applied its longstanding plain-error standard and concluded in both cases that, despite the seriousness of the errors at issue, reversal was improper under *Olano*'s fourth prong because the defendants were unable to show that the errors affected the judgment. *Johnson*, 520 U.S. at 470; *Cotton*, 535 U.S. at 633-634.

3. As the concurring judges explained below, nothing justifies a different standard of plain-error review for forfeited ex post facto claims: "While the Ex Post Facto Clause is certainly fundamental to our notions of justice, it is no more so than the Fifth and Sixth Amendment rights at issue in *Johnson* and *Cotton*." Pet. App. 13a

(citation omitted). Indeed, the error in this case is very like the error asserted in *Johnson*, because it resulted in part from the failure properly to instruct the jury. In *Johnson*, the error involved the failure of the instructions to require a finding on the element of materiality; here, it involved instructing the jury to find the elements of the offense without requiring it to distinguish between pre- and post-enactment conduct. See *id.* at 6a. Accordingly, there is no basis for adopting a different approach to plain-error review of forfeited claims such as respondent's claim in this case.

This Court “ha[s] repeatedly cautioned that ‘[a]ny unwarranted extension’ of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice” and that “the creation of an unjustified exception to the Rule would be ‘[e]ven less appropriate.’” *Puckett*, 129 S. Ct. at 1429 (second and third brackets in original) (quoting *Young*, 470 U.S. at 15, and *Johnson*, 520 U.S. at 466). As this Court has observed, “[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Johnson*, 520 U.S. at 470 (quoting Roger J. Traynor, *The Riddle of Harmless Error* 50 (1970)). “The real threat then to the ‘fairness, integrity, and public reputation of judicial proceedings’ would be if [criminal defendants], despite the overwhelming and uncontroverted evidence that they” engaged in criminal activity, were left unpunished “because of an error that was never objected to at trial.” *Cotton*, 535 U.S. at 634.

Significantly, the court of appeals' decision in this case does not set forth any justification for treating forfeited ex post facto claims differently from other forfeited claims. Rather, as the concurring judges ob-

served, the court of appeals was bound by its previous decision in *United States v. Torres*, 901 F.2d 205 (2d Cir.), cert. denied, 498 U.S. 906 (1990), which was decided before *Olano*, *Johnson*, *Cotton*, and *Puckett*. Pet. App. 14a. In *Torres*, the Second Circuit stated that “errors of constitutional magnitude will be noticed more freely under the plain error rule than less serious errors.” 901 F.2d at 228 (citation omitted). The *Torres* court, however, “did not apply [this] Court’s current four-part plain-error analysis in crafting [its] standard.” Pet. App. 14a (concurring opinion). It appears, therefore, that the court of appeals’ decision resulted from the court’s pre-*Olano* understanding of plain-error review rather than from any desire to carve out a special standard for forfeited ex post facto claims.

Nor has any other court of appeals articulated a justification for applying a special rule of plain-error review to forfeited ex post facto claims. To the contrary, since this Court decided *Olano*, other courts that have considered forfeited claims similar to respondent’s have declined to grant relief in the absence of a “reasonable possibility” that the defendant could have been convicted solely on the basis of pre-enactment conduct. See *United States v. Paulin*, 329 Fed. Appx. 232, 234 (11th Cir. 2009) (per curiam) (unpublished decision) (denying relief under the plain-error standard because there was “no doubt that the jury would have decided the case the same way if the evidence had been limited to [the defendant’s] conduct after * * * the effective date of the TVPA”) (internal quotation marks and citation omitted); *United States v. Muñoz-Franco*, 487 F.3d 25, 57 (1st Cir.) (denying relief on plain-error review because “no reasonable jury would have convicted [the defendants] based exclusively on conduct that occurred prior to the

enactment date”), cert. denied, 128 S. Ct. 678, 128 S. Ct. 679, and 128 S. Ct. 682 (2007); *United States v. Tykarsky*, 446 F.3d 458, 480 (3d Cir. 2006) (“To ‘affect substantial rights,’ the error must have been prejudicial. Tykarsky has been prejudiced if there is a reasonable possibility that a jury, properly instructed on this point, might have found Tykarsky guilty based exclusively on acts that occurred before the increased penalty took effect.”) (citation omitted); *United States v. Julian*, 427 F.3d 471, 483 (7th Cir. 2005) (denying relief on plain-error review because “no reasonable jury would have found that [the defendant] withdrew from the conspiracy prior to” the effective date of the statute), cert. denied, 546 U.S. 1220 (2006).

C. This Court Should Remand To Allow The Court Of Appeals To Apply The Correct Standard Of Plain-Error Review

On a correct understanding of the plain-error standard, the court of appeals erred in vacating respondent’s conviction simply because it identified a “possibility” that the outcome of the proceeding would have been different in the absence of the error. Pet. App. 10a. At a minimum, respondent must “offer[] a plausible explanation as to how the relevant pre- and post-enactment conduct differed, thereby demonstrating a reasonable possibility that the jury might have convicted him * * * based exclusively on pre-enactment conduct.” *Id.* at 14a (concurring opinion). In the view of the concurring judges, a reasonable possibility existed that respondent would not have been convicted of sex trafficking in the absence of the error, but no such possibility existed with

respect to his forced-labor conviction. *Id.* at 15a-18a.⁵ There is, however, no holding of the court of appeals on those questions. Ordinarily, this Court does not consider issues that were not passed on below, see *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and nothing in this case suggests departing from that practice. To the contrary, the court of appeals is better situated to conduct the record-specific review necessary to apply the correct standard. Accordingly, if this Court holds that this case is governed by ordinary plain-error principles rather than by the *Torres* approach, this Court should remand to allow the court of appeals to apply the correct principles in the first instance.

⁵ With respect to the forced-labor conviction, the concurring judges reached that conclusion based on their assessment that respondent's "relevant conduct was materially indistinguishable" in the pre- and post-enactment periods. Pet. App. 17a-18a. The concurring judges were correct that, if evidence of the defendant's conduct is materially the same in the periods before and after the enactment of a statute, then the defendant will not be able to establish a reasonable possibility that the jury relied exclusively on pre-enactment conduct. But that is not the only context in which a defendant will be unable to establish the requisite reasonable possibility of a different outcome. For example, the jury might have found the defendant guilty of another offense that necessarily required the defendant to have engaged in prohibited conduct after the statute's effective date, or the government might have offered "overwhelming" and "essentially uncontroverted" proof that conduct constituting one element of the offense occurred after the effective date. *Johnson*, 520 U.S. at 470.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

ELENA KAGAN
Solicitor General

THOMAS E. PEREZ
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

ERIC D. MILLER
*Assistant to the Solicitor
General*

JESSICA DUNSAY SILVER
TOVAH R. CALDERON
Attorneys

DECEMBER 2009