SUPREME COURT OF THE UNITED STATES

Nos. 01–10873 and 02–5034

KHANH PHUONG NGUYEN, PETITIONER
01–10873 *v.*
UNITED STATES ET AL.

TUYET MAI THI PHAN, PETITIONER
02–5034 *v.*
UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 9, 2003]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

Under Federal Rule of Criminal Procedure 52(b), courts have "a *limited* power to correct errors that were forfeited because [they were] not timely raised" below. *United States* v. *Olano,* 507 U. S. 725, 731 (1993) (emphasis added). Even when an error has occurred that is "'plain'" and "'affect[s] substantial rights,'" *id.*, at 732, "'an appellate court may . . . exercise its discretion to notice a forfeited error . . . *only if* . . . the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings,"'" *United States* v. *Cotton,* 535 U. S. 625, 631–632 (2002) (quoting *Johnson* v. *United States,* 520 U. S. 461, 467 (1997)) (emphasis added). By ignoring this well-established limitation of our remedial authority, the Court flouts the stated will of Congress and almost 70 years of our own precedent.

It was undoubtedly a mistake, for the reasons stated by the Court, *ante*, at 4–7, for the appellate panel to include an Article IV judge. Exercise of our certiorari jurisdiction

was warranted to review the case and to state the law correctly. To that extent, I agree with the Court's opinion. But I do not agree that that error is a valid basis for vacating petitioners' convictions, because even assuming that the error affected petitioners' substantial rights, it simply did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Petitioners knew of the composition of the panel of the Court of Appeals more than a week before the case was orally argued. App. 7, 9–12. They made no objection then or later in that court, preferring to wait until the panel had decided against them on the merits to raise it. The Court first concedes, as it must, that a failure to object to error limits an appellate court to review for plain error. *Ante*, at 11. But the Court then completely ignores the fact that "the authority created by Rule 52(b) is circumscribed." *Olano*, *supra*, at 732. Indeed, the opinion fails to cite, much less apply, *Olano* or our other recent cases reaffirming that "we exercise our power under Rule 52(b) sparingly," *Jones* v. *United States,* 527 U. S. 373, 389 (1999), and only "'in those circumstances in which a miscarriage of justice would otherwise result,'" *Olano*, *supra*, at 736 (quoting *United States* v. *Young,* 470 U. S. 1, 15 (1985)).

This failure is baffling in light of our well-established precedent and the clarity of Congress' intent to limit federal courts' authority to correct plain error. As we explained in *Olano*, we articulated the standard that should guide the exercise of remedial discretion under Rule 52(b) almost 70 years ago in *United States* v. *Atkinson,* 297 U. S. 157 (1936). 507 U. S., at 736. Congress then codified that standard in Rule 52(b). *Ibid*. (quoting *Young, supra*, at 7). Since then, "we repeatedly have quoted the *Atkinson* language in describing plain-error review." *Olano*, *supra*, at 736 (citing cases). According to this long line of cases, when an error is plain and affects substantial rights, "an appellate court *must* then determine whether the forfeited error

seriously affect[s] the fairness, integrity or public reputation of judicial proceedings *before* it may exercise its discretion to correct the error." *Johnson*, *supra*, at 469–470 (quoting *Olano*, *supra*, at 736) (internal quotation marks omitted; emphasis added).

This mandatory inquiry confirms that no "miscarriage of justice" would result if petitioners' convictions were affirmed. Petitioners make no claim that Chief Judge Munson was biased or incompetent. His character and abilities as a jurist, peculiarly experienced in adjudicating matters arising within the United States Territories, stands unimpeached. It is therefore difficult to understand how fairness or the public reputation of the judicial process is advanced by allowing criminal defendants, whose convictions are supported by "'overwhelming'" evidence, *Cotton*, *supra*, at 633, 634, and whose arguments on appeal were meritless, to consume the public resources necessary for a second appellate review.*

The Court proffers several justifications for ignoring our controlling precedents, none of which is persuasive. First, the Court's reliance on *United States* v. *American-Foreign S. S. Corp.,* 363 U. S. 685 (1960), is misplaced. See *ante*, at

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*Drug enforcement agents seized 443.8 grams of methamphetamine in a package that was mailed to Phan and opened in Nguyen's apartment. 284 F. 3d 1086, 1087–1088 (CA9 2002). In that apartment, agents also discovered drug paraphernalia, "nearly a hundred little plastic zip lock bags," and $6,000 in cash. *Id.,* at 1088, 1091.

All three members of the Ninth Circuit panel agreed that petitioners' challenges—that the District Court abused its discretion in admitting certain evidence, and that the evidence was insufficient to support the convictions—lacked merit. Judge Goodwin, writing for the court, explained that petitioners' evidentiary challenges were "overstate[d]," and that the District Court "clearly performed the necessary" analysis. *Id.,* at 1090. With respect to petitioners' sufficiency of the evidence argument, the judges were also unanimous "[t]here was plenty of evidence," *id.,* at 1091, and "abundant facts," *id.,* at 1090, in support of petitioners' convictions.

10, n. 11, 12, 13. In that case, Circuit Judge Medina retired three months after the Court of Appeals for the Second Circuit granted a petition for rehearing en banc, but before the court issued its en banc decision. 363 U. S., at 686–687. He nonetheless participated in consideration of the case and subsequently joined the en banc decision. *Id.,* at 687. This Court vacated the judgment because, under the relevant statute, a "court in banc" could consist only of "active circuit judges." *Id.,* at 685 (quoting 28 U. S. C. §46(c) (internal quotation marks omitted)).

American-Foreign does not speak to the situation here because the petitioner in that case did not forfeit the error. Forfeiture is "'the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Johnson*, 520 U. S., at 465 (quoting *Olano*, 507 U. S., at 731). The petitioner in *American-Foreign* did not so fail. Rather, it objected at the earliest possible moment: immediately after the Court of Appeals issued an en banc decision that Judge Medina joined. It did not know that Judge Medina would retire or then participate in the en banc decision until after the case was briefed and submitted; it availed itself of the earliest opportunity to object to this error by filing a motion for further rehearing en banc. Petitioner did not forfeit the error, so Rule 52(b) did not apply.

That is not the case here. Petitioners Nguyen and Phan learned before oral argument that Chief Judge Munson was a member of their Court of Appeals panel. They nonetheless failed to object at oral argument or in a petition for rehearing en banc. This forfeiture requires us to apply the *Olano* test faithfully.

The Court also relies mistakenly on *William Cramp & Sons Ship & Engine Building Co.* v. *International Curtiss Marine Turbine Co.*, 228 U. S. 645 (1913), and *American Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372 (1893). *Ante*, at 8–10, and n. 11. In both cases, this

Court considered an Act of Congress providing that "'no judge before whom a cause or question may have been tried or heard in a district court . . . shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals.'" 228 U. S., at 649; 148 U. S., at 387. This Court held that, when a district judge sat in contravention of that "comprehensive and inflexible" prohibition, 228 U. S., at 650, the court of appeals was statutorily unable to act. See also *American Construction*, *supra*, at 387.

But these cases do not control here because, as the Court fails to note, both cases predate our adoption of the standard for plain-error review in *Atkinson* in 1936, and Congress' codification of that standard in Rule 52(b) in 1944. This, and not some broader principle, explains the Court's failure in those cases to apply our modern plain-error analysis. The Court has no such excuse. The cases can also easily be distinguished from this one on the facts: They held only that courts constituted "in violation of the *express prohibitions* of [a] statute" lack the authority to act. *Cramp*, 228 U. S., at 650 (emphasis added). In contrast, the Ninth Circuit panel in this case did not run afoul of any "comprehensive and inflexible" statutory "prohibition." *Ibid.* Rather, the error must be deduced by negative implication, from a series of statutes that describe the proper use of district judges in panels of the Courts of Appeals. See *ante*, at 5–7.

The Court also says that "to ignore the violation of the designation statute in these cases would incorrectly suggest that some action (or inaction) on petitioners' part could create authority Congress has quite carefully withheld." *Ante*, at 11. But proper affirmance of petitioners' convictions on the ground that the error did not affect the fairness, integrity, or public reputation of judicial proceedings would not so suggest. The Solicitor General has conceded the error, and the Court's opinion properly makes clear to the Courts of Appeals that Chief Judge

Munson's participation constituted plain error. Indeed, the Court unwittingly explains why its own holding is mistaken: By ignoring the limits that Congress has imposed on appellate courts' discretion via Rule 52(b), the Court "create[s]" for itself and exercises "authority [that] Congress has quite carefully withheld." *Ibid.*

On this record, there is no basis for concluding that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. No miscarriage of justice will result from deciding not to notice the plain error here. Accordingly, I would proceed to address petitioners' constitutional claims. Petitioners argue that the designation of a non-Article III judge to sit on the Ninth Circuit panel violated the Appointments Clause, U. S. Const., Art. II, §2, cl. 2, and the structural guarantees embodied in Article III. I would decline to address the first question because it was "neither raised nor decided below, and [was] not presented in the petition for certiorari." *Blessing* v. *Freestone,* 520 U. S. 329, 340, n. 3 (1997).

Petitioners' second constitutional claim, like their statutory one, is subject to plain-error review. "No procedural principle is more familiar to this Court than that a constitutional right 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." *Yakus* v. *United States,* 321 U. S. 414, 444 (1944); *Johnson*, *supra*, at 465. See also *Cotton*, 535 U. S., at 631–633 (applying plain-error review to a claimed violation of *Apprendi* v. *New Jersey,* 530 U. S. 466 (2000)); *Plaut* v. *Spendthrift Farm, Inc.,* 514 U. S. 211, 231 (1995) ("[T]he proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases"); *Commodity Futures Trading Comm'n* v. *Schor,* 478 U. S. 833, 848–849 (1986) ("[A]s a personal right, Article III's guarantee of an impartial and

independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried").

Assuming, *arguendo*, that petitioners could satisfy the first three elements of the plain-error inquiry, see *Olano*, 507 U. S., at 732; *supra*, at 2, their constitutional claim fails for the same reason as does their statutory claim: Petitioners have not shown that the claimed error seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *supra*, at 3. I would therefore affirm the judgment of the Court of Appeals.