No. __-____

IN THE
Supreme Court of the United States

ARMARCION D. HENDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Rule 52(b) of the Federal Rules of Criminal Procedure permits an appellate court to correct a trial court's "plain error" despite the lack of an objection in the trial court. In *Johnson v. United States*, 520 U.S. 461 (1997), this Court held that, when the governing law on an issue is *settled* against the defendant at the time of trial but then changes in the defendant's favor by the time of appeal, "it is enough that an error be 'plain' at the time of appellate consideration." *Id.* at 468. *Johnson* did not address the timing of plain-error review when the governing law on an issue is *unsettled* at trial but clarified in the defendant's favor while his appeal is pending. The courts of appeals have split 5 to 3 on the question that *Johnson* left open. That question, which this case squarely presents, is:

When the governing law is unsettled at the time of trial but settled in the defendant's favor by the time of appeal, should an appellate court reviewing for "plain error" apply *Johnson*'s time-of-appeal standard, as the First, Second, Sixth, Tenth, and Eleventh Circuits do, or should the appellate court apply the Ninth Circuit's time-of-trial standard, which the D.C. Circuit and the panel below have adopted?

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Armarcion Henderson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

INTRODUCTION

Because the courts of appeals "deal almost daily with issues of plain error," App. 17a (Haynes, J., dissenting from denial of rehearing en banc), this case presents a question of recurring importance in the federal administration of criminal justice. And it offers this Court an ideal vehicle to resolve a conflict that has not only divided the circuits 5 to 3, but also created confusion throughout the federal system.

A defendant generally forfeits a right, including the correction of an error, by failing "'to make [a] 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)). But the "plain error" doctrine allows an appellate court to correct a "plain error that affects substantial rights . . . even though it was not brought to the [trial] court's attention." Fed. R. Crim. P. 52(b).

In 2010, the district court below imposed a criminal sentence on petitioner that exceeded the recommended guidelines range by approximately two years in order to ensure that he would have an opportunity to enroll in a drug treatment program. At the time, the law in the Fifth Circuit was unsettled; it did not clearly address whether that upward departure was permissible. Last year, however, this

Court settled the law in *Tapia v. United States*, 131 S. Ct. 2382 (2011), holding that a court may not "impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation." *Id.* at 2393.

On petitioner's post-*Tapia* appeal, the Fifth Circuit explicitly acknowledged that the district court had erred when it imposed the longer sentence, but held that because petitioner had not objected at sentencing it could not correct the mistake unless the error was "plain." App. 1a, 4a. Although no one doubted after *Tapia* that the error was "plain" at the time of the appeal, the panel concluded that the error was not "plain" at the time of sentencing because the law had then been unsettled in the Fifth Circuit. App. 4a. The dispositive issue was thus when the "plainness" of the error should be judged.

In *Johnson v. United States*, 520 U.S. 461 (1997), this Court held that, when "the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration." *Id.* at 468. The court below did not follow *Johnson*, however, because the law here had been unsettled at the time of trial. The panel instead followed the time-of-trial standard first announced by the Ninth Circuit and subsequently adopted by the D.C. Circuit. *See* App. 4a. In so doing, it rejected *Johnson*'s time-of-appeal standard, which the First, Second, Sixth, Tenth, and Eleventh Circuits have all extended to cases in which the law was unsettled at the time of trial.

The lower courts have had numerous opportunities to consider the standard for plain-error review when the law is unsettled at the time of trial. The result

has been a direct, irreconcilable, and deeply entrenched conflict. Nothing would be gained by further percolation. The importance of the issue is underlined by the number of cases in which it has arisen and will likely arise in the future. Because this case offers an ideal vehicle for resolving this important conflict, certiorari should be granted.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-4a) is reported at 646 F.3d 223. The district court's order denying petitioner's Rule 35(a) Motion to Correct a Sentence for Clear Error (App. 5a-7a) is not reported.

JURISDICTION

The court of appeals entered its judgment on July 8, 2011. A timely petition for rehearing was denied by the en banc court on December 15, 2011 (App. 8a-18a), and by the panel on January 30, 2012 (App. 19a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Rule 52(b) of the Federal Rules of Criminal Procedure 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

Petitioner pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). App. 1a. On June 2, 2010, the district court sentenced him to 60 months' imprisonment, which exceeded the recommended guidelines range of 33-41 months. *Id.* The upward departure (19-27 months) was not intended as additional punishment. On the contrary, it "was necessary to ensure that [petitioner] had an opportunity to enroll in the federal Bureau of Prisons drug treatment program." App. 2a. The district court declared, "'I've got to give him that length of time to do the programming and the treatment and the counselling that [petitioner] needs right now. And that is the reason for that sentence under [18 U.S.C. §] 3553(a)(2)(D).'" App. 39a-40a.[1] When asked if there was "any reason why that sentence as stated should not be imposed," defense counsel responded, "'[p]rocedurally, no, Your Honor.'" App. 41a.

At the time petitioner was sentenced, the courts of appeals were divided on whether a district court may impose a longer prison sentence to promote a defendant's rehabilitation. *See Tapia v. United States*, 131 S. Ct. 2382, 2386 n.1 (2011) (collecting cases). The Fifth Circuit had not yet addressed the issue. *See* App. 4a & n.4. The law was accordingly unsettled in the Fifth Circuit.

On June 10, 2010, eight days after the sentencing hearing, petitioner filed a motion under Federal Rule of Criminal Procedure 35(a) to correct the sentence for

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[1] The cited statute, 18 U.S.C. § 3553(a)(2)(D), provides that "[t]he court, in determining the particular sentence to be imposed, shall consider . . . the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

clear error. He argued that the district court had violated 18 U.S.C. § 3582(a), which requires the court to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." The district court denied the motion. *See* App. 5a-7a.

While petitioner's appeal was pending in the Fifth Circuit, this Court decided *Tapia*. Tapia had received a sentence at the upper end of the guidelines range. In explaining its decision, the sentencing court had "referred several times to Tapia's need for drug treatment" and had "indicated that Tapia should serve a prison term long enough to qualify for and complete" the Bureau of Prisons' Residential Drug Abuse Program. *Tapia*, 131 S. Ct. at 2385. This Court unanimously held that "a court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation." *Id*. at 2393; *see also id*. at 2385 ("[T]he Sentencing Reform Act precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation.").

Less than a month after *Tapia* was decided, the Fifth Circuit affirmed petitioner's sentence. The court of appeals recognized that, "[u]nder *Tapia*," petitioner was "correct that the district court erred" in "giving him a longer sentence to promote his rehabilitation." App. 1a. But the court of appeals did not correct the error "because he cannot show that the district court plainly erred." *Id.* Even though the Fifth Circuit acknowledged the district court's error, it held that "an error is plain only if it 'was clear under current law *at the time of trial*.'" App. 4a (quoting *United*

States v. Jackson, 549 F.3d 963, 977 (5th Cir. 2008)) (emphasis added by court below).[2]

Petitioner sought both panel and en banc rehearing. The court denied en banc rehearing by a 10-7 vote over Judge Haynes's published dissent (joined by Judge Dennis). *See* App. 8a-18a. Judge Haynes observed that *Johnson v. United States*, 520 U.S. 461 (1997), had established that, "'where the law at time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be "plain" at the time of appellate consideration.'" App. 13a-14a (quoting *Johnson*, 520 U.S. at 468) (alteration in original). She also noted that *United States v. Olano*, 507 U.S. 725 (1993), had "left open the question of whether plain error would be established 'where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified.'" App. 14a (quoting *Olano*, 507 U.S. at 734). Surveying other circuits' decisions, Judge Haynes explained that the "circuits have split over whether *Johnson* applies to the plain error analysis when the law was unclear at the time of trial and later becomes clear." App. 14a-15a (citing decisions of the Ninth and D.C. Circuits for the time-of-trial rule and decisions of the First, Second, Sixth, and Eleventh Circuits for *Johnson*'s time-of-appeal rule).

Judge Haynes stressed the importance of the issue, observing that "[w]e deal almost daily with issues of plain error, and it is certainly not an unusual occurrence for a claim of plain error to be made where the law was unclear at the time of the

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[2] The circuit court also affirmed the district court's denial of the Rule 35(a) motion. *See* App. 3a-4a. That issue is not before this Court.

trial court's decision but is clear by the time of appeal." App. 17a. She also explained why this case is a good vehicle for resolving the important question presented because the "timing issue" is dispositive: "The Supreme Court's decision in *Tapia* establishes that at the time of appeal, the district court's error was plain. I submit that [petitioner] easily meets the other requirements for plain error." *Id.*

Panel rehearing was denied without comment a month and a half later, on January 30, 2012. *See* App. 19a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DEEPLY DIVIDED OVER WHETHER, WHEN A LEGAL ISSUE IS UNSETTLED AT THE TIME OF TRIAL BUT SETTLED DURING THE APPEAL, REVIEW FOR PLAIN ERROR OCCURS UNDER THE NEWLY SETTLED LAW

This Court's decisions on plain-error review under Federal Rule of Criminal Procedure 52(b) leave open the important question presented here. In *United States v. Olano*, 507 U.S. 725 (1993), this Court explicitly declined to "consider the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Id.* at 734. In *Johnson v. United States*, 520 U.S. 461 (1997), the Court again left open *Olano*'s "special case," holding only that courts should review for plain error under the law at the time of appeal "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal." *Id.* at 468.

The courts of appeals are constantly facing *Olano*'s "special case," however, and they are irreconcilably divided on the correct time frame to use in conducting plain-error review. On one side of the split, the First, Second, Sixth, Tenth, and

Eleventh Circuits have extended *Johnson*'s time-of-appeal rule to cases in which the law is unsettled at the time of trial. *See infra* pp. 8-12. The Ninth Circuit, in contrast, has adopted a time-of-trial rule for such cases. *See infra* pp. 12-14. The D.C. Circuit, and now the Fifth Circuit below, adhere to the Ninth Circuit's rule. *See infra* pp. 14-16.

This 5-3 split also has spawned broader confusion. Other courts of appeals have disagreed in dicta about how to conduct plain-error review in the face of newly settled law at the time of appeal. *See infra* p. 17. Many commentators recognize the question left open by *Johnson* and the resulting conflict in the courts of appeals, while others choose one side of the split without acknowledging the other. *See infra* pp. 16-18. That confusion has reached the point that circuits cannot even keep their own law consistent: another Fifth Circuit panel recently applied the time-of-appeal standard to nearly identical facts. *See infra* pp. 15-16.

Fundamental values of fairness and consistency demand that the plain-error standard should not vary depending on which circuit the case arises in or which appellate judges are assigned to hear it. This Court should grant certiorari to answer *Olano*'s open question and settle the conflict.

A. The Courts Of Appeals Are Divided Over Whether To Review For Plain Error Using The Law At The Time Of Appeal Or At The Time Of Trial

1. The First, Second, Sixth, Tenth, and Eleventh Circuits hold that claims of plain error are reviewed using *Johnson*'s time-of-appeal standard

The Tenth Circuit, on facts nearly identical to those here, recently applied *Johnson*'s time-of-appeal standard to a case in which the law was unsettled at trial

but became settled while the case was on appeal. *See United States v. Cordery*, 656 F.3d 1103, 1105-06 (10th Cir. 2011). In *Cordery*, as here, a trial court extended a sentence so that the defendant could participate in a drug treatment program, and the defendant did not object. *Id.* at 1105. At the time of sentencing, the circuit law regarding such an extension was unsettled. While the defendant's appeal was pending, however, the Tenth Circuit and then this Court decided that rehabilitation is not a valid basis for lengthening a sentence. *See Tapia v. United States*, 131 S. Ct. 2382, 2391 (2011); *United States v. Story*, 635 F.3d 1241 (10th Cir. 2011). On appeal in *Cordery*, the Tenth Circuit then reversed for plain error in light of *Tapia* and *Story*. 656 F.3d at 1106-07. In so doing, it looked to the law at the time of appeal to conclude that the error was plain, expressly rejecting the Ninth Circuit's time-of-trial standard. *Id.* at 1107.

Like other circuits in the split, the Tenth Circuit explained that *Johnson* "brings no clarity to cases . . . where the law at the time of the contested decision was unsettled, but clarified while the appeal was pending." *Id.* It acknowledged "that the question of whether an error must be plain at the time of trial or merely at the time of appeal has divided the circuits." *Id.* The Tenth Circuit recognized that the Ninth and D.C. Circuits, on one side of the conflict, interpret *Johnson* as creating a "narrow exception to an otherwise broad rule that an error is 'plain' only if it was clear at the time of the district court's decision." *Id.* (citing *United States v. Mouling*, 557 F.3d 658, 663-64 (D.C. Cir. 2009); *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997)). On the other side of the conflict are circuits that adopt

a "blanket rule that plain error is measured at the time of appeal." *Id.* (citing *United States v. Smith*, 402 F.3d 1303, 1315 n.7 (11th Cir.), *vacated on other grounds*, 545 U.S. 1125 (2005); *United States v. Ross*, 77 F.3d 1525, 1539 (7th Cir. 1996)).

The *Cordery* court held that "it is the law of this circuit that we side with the latter view," reviewing for plain error under the law at the time of appeal. *Id.* The Tenth Circuit accordingly joined the majority in favor of applying *Johnson*'s time-of-appeal standard to cases in which the governing law was unsettled at the time of trial.

The First Circuit also recently acknowledged this circuit split and joined the majority in favor of the time-of-appeal standard. *See United States v. Farrell*, No. 10-1140, 2012 WL 516069, at *8-*9 (1st Cir. Feb. 17, 2012).[3] Explaining that this Court in *Johnson* "left open the question of whether plain error would be established where the law was *unsettled* at the time of trial, and subsequently clarified while the appeal was pending," the court acknowledged that "[t]he circuits are divided on this issue." *Id.* at *8. It then joined the majority view "that 'the time of appellate consideration' standard applies regardless of the law's clarity at the time of trial." *Id.* at *8-*9. The court explained that "[t]his approach is consistent with the principles undergirding the forfeiture doctrine . . . . Plain error review is not a

[3] The district court in *Farrell* had held that breaking and entering a vessel in the daytime constituted a violent offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e). *See* 2012 WL 516069, at *1, *4. Circuit law was then unsettled on that issue. *See id.* at *6. While Farrell's appeal was pending, the First Circuit held that a similar crime was not a violent offense under a similar statute. *See id.* (citing *United States v. Brown*, 631 F.3d 573 (1st Cir. 2011)). The court of appeals accordingly determined that the district court had erred and the error was plain under the time-of-appeal standard. *See id.* at *8-*9.

vehicle for gauging the magnitude of the district court's mistake; rather, it functions as a limitation on the appellate court's discretion. We do not correct forfeited errors that are questionable or inconsequential, but only those that are 'plain' and 'affect substantial rights.'" *Id.* at *9. Furthermore, the court recognized that "assessing the plainness of error at the time of appellate consideration allows the reviewing court to avoid the elusive and potentially onerous case-by-case determination of whether the law was 'settled' or 'unsettled' at the time of trial." *Id.* (citing *Smith*, 402 F.3d at 1315 n.7).

In *United States v. Garcia*, 587 F.3d 509 (2d Cir. 2009), the Second Circuit similarly held that plain error "'is determined by reference to the law as of the time of appeal'" in these circumstances. *Id.* at 520 (quoting *United States v. Gamez*, 577 F.3d 394, 400 (2d Cir. 2009)). The court of appeals held that Garcia could benefit from this Court's decision in *Cuellar v. United States*, 553 U.S. 550 (2008), which was decided while his appeal was pending and clarified law that had previously been unsettled in the circuit. *See Garcia*, 587 F.3d at 519-20.

The Sixth Circuit also applies the time-of-appeal standard. *See United States v. Brown*, No. 97-1618, 2000 WL 876382, at *12 (6th Cir. June 20, 2000) (unpublished). The *Brown* court reasoned that, "[e]ven where an issue was unsettled at the time of trial, the error is 'plain' if it is clear and obvious at the time of appellate consideration." *Id.* Applying the time-of-appeal standard, the Sixth Circuit concluded that, "[s]ince the district court's error is *now* clear . . . , although it was

not clear at the time of trial, the second prong of 'plain error' analysis is satisfied." *Id.*[4]

Finally, the Eleventh Circuit also reviews for plain error under the time-of-appeal standard. *See Smith*, 402 F.3d at 1315 n.7, 1323.[5] The Eleventh Circuit reasoned that applying the law at the time of appeal "has the advantage of avoiding the necessity of distinguishing between cases in which 'the law at the time of trial was settled and clearly contrary to the law at the time of appeal' on the one hand and cases in which it was merely 'unsettled' on the other." *Id.* at 1315 n.7. Rejecting the Ninth Circuit's time-of-trial standard, the Eleventh Circuit pointed out that reviewing for the plainness of error under the time-of-trial standard "is the same as no plain error review at all, as error will never be 'plain' under 'unsettled' law." *Id.* (citing *Turman*, 122 F.3d at 1170-71).

2. The Ninth and D.C. Circuits hold that plain error is reviewed under the law at the time of trial

In contrast to the First, Second, Sixth, Tenth, and Eleventh Circuits, the Ninth Circuit reviews for plain error under a time-of-trial standard. In *Turman*, the Ninth Circuit explained that, "[w]hen the state of the law is unclear at trial and

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[4] The Sixth Circuit has since reaffirmed its support for the time-of-appeal standard in dicta. *See United States v. Gabrion*, 517 F.3d 839, 875 (6th Cir. 2008) ("For us to consider the error plain, however, the error does not need to be obvious at the time of the trial but rather can become obvious pending appeal. . . . [A]lthough the law regarding 16 U.S.C. § 480 and 40 U.S.C. § 255 . . . may not have been clear at the time of trial, the jury instruction may still have constituted plain error.").

[5] The Eleventh Circuit's decision in *Smith* was vacated and remanded for reconsideration in light of this Court's Commerce Clause holding in *Gonzalez v. Raich*, 545 U.S. 1 (2005). *See United States v. Smith*, 545 U.S. 1125 (2005). On remand, the Eleventh Circuit did not revisit the plain-error question because, as a result of *Raich*, it found no error, let alone plain error. *See United States v. Smith*, 459 F.3d 1276, 1284 (11th Cir. 2006). Although the Eleventh Circuit has not returned to this question, other courts consider *Smith* part of this split. *See*, *e.g.*, *Farrell*, 2012 WL 516069, at *8; *Mouling*, 557 F.3d at 664.

only becomes clear as a result of later authority, the district court's error is perforce not plain." 122 F.3d at 1170. The court followed what it saw as the general rule that "plain error . . . normally means error plain at the time the district court made the alleged mistake." *Id.*

The Ninth Circuit recently reaffirmed its time-of-trial standard in *United States v. Wahid*, 614 F.3d 1009 (9th Cir.), *cert. denied*, 131 S. Ct. 840 (2010). The court explicitly acknowledged that the "analysis for plain error differs depending on whether the state of the law was unclear at the time of the trial or was settled at the time of trial and clearly contrary to the law at the time of the appeal." *Id.* at 1015 (citing *Turman*, 122 F.3d at 1170).

In *Mouling*, the D.C. Circuit acknowledged the circuit conflict and adopted the Ninth Circuit's time-of-trial standard. *See* 557 F.3d at 664. The *Mouling* court "agree[d] with the Ninth Circuit that *Johnson* represents an exception to the general rule that error is assessed as of the time of trial." *Id.* (citing *Turman*, 122 F.3d at 1170). The court then explained that, "where, as here, the law was unsettled at the time of trial but became settled by the time of appeal, the general rule applies, and we assess error as of the time of trial." *Id.* Like the Ninth Circuit, the D.C. Circuit reasoned that the time-of-trial standard is appropriate because objections to rulings based on unsettled law "serve a valuable function, alerting the district court to potential error at a moment when the court can take remedial action." *Id.* Because district courts may alter rulings based on unsettled law when a party objects, "the interest in requiring parties to present their objections to the trial

court, which underlies plain error review, applies with full force" when the law is unsettled at trial. *Id.*[6]

3. The Fifth Circuit panel below joined the Ninth and D.C. Circuits in applying the time-of-trial standard

In this case, as explained above, *supra* pp. 5-6, the Fifth Circuit panel joined the Ninth and D.C. Circuits in applying the time-of-trial standard. *See* App. 1a-4a. Despite a vigorous dissent and seven judges voting to rehear the case en banc, the full court allowed the panel decision to stand. *See* App. 8a-18a. That disposition is perhaps the best indication of the current state of the law in the Fifth Circuit.

Unfortunately, confusion remains. After the en banc Fifth Circuit denied rehearing in this case, Fifth Circuit panels have split on the issue – and some judges have even come down on both sides. *Compare United States v. Broussard*, No. 11-30274, 2012 WL 309102, at *14 (5th Cir. Feb. 1, 2012) (applying the time-of-appeal standard), *with United States v. Davis*, No. 10-11178, 2012 WL 253825, at *1 (5th Cir. Jan. 27, 2012) (applying the time-of-trial standard).

Broussard involved facts nearly identical to those here. The sentencing judge considered Broussard's need for treatment in deciding his sentence, thereby violating *Tapia*'s subsequently announced ban on the imposition of longer sentences to promote defendants' rehabilitative needs. *See* 2012 WL 309102, at *12 (citing *Tapia*, 131 S. Ct. at 2391). But the *Broussard* court expressly rejected the time-of-trial standard adopted by the panel in this case and instead applied the time-of-

[6] The D.C. Circuit recently reaffirmed its adoption of the Ninth Circuit's time-of-trial standard in *United States v. Anderson*, 632 F.3d 1264, 1270 (D.C. Cir. 2011) (applying the *Mouling* time-of-trial standard when the law was unsettled at the time of trial but settled by the time of appeal).

appeal standard. *Id.* at *14. Under that standard, the panel held that the sentencing error was plain under *Tapia*, vacated the sentence, and remanded for resentencing. *Id.* at *14-*15.

On the other hand, the Fifth Circuit in *Davis* recently reviewed for plain error under the law at the time of trial. *See* 2012 WL 253825, at *1. In *Davis*, the district judge revoked the defendant's supervised release and then considered the sentencing factors in 18 U.S.C. § 3553(a)(2)(A) in deciding his ultimate sentence. *Id*. Between the revocation of his supervised release and the consideration of his appeal, the Fifth Circuit held in another case that judges cannot consider those sentencing factors in revoking supervised release. *Id.* (citing *United States v. Miller*, 634 F.3d 841 (5th Cir.), *cert. denied*, 132 S. Ct. 496 (2011)). The *Davis* court applied a time-of-trial standard and affirmed his sentence, however, explaining that "the split among the circuit courts of appeals on [this] issue and the lack of a published opinion from this court at the time of the district court proceedings rendered any consideration of the § 3553(a)(2)(A) factors neither clear nor obvious legal error." *Id.* Another recent Fifth Circuit case involving similar facts but a different defendant also applied the time-of-trial standard. *See United States v. Davis*, No. 10-11152, 2011 WL 6379317, at *1 (5th Cir. Dec. 21, 2011) (concluding that there was no plain error in the district judge's reliance on impermissible sentencing factors in revoking the defendant's supervised release because the law was unsettled at trial and had become settled only by the intervening decision in *Miller*).

The full Fifth Circuit had the opportunity to choose a timing standard for judging plain error in this case, but it declined to do so. *See* App. 8a, 18a ("Given the discord within our own circuit (and that among our sister circuits), I submit that the full court should resolve this question.") (Haynes, J., dissenting from denial of rehearing en banc). That deeply divided rejection of en banc review suggests that the Fifth Circuit will not resolve the issue, and Fifth Circuit panels will continue to apply inconsistent standards in conducting plain-error review depending on which judges are drawn for the panel.

Moreover, even if the Fifth Circuit were to address this issue en banc and establish a standard for the timing of plain-error review in the circuit, such a decision could not resolve the deep and entrenched circuit split. Rather, it would only establish the Fifth Circuit's position in the ongoing disagreement. Because of the strong inter-circuit disagreement and the Fifth Circuit's decision not to resolve this issue in its own circuit, the split will persist without this Court's intervention.

4. Commentators recognize the division in circuits over this issue

Many secondary sources identify this entrenched split among the courts of appeals. As Judge Edwards noted in 2007, "[w]hat the Supreme Court has yet to decide is whether an error will be considered plain when it is clear under the law at the time of appeal, but the law at the time of trial was unsettled. Only the Ninth and Eleventh Circuits appear to have definitively resolved this question, though in opposite directions." HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW 92 (2007) (citation omitted); *see also* Toby J. Heytens,

Managing Transitional Moments in Criminal Cases, 115 YALE L.J. 922, 952 (2006) ("[C]ontroversies have also erupted over the proper approach to applying the second *Olano* factor, 'plain error,' when the law was unclear at the time of trial. Most courts that have addressed the issue have said that plainness should be addressed as of the time of appeal . . . . Other circuits, however, have endorsed a time-of-trial approach.") (footnote omitted).

B. Other Courts Of Appeals In Dicta And Commentators Disagree About Whether To Follow The Time-Of-Appeal Or Time-Of-Trial Standard In These Circumstances

This intractable 5-3 split has fostered confusion and uncertainty nationwide. The Seventh Circuit supports the time-of-appeal standard and the Fourth Circuit supports the time-of-trial standard, but neither has decided the precise question raised here. *See Helsabeck v. Fabyanic*, 173 F. App'x 251, 255-56 (4th Cir. 2006) (noting that the Fourth Circuit has not reached a holding on this issue); *United States v. David*, 83 F.3d 638, 645 (4th Cir. 1996) (adopting the time-of-trial standard); *Ross*, 77 F.3d at 1539 (adopting the time-of-appeal standard).

Like many of the courts of appeals, commentators disagree about when courts judge the plainness of an error if the law was unsettled at trial. Some explain that courts apply the time-of-trial approach. *See* 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 856, at 141 n.19 (Supp. 2011) ("'[When] the law was unsettled at the time of trial but became settled by the time of appeal, the general rule applies, and we assess error as of the time of trial.'") (quoting *Mouling*, 557 F.3d at 664). Others recognize the time-of-appeal approach. *See* 9B FEDERAL PROCEDURE, LAWYERS EDITION § 22:2294, at 466-67 (2005) ("[A]n error is plain for

purposes of plain error review, even though it was not clear at the time of trial, as long as it is clear at the time of appellate consideration.").

Commentators also disagree about the scope of *Johnson*. Some read *Johnson* broadly and suggest that its holding applies to cases in which the law was unclear at trial. *See* 1 PAUL G. ULRICH, FEDERAL APPELLATE PRACTICE GUIDE 9TH CIRCUIT § 10:15 (2d ed. 2011) ("[W]hen the state of the law at the time of trial is unclear and becomes clear only as a result of later authority, the Supreme Court has held the plainness of the error is determined as of the time of appellate review.") (citing *Johnson*, 520 U.S. at 467-69). Others read *Johnson* as an exception to a general time-of-trial standard. *See* TIMOTHY A. BAUGHMAN, GILLESPIE MICHIGAN CRIMINAL LAW AND PROCEDURE WITH FORMS PRACTICE DESKBOOK § 1:70 (2011) ("Whether an error was 'plain' is judged by the state of the law at the time of trial, as any broader definition would require a trial judge to be clairvoyant. An exception exists where the law was settled at the time of trial and clearly contrary to the law at the time of appeal.") (citing *Johnson*).

The commentators' confusion is understandable. *Johnson* has permitted and will continue to permit diverging interpretations until this Court clarifies at what point a reviewing court should judge the plainness of an error. As discussed below, this case offers the Court an excellent opportunity to do so.

II. THE COURT BELOW ERRED IN ASSESSING PETITIONER'S PLAIN-ERROR CLAIM IN LIGHT OF THE UNSETTLED LAW AT THE TIME OF HIS TRIAL RATHER THAN THE SETTLED LAW AT THE TIME OF HIS APPEAL

A. Reviewing For Plain Error Based On The Unsettled Law At The Time Of Trial Rather Than The Settled Law At The Time Of Appeal Undermines The Integrity Of Judicial Review

This Court has made clear that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). That requirement is grounded on the distinction between legislation and adjudication, and on the integrity of judicial review:

> [T]he nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review.

Id. at 322-23. Evaluating the plainness of error at the time of trial is inconsistent with the requirement that settled law be applied to all cases not yet final when the law becomes settled, and thereby undermines the integrity of judicial review.

B. Reviewing For Plain Error Based On The Unsettled Law At The Time Of Trial Rather Than The Settled Law At The Time Of Appeal Contravenes This Court's Insistence On Treating Similarly Situated Defendants Similarly

This Court has recognized often the importance of affording equal treatment to similarly situated litigants by applying the same rules to similar cases on direct review. In *United States v. Johnson*, 457 U.S. 537 (1982), the Court acknowledged "the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary of a retroactively applied

rule." *Id.* at 555 n.16. Rejecting its prior "ambulatory retroactivity doctrine," the Court embraced "the Harlan approach" to retroactivity, which would "further the goal of treating similarly situated defendants similarly." *Id.* at 555 & n.17. *See also Powell v. Nevada*, 511 U.S. 79, 84 (1994) ("'[S]elective application of new rules violates the principle of treating similarly situated defendants the same.'") (quoting *Griffith*, 479 U.S. at 323). The same imperative applies in noncriminal cases as well. *See*, *e.g.*, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537 (1991) ("[S]elective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally."); *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 212-13 (1990) ("Fundamental notions of fairness and legal process dictate that the same rules should be applied to all similar cases on direct review. . . . [W]hen the legal rights of the parties have not been finally determined by a court of law, 'simple justice' requires that a rule of law, even a 'new' rule, be evenhandedly applied.") (citation omitted).

Evaluating for plain error at the time of trial contravenes this basic principle of "evenhanded justice" for similarly situated defendants. *Teague v. Lane*, 489 U.S. 288, 300 (1989) ("[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."). Imagine that petitioner had a co-defendant, arrested for the same offense on the same day, and that both were tried and convicted by the same court. Imagine further that the court imposed, without objec-

tion, an identical five-year sentence to allow for the co-defendant to participate in a rehabilitation program, but the co-defendant was sentenced one week later than petitioner. Finally, assume that this Court's opinion in *Tapia* was handed down during the week separating the two sentencing hearings. On appeal for plain error, under the Ninth Circuit's time-of-trial standard used by the court below, petitioner would not be entitled to relief while his co-defendant would. Only by using the time-of-appeal standard for plain-error review can courts of appeals ensure that similarly situated defendants are treated similarly, as this Court's precedents demand.

C. Applying A Time-Of-Trial Standard To Cases In Which The Law Was Unsettled At The Time Of Trial Will Lead To Wasted Judicial Resources As Courts Of Appeals Attempt To Determine Whether The Law Was Settled Or Unsettled At The Time Of Trial

Claim-presentation rules, and the exceptions to them, are intended to conserve judicial resources. *See Turman*, 122 F.3d at 1170 ("An objection affords the judge an opportunity to focus on the issue and hopefully avoid the error, thereby saving the time and expense of an appeal and retrial."). In adopting the time-of-appeal rule in *Johnson*, this Court relied in part on considerations of judicial economy: "[A time-of-trial rule] would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." 520 U.S. at 468.

In choosing to depart from *Johnson* and follow a time-of-trial rule for plain-error inquiries in cases in which the underlying law is unsettled, the Ninth Circuit concluded that *Johnson*'s judicial-economy justification applied *only* to cases in

which the law was firmly settled against the defendant. *See Turman*, 122 F.3d at 1170 ("In that situation, objections are pointless. . . . This is not such a case."). More recently, the D.C. Circuit reached the same conclusion. *See Mouling*, 557 F.3d at 664.

The *Turman* and *Mouling* conclusions are in error. The Ninth Circuit's rule, which evaluates the plainness of error at the time of appeal when the law was *settled* at the time of trial (following *Johnson*) but at the time of trial when the law was *unsettled* at the time of trial, will generate extensive and wasteful litigation in the appellate courts over whether the law was settled or unsettled at the time of trial. By contrast, a rule unified as a time-of-appeal standard "allows the reviewing court to avoid [this] elusive and potentially onerous case-by-case determination." *Farrell*, 2012 WL 516069, at *9.

Recent cases applying *Johnson* illustrate the difficulties involved. In *United States v. Mercado-Ortiz*, 380 F. App'x 565 (9th Cir. 2010) (unpublished), for example, the bulk of the panel opinion is devoted to an analysis of the state of circuit precedent at the time of trial. The defendant was convicted of illegal reentry after deportation, and his sentence was enhanced based on his prior conviction for a crime of violence, specifically third-degree child molestation under a Washington state statute. *Id.* at 566. The panel, following *Turman*, reviewed its now-outdated definition of "sexual abuse of a minor" under two precedents antedating the trial, but ignored the effect of more recent holdings. *Id.* at 567. It first analyzed whether those precedents settled the law against the defendant, which would have invoked

the rule of *Johnson*, but concluded that they did not. *Id.* The panel then analyzed whether the two precedents clearly settled the law in favor of the defendant, which would have made the error plain at the time of the trial. *Id.* at 567-68. After careful consideration of each, it again concluded that they did not. *Id.* Only then could it say that the law was unsettled at the time of trial, so that it could apply *Turman*. Under a time-of-appeal standard, such difficult and time-consuming line-drawing exercises are unnecessary.

D. Reviewing For Plain Error Based On The Unsettled Law At The Time Of Trial Rather Than The Settled Law At The Time Of Appeal Essentially Eliminates Plain-Error Review

The plain-error principle of Rule 52(b) was created to allow courts to correct obvious injustices notwithstanding the defendant's failure to object at trial. *See United States v. Young*, 470 U.S. 1, 15 n.12 (1985) ("A review of the drafting that led to the Rule shows that the [Advisory] Committee sought to enable the courts of appeals to review prejudicial errors 'so that any miscarriage of justice may be thwarted.'") (quoting Fed. R. Crim. P. at 263 (Preliminary Draft (1943))). Assessing for plain error based on the unsettled law at the time of trial is "the same as no plain error review at all, as error will never be 'plain' under 'unsettled' law." *Smith*, 402 F.3d at 1315 n.7. Thus, under the Ninth Circuit's time-of-trial standard applied by the court below, "the defendant is obliged to object if the law is unsettled, and if he does not he has waived the objection forever." *Id.*

III. THE TIMING OF PLAIN-ERROR REVIEW IS AN IMPORTANT ISSUE THAT SHOULD BE DECIDED BY THIS COURT

A. This Issue Recurs Any Time The Law Changes From Unsettled To Settled

Petitioner's dilemma faces a criminal defendant any time that this Court or a court of appeals clarifies law that was previously unsettled and the defendant has failed to object. Because one of this Court's primary functions is to clarify legal issues that have generated conflicts, *see* Sup. Ct. R. 10, it by custom and rule does not typically deal with law that is well-settled.[7] In addition, criminal decisions in the courts of appeals regularly clarify law that was previously unsettled and thus create an opportunity for plain-error review.

Because defendants cannot realistically object to every issue of law, settled or otherwise, plain-error analysis is one of the more common procedural issues for lower courts. As Judge Haynes stated in her dissent from the Fifth Circuit's denial of rehearing en banc, "[w]e deal almost daily with issues of plain error, and it is certainly not an unusual occurrence for a claim of plain error to be made where the law was unclear at the time of the trial court's decision." App. 17a (Haynes, J., dissenting from denial of rehearing en banc). In fact, Judge Haynes identified three Fifth Circuit cases in the past year with the same procedural setting as petitioner's. App. 17a-18a. As an example of how frequently the plain-error rule arises, in 2011 the courts of appeals cited the standard from *Olano* more than 400 times and cited *Johnson* more than 78 times. As the government has recognized in a prior case

[7] Justice Scalia has noted in the federal-state context that, "I think we will be little tempted to intervene when the settled law below seems at least reasonable." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186 (1989).

before this Court, "plain-error issues are of great systemic consequence, and the existence of a flawed approach to plain-error review in one context holds the potential to destabilize plain-error doctrine more broadly." Petition for a Writ of Certiorari at 19, *United States v. Marcus*, 130 S. Ct. 2159 (2010) (No. 08-1341), *available at* http://www.justice.gov/osg/briefs/2008/2pet/7pet/2008-1341.pet.aa.pdf.

This Court itself has recognized that plain-error review is of particular importance by addressing the issue seven times in the past 20 years. *See United States v. Marcus*, 130 S. Ct. 2159 (2010); *Puckett v. United States*, 556 U.S. 129 (2009); *United States v. Dominguez Benitez*, 542 U.S. 74 (2004); *United States v. Cotton*, 535 U.S. 625 (2002); *United States v. Vonn*, 535 U.S. 55 (2002); *Johnson v. United States*, 520 U.S. 461 (1997); *United States v. Olano*, 507 U.S. 725 (1993). This case presents an opportunity for the Court to resolve one of the last remaining problems in determining whether an error is "plain." This Court has already addressed the plain-error rule "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal." *Johnson*, 520 U.S. at 468. It should now take the final step and fully address the "special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Olano*, 507 U.S. at 734.

B. This Court's Resolution Of This Issue Would End The Disparate Treatment Of Criminal Defendants Among The Circuits

This Court's guidance on the plain-error rule is necessary to ensure uniform treatment of criminal defendants among the circuits. The current circuit split violates key principles that the Court has used in addressing questions of plain-

error review and retroactivity. The *Griffith* Court's rule of retroactivity was aimed at ensuring that lower courts "treat[] similarly situated defendants the same." 479 U.S. at 323. In addition, one of the factors for plain-error review is whether the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (alteration in original).

The current circuit conflict naturally creates disparate treatment of defendants based on geography, a problem starkly highlighted by the different outcomes of this case and *Cordery*, *supra* p. 9, which involve virtually identical facts. Both defendants received sentence enhancements for rehabilitation in violation of *Tapia*. Both defendants failed to object at trial in the face of unsettled precedent. Yet the Tenth Circuit ordered that Cordery receive a new sentence, while petitioner faces roughly two years of additional prison time simply because he was tried in the Fifth Circuit. Without review by this Court on the plain-error issue, future defendants will be similarly left to face an arbitrary application of the plain-error rule based only on the location of their trial court.

The conflicting rules applied by different circuits ensure that "similarly situated" defendants receive different treatment under the law whenever the criminal law changes. As it stands, time-of-appeal circuits give all criminal defendants on appeal the benefit of new law but time-of-trial circuits limit this benefit to those few who have previously objected to the exact issue (or to cases in which the law was settled in the circuit at the time of trial). In effect, defendants in the same procedural posture – those who have forfeited claims when the law was unsettled at

the time of trial – will receive disparate treatment by lower courts simply because of their circuit's interpretation of the plain-error rule.

Moreover, having the success of a defendant's claim depend only on geography "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (alteration in original). Until this Court settles this issue, the fairness, integrity, and reputation of the judicial process of retroactivity will continue to be called into question by the selective application of the circuits' varying rules.

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR THIS COURT TO ADDRESS WHETHER "PLAINNESS" IS REVIEWED AT THE TIME OF TRIAL OR THE TIME OF APPEAL

This case presents an ideal vehicle for the Court to clarify whether plain-error review should be assessed at the time of trial or at the time of appeal. Besides the disputed issue – whether an error's "plainness" should be judged at the time of trial or the time of appeal – petitioner's sentence enhancement of 19-27 months in violation of *Tapia* easily meets the other requirements for plain error. For a defendant to show plain error, there must be (1) "error"; (2) that is "plain"; (3) that "affect[s] substantial rights"; and (4) that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (internal quotation marks omitted; alterations in original). Only the second prong of the *Olano* analysis is in dispute.

The facts of this case are uncomplicated. The district court found petitioner guilty pursuant to a plea agreement. *See* App. 1a. The court then announced that it would sentence petitioner to 60 months' imprisonment, rather than the guidelines

range of 33-41 months. *See* App. 28a-29a, 39a. At the sentencing hearing, the judge announced that he "want[ed] the record to reflect that this sentence is a [18 U.S.C. §] 3553(a) sentence, particularly under subparagraph (2)(D), because this defendant needs training, he needs counselling, and he needs substance abuse treatment within the confines of that system." App. 39a. Before petitioner's appeal was decided, *Tapia* established that courts may not "impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation." 131 S. Ct. at 2393.

Tapia establishes that the district court's sentence was error. At sentencing, the court left no doubt that it relied upon a factor that this Court in *Tapia* held impermissible, and that factor led to the sentence enhancement. *See* App. 39a-40a. Because petitioner's sentence was enhanced by roughly two years, his case satisfies the third and fourth prongs of the *Olano* test. *See* App. 17a (petitioner "easily meets the other requirements for plain error because the district court, in granting a longer sentence, considered a factor the Supreme Court has stated is an impermissible consideration") (Haynes, J., dissenting from denial of rehearing en banc); *United States v. Andino-Ortega*, 608 F.3d 305, 311-12 (5th Cir. 2010) (holding that a misinterpretation of the sentencing guidelines satisfied the third and fourth prongs of the *Olano* test); *United States v. Villegas*, 404 F.3d 355, 364-65 (5th Cir. 2005) (same).

This important issue is ripe for review, and further percolation in the courts of appeals is unnecessary. Eight circuits have squarely addressed this issue, creat-

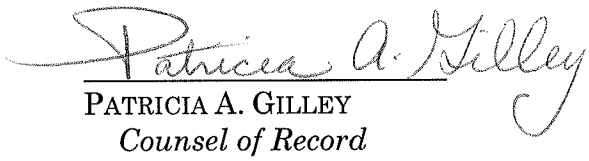
ing a 5-3 split. Two more circuits have addressed the issue in dicta, coming out on both sides of the conflict. Despite the confusion in the Fifth Circuit, it would be pointless to defer consideration of this case to allow the Fifth Circuit to resolve its internal disagreements. In this case, all of that court's members carefully considered the question presented and voted 10-7 over a vigorous published dissent to deny the petition for rehearing en banc. More importantly, even if the Fifth Circuit did decide the issue en banc, the federal circuits would still be divided either 5-3 or 6-2. The conflict will not be resolved absent a decision by this Court.

This case presents the sole question of whether error should be judged at the time of trial or at the time of appeal, and the facts and law surrounding other aspects of the case are clear. This case would accordingly provide an excellent vehicle for this Court to clarify the correct standard for plain-error review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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March 14, 2012

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-30571

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARMARCION D. HENDERSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

[Filed July 8, 2011]

Before SMITH, SOUTHWICK, and GRAVES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Armarcion Henderson argues that the district court erred by giving him a longer sentence to promote his rehabilitation. Under *Tapia v. United States*, No. 10-5400, 2011 WL 2369395 (U.S. June 16, 2011), Henderson is correct that the district court erred. Henderson did not preserve the error, however, and we affirm, because he cannot show that the district court plainly erred.

I.

Henderson pleaded guilty of being a felon in possession of a firearm under 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Although the sentencing guideline range was 33 to 41 months, Henderson was sentenced to 60 months of imprisonment. The dis-

trict court stated that the upward departure was necessary to ensure that Henderson had an opportunity to enroll in the federal Bureau of Prisons drug treatment program:

> I want the record to reflect that this sentence is a [18 U.S.C. §] 3553(a) sentence, particularly under subparagraph (2)(D),[1] because this defendant needs training, he needs counselling [sic], and he needs substance abuse treatment within the confines of that system.
>
> . . . . I've got to give him that length of time to do the programming and the treatment and the counselling [sic] that this defendant needs right now. And that is the reason for that sentence under 3553(a)(2)(D).

Henderson did not object to the sentence. When asked if there was "any reason why that sentence as stated should not be imposed," his attorney responded, "[p]rocedurally, no, Your Honor."

Eight days after the sentencing hearing, Henderson filed a motion under Federal Rule of Criminal Procedure 35(a) to correct the sentence, arguing that the court violated the admonition of 18 U.S.C. § 3582(a) that

> [t]he court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

The district court denied the motion, and Henderson appeals.

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[1] Title 18 U.S.C. § 3553(a)(2)(D) provides that "[t]he court, in determining the particular sentence to be imposed, shall consider . . . the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

II.

The first issue is whether Henderson's rule 35(a) motion preserved his claim of error. We have previously held that a rule 35(a) motion preserved a claim of error under *United States v. Booker*, 543 U.S. 220 (2005). *United States v. Watkins*, 450 F.3d 184, 185 (5th Cir. 2006) (per curiam). *Watkins* does not control here, however, because the *Booker* error in that case was clear.[2] It was thus correctable under rule 35(a), which allows the court to correct only sentences "that resulted from arithmetical, technical, or other clear error." Because the purpose of waiver doctrine is to "give[] the district court the opportunity to consider and resolve [errors],"[3] however, a rule 35(a) motion can preserve error only if it gave the district court an opportunity to correct it. Consequently, a rule 35(a) motion cannot preserve an error unless the error is arithmetical, technical, or otherwise clear.

A sentencing error is clear under rule 35(a) only if it is not the result of "the exercise of the court's discretion with regard to the application of the sentencing guidelines." *United State v. Ross*, 557 F.3d 237, 241 (5th Cir. 2009). That rule flows from the comments of the advisory committee that Rule 35(a) is "'very narrow and . . . extend[s] only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action.'" *Id.* at 239 (quoting FED. R. CRIM. P. 35 advisory committee's note).

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[2] The Supreme Court had decided *Booker* immediately before Watkins's Rule 35(a) motion, so it was clear at the time of the motion that the district court should not have considered judge-found facts when operating under a mandatory guidelines regime. *Watkins*, 450 F.3d at 185.

[3] *Puckett v. United States*, 129 S. Ct. 1423, 1428 (2009).

Before *Tapia*, there was a circuit split on whether a district court can consider a defendant's rehabilitative needs to lengthen a sentence. *Tapia*, 2011 WL 2369395, at *3 n.1. Moreover, we have not pronounced on the question.[4] In that situation, when there is no binding precedent on a question on which there is a circuit split, an alleged error is not "clear." If we had confronted the question, we might have gone either way, so the error would not "almost certainly result in a remand of the case." The error was not correctable under rule 35(a), and Henderson's motion failed to preserve the error. We must therefore review for plain error.

Tapia established that it is error for a court to "impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation." *Tapia*, 2011 WL 2369395, at *9. Henderson cannot show that the error in his case was plain, however, because an error is plain only if it "was clear under current law *at the time of trial*." *United States v. Jackson*, 549 F.3d 963, 977 (5th Cir. 2008) (emphasis added). At the time of trial, the Supreme Court had not yet decided *Tapia* and, as we have just explained, we had not yet addressed the question. Where we have not previously addressed a question, any error cannot be plain.[5]

The judgment of sentence is AFFIRMED.

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[4] In *United States v. Giddings*, 37 F.3d 1091 (5th Cir. 1994), we held only that a court could consider a defendant's rehabilitative needs when sentencing him to imprisonment upon revocation of supervised release. Our decision in *United States v. Lara-Velasquez*, 919 F.2d 946, 953-57 (5th Cir. 1990), held only that the court can consider rehabilitative potential as a mitigating factor within an appropriate range of punishment, but not necessarily as a reason for a sentencing enhancement.

[5] *See United States v. Vega*, 332 F.3d 849, 852 n.3 (5th Cir. 2003) ("We conclude that any error by the district court in this regard was not plain or obvious, as we have not previously addressed this issue." (citing *United States v. Calverley*, 37 F.3d 160, 162-63 (5th Cir. 1994) (en banc))).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	CRIMINAL ACTION NO. 09-111
VERSUS	JUDGE S. MAURICE HICKS, JR.
ARMARCION D. HENDERSON	MAGISTRATE JUDGE HORNSBY

MEMORANDUM ORDER

Before the Court is a Rule 35(a) Motion to Correct a Sentence for Clear Error (Record Document 43) filed by Defendant Armarcion D. Henderson ("Henderson"). Defense counsel argues that it was clear error for the Court to sentence Henderson to 60 months incarceration, which was above the advisory guideline range of 33-41 months, because increasing a sentence to accommodate a rehabilitation programs violates 18 U.S.C. § 3582(a). Defense counsel further asks the Court to clarify its intention to give Henderson credit for the time he has spent in federal custody beginning June 17, 2009. The United States of America ("the Government") opposed the motion. See Record Document 48. For the reasons which follow, the motion is **DENIED**.

Federal Rule of Criminal Procedure 35(a) provides:

> Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

F.R.Cr.P. 35(a). Rule 35(a) is "intended to be very narrow" and extends only to those "errors which would most certainly result in remand of the case to the trial court for further action." U.S. v. Bridges, 116 F.3d 1110, 1112 n. 3 (5th Cir. 1997).

The rule is not meant to afford the district court "the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the [district] court to simply change its mind about the appropriateness of the sentence." Id.

The Fifth Circuit has also concluded that Rule 35(a)'s explicit time limit is jurisdictional, meaning the district court lacks jurisdiction to correct its original sentence beyond the limitation period set forth in Rule 35(a). See U.S. v. Lopez, 26 F.3d 512, 518-519. The time period set forth in the rule is "strictly construed." Bridges, 116 F.3d at 1112. In Bridges, the Fifth Circuit stated:

> We must note that the district court's modification of Bridges's sentence occurred approximately 50 days after the imposition of the initial sentence, clearly outside the seven-day window [now fourteen-day window]. Thus, we conclude that the district court lacked jurisdiction to resentence Bridges.

Id.

Under Rule 35(c), "sentencing" is defined as "the oral announcement of the sentence." F.R.Cr.P. 35(c). The oral announcement of the sentence in the instant matter occurred on June 2, 2010. See Record Document 44. Thus, the undersigned no longer has jurisdiction to correct any alleged error in Henderson's sentence pursuant to Rule 35(a), as almost sixty days have passed since the oral announcement of sentence.[1] Defense counsel conceded as much in the reply, stating:

> Less clear is the question of whether the district court has jurisdiction at this point to change any part of defendant's sentence. . . . Defendant

[1] Even if the Court had jurisdiction to consider Henderson's Rule 35(a) motion, his request for clarification regarding credit for time spent in federal custody prior to sentencing would fail. This claim relates to the execution of Henderson's sentence, not a correction of the sentence itself. See U.S. v. Giddings, 740 F.2d 770, 771 (9th Cir. 1984).

> concedes it is probably too late for the district court to make any modification to his sentence. It will be left to the Fifth Circuit.

Record Document 52 at 4.

Accordingly,

IT IS ORDERED that the Rule 35(a) Motion to Correct a Sentence for Clear Error (Record Document 43) filed by Defendant Armarcion D. Henderson be and is hereby **DENIED**.

THUS DONE AND SIGNED, in Shreveport, Louisiana, this 30th day of July, 2010.

/s/ S. Maurice Hicks, Jr.

S. MAURICE HICKS, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-30571

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARMARCION D. HENDERSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

[Filed Dec. 15, 2011]

ON PETITION FOR REHEARING EN BANC

Before SMITH, SOUTHWICK, and GRAVES, Circuit Judges.

PER CURIAM:

The court having been polled at the request of one of the members of the court, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

In the en banc poll, 7 judges voted in favor of rehearing (Stewart, Dennis, Elrod, Southwick, Haynes, Graves, and Higginson), and 10 judges voted against rehearing (Jones, King, Jolly, Davis, Smith, Garza, Benavides, Clement, Prado, and Owen).

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

HAYNES, Circuit Judge, joined by DENNIS, Circuit Judge, dissenting:

I respectfully dissent from the court's decision to deny rehearing en banc. Two issues raised by the panel's opinion merit the full court's attention: (1) the nature of the error that can be corrected under Federal Rule of Criminal Procedure 35(a); and (2) the timing of when the "obviousness" of plain error is judged – at the time of the error or at the time of the appellate decision.

I.

On the first issue, while the panel cites the appropriate standard – "errors which would almost certainly result in a remand of the case to the trial court for further action" – it applies this standard in a way that puts the opinion at odds with our own precedent, *Watkins*, and that of other circuits. Federal Rule of Criminal Procedure 35(a) provides that "[w]ithin 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." FED. R. CRIM. P. 35(a). The Advisory Committee's notes provide that "[t]he authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the

sentence, that is, errors which would almost certainly result in a remand of the case to the trial court . . . ." FED. R. CRIM. P. 35 advisory committee's note.[1]

The Advisory Committee's notes also explain that Rule 35(a) was intended to codify the results in *United States v. Cook*, 890 F.2d 672 (4th Cir. 1989), and *United States v. Rico*, 902 F.2d 1065 (2d Cir. 1990), subject to a more stringent time requirement (now 14 days) for correcting sentencing errors. FED. R. CRIM. P. 35 advisory committee's note; *see also United States v. Ross*, 557 F.3d 237, 239-41 (5th Cir. 2009). In *Cook*, the appellate court upheld the district court's decision to amend a sentence that was not authorized under the sentencing guidelines as they existed at the time. 890 F.2d at 675. Similarly, in *Rico*, the Second Circuit upheld the district court's decision to correct a sentence that mistakenly applied a plea agreement. 902 F.2d at 1068. Thus, Rule 35(a) is intended to allow a district court to correct a sentence that was unlawful. *See Cook*, 890 F.2d at 675; *Rico*, 902 F.2d at 1068; FED. R. CRIM. P. 35 advisory committee's note. However, "[t]he subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence." FED. R. CRIM. P. 35 advisory committee's note.

Other than the panel's opinion, only one published Fifth Circuit case has addressed whether a Rule 35(a) motion can preserve error. *See United States v. Watkins*, 450 F.3d 184 (5th Cir. 2006) (per curiam). In that case, the defendants

[1] This note addresses former Rule 35(c); however, the substantive provisions of Rule 35(c) were moved to subsection (a) in 2002. Therefore, earlier analyses of subsection (c) now apply to subsection (a).

filed a timely Rule 35(a) motion to raise their claim that application of a firearm adjustment to their sentences would violate their Sixth Amendment rights. *Id.* at 185. They had not raised that point of error before the district court announced their sentences. *Id.* Our court concluded that their Rule 35(a) motion was sufficient to preserve the error. *Id.*

In distinguishing *Watkins*, the panel looked beyond the facts set out in the *Watkins* opinion.[2] The underlying record in *Watkins* indicates that the defendants filed a Rule 35 motion because a Supreme Court case issued three days after their sentencing rendered their sentence unlawful. That Supreme Court opinion was issued during the period that the district court could have corrected its error under Rule 35. The panel distinguished Watkins because here, the Supreme Court's opinion in *Tapia v. United States*, 131 S. Ct. 2382 (2011), was issued after the case had already been appealed and after the fourteen-day time period during which the district court could have corrected the error had expired. *Watkins* itself, however, made no such distinction, and I do not think it is appropriate to "go behind" the published opinion to introduce facts not therein expressly relied upon.

Several other circuits have indicated that Rule 35 permits a district judge to correct errors of law. *See Cook*, 890 F.2d at 675 (noting that the district court could correct a sentencing error because the original sentence "was not a lawful one"); *Rico*, 902 F.2d at 1068 (upholding a sentencing modification because the original

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[2] In discussing this issue, *Watkins* stated: "The defendants were sentenced before the mandatory provision of the Sentencing Guidelines were modified and rendered advisory by the United States Supreme Court in [*Booker*]. . . . The defendants first raised their Sixth Amendment claim in a timely Fed. R. Crim. P. 35(a) motion, after the district court had orally pronounced the defendants' sentences. We conclude that they preserved the error." 450 F.3d at 185.

sentence was an "illegal sentence"); *United States v. Himsel*, 951 F.2d 144, 147 (7th Cir. 1991) (noting that "the district judge had authority to vacate [a defendant's] first sentence if that sentence was illegal"); *United States v. Quijada*, 146 F. App'x 958, 971 (10th Cir. 2005) (unpublished) (concluding that a mistake or violation of the law was clear error). The panel opinion represents a divergence (if not a split) from those cases, worthy of the full court's consideration.

Moreover, it would seem odd not to interpret "clear error" to mean "legal error." If the district court could not correct a legal error, Rule 35's "other clear error" would seem to have little meaning since "arithmetical" and "technical" are already listed. If this court concludes that "clear error" means "legal error," then the district court would have had the authority to correct Henderson's sentence at the time Henderson filed his Rule 35(a) motion. Even under the law as it existed at the time of Henderson's Rule 35(a) motion, Henderson's sentence would likely have been considered unlawful. Certainly, *Tapia* makes clear that it is. Additionally, this is not a situation where the district court would have simply "changed its mind" or made a different discretionary call about Henderson's sentence, as it could have found that the sentence originally imposed was unlawful under 18 U.S.C. § 3582(a).

Thus, practically speaking, it makes little sense not to construe Rule 35 to permit correction of legal errors within the 14 day period. One could construe the panel opinion to mean that even though the district court realizes a legal error, the parties must still go through a time-consuming and expensive delay to fix it. Rule 35's strictures seem more directed to avoiding "flip-flopping" than to avoiding

correction of legal errors. It would seem strange that a point of legal error actually raised to the district court and able to be ruled upon by that court while the court still was within the time for correcting the error[3] would be considered the same way as a point never raised at all in the district court. Therefore, I would recommend concluding that Henderson's Rule 35(a) motion preserved the point of error adequately, and this court should review Henderson's claim de novo. *United States v. Oliver*, 630 F.3d 397, 413 (5th Cir. 2011) (noting that an issue raised and rejected in the district court is reviewed de novo), *cert. denied*, No. 11-5508, 2011 U.S. LEXIS 8503 (Nov. 28, 2011). Under a de novo standard of review, Henderson would be entitled to a new sentencing hearing.

II.

If the panel correctly determined that the Rule 35(a) motion did not preserve the error, then the question is raised whether the "obviousness" of the error made is judged at the time of the error or at the time of appeal. The panel opinion, with little discussion, concludes that error is judged at the time of the proceeding in question (here, pre-*Tapia*, at the sentencing hearing). In so doing, the panel opinion does not acknowledge either our intra-circuit split or the inter-circuit split on this question. To understand this issue, a bit of history is necessary. The Supreme Court established in *Johnson v. United States*, 520 U.S. 461, 468 (1997) that "where

[3] The sequence of events in this case was that the sentencing hearing took place, eight days later Henderson filed his motion, two days later the court entered a written judgment of conviction and sentence containing the sentence announced at the oral hearing. Thereafter, the court ordered briefing on the Rule 35(a) motion before concluding that it could not grant the motion because, by the time it ruled, more than fourteen days had passed. Whether or not that is true, I conclude that the district court erred by not granting the motion within the fourteen days in light of Henderson's timely motion.

the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration."

The Government argued in this case that "if the law at the time of trial is not settled, it is not enough that the error be plain at the time of appellate consideration." The Government cites no authority for its contention[4]; instead, it simply assumes that because the Supreme Court stated that "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration," *Johnson*, 520 U.S. at 468, the converse of that statement must also be true. However, the issue is not nearly so clear, as the Supreme Court has left open the question of whether plain error would be established "where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified," *United States v. Olano*, 507 U.S. 725, 734 (1993), and our sister circuits have split over whether *Johnson* applies to the plain error analysis when the law was unclear at the time of trial and later becomes clear. The Ninth and District of Columbia Circuits hold that if the law is unclear at the time of trial and later becomes clear, the exception laid out in *Johnson* does not apply, and the error is evaluated based on the law as it existed at the time of trial. *See*, *e.g.*, *United States v. Gonzalez-Aparicio*, 648 F.3d 749, 757 (9th Cir. 2011) ("When the state of the law is unclear at the time of trial and is then clarified by subsequent authority, the district court's

[4] The Government's citation to *Puckett v. United States*, 556 U.S. 129, 129 S. Ct. 1423 (2009), adds little to the discussion, as *Puckett* did not address when plain error is evaluated. The Government concludes that because *Puckett* states that for an error to be plain, it "must be clear or obvious, rather than subject to reasonable dispute," *id.* at 1429, that means that "if the law is unclear at the time of trial . . . the reviewing court considers the status of the law at the time of trial."

error is still not considered plain. . . . Therefore, plain error 'normally means error plain at the time the district court made the alleged mistake.'"); *United States v. Mouling*, 557 F.3d 658, 664 (D.C. Cir.) ("We therefore hold that where, as here, the law was unsettled at the time of trial but becomes settled by the time of appeal, the general rule applies, and we assess error as of the time of trial."), *cert. denied*, 130 S. Ct. 795 (2009).

In contrast, the First, Second, Sixth, and Eleventh Circuits hold that *Johnson* applies whether the law was clear or unclear at the time of trial; the plainness of the error is always evaluated at the time of appellate review. *See*, *e.g.*, *United States v. Crosgrove*, 637 F.3d 646, 656-57 (6th Cir. 2011) ("However, the requirement that the error be plain means 'plain under current law.' . . . For plain error review, current law 'is the law as it exists at the time of review.'"); *United States v. Gamez*, 577 F.3d 394, 400 (2d Cir. 2009) (per curiam) ("A court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law. . . . Whether an error is 'plain' is determined by reference to the law as of the time of appeal." (internal quotation marks and citations omitted)); *United States v. Ziskind*, 491 F.3d 10, 14 (1st Cir. 2007) (citing *Johnson* for the proposition "that error is plain if the law is clear at the time of direct appellate review, even though governing law was unclear at time of trial"); *United States v. Underwood*, 446 F.3d 1340, 1343 (11th Cir. 2006) (noting that "even though the error was not plain at the time of sentencing, the subsequent issuance of [a Supreme Court opinion] establishes that the error is plain at the time of appellate consideration").

We have not previously squarely addressed this issue where the timing of when the "plainness" was judged was critical; however, our decisions are in something of a disarray on this point. Several opinions, including the panel's opinion in this case, have held that the court considers the law at the time of trial when determining whether an error is plain. *See*, *e.g.*, *United States v. Henderson*, 646 F.3d 223, 225 (5th Cir. 2011) ("[A]n error is plain only if it was 'clear under current law *at the time of trial*.'" (quoting *United States v. Jackson*, 549 F.3d 963, 977 (5th Cir. 2008))); *United States v. Garcia-Rodriguez*, 415 F.3d 452, 455 (5th Cir. 2005) ("'Plain' is synonymous with 'clear' or 'obvious,' and at a minimum, contemplates an error which was clear under current law at the time of trial."); *United States v. Hull*, 160 F.3d 265, 272 (5th Cir. 1998) (same). Other opinions have concluded that *Johnson* established that the court considers the error at the time of appeal in deciding whether it is plain. *See*, *e.g.*, *United States v. Bishop*, 603 F.3d 279, 281 (5th Cir.) ("We determine whether an alleged error is plain by reference to existing law at the time of appeal."), *cert. denied*, 131 S. Ct. 272 (2010); *United States v. Gonzalez-Terrazas*, 529 F.3d 293, 298 (5th Cir. 2008) ("[T]he error need only be plain at the time of appellate consideration."). We have not squarely addressed the precise question of whether *Johnson* applies to the plain error analysis when the law was unclear at the time of trial and later becomes clear.

Our earliest discussion of this issue applying the *Olano* formulation of plain error (decided prior to *Johnson*), judged the error at the time of appeal. *United States v. Knowles*, 29 F.3d 947 (5th Cir. 1994). Where "two previous holdings or

lines of precedent conflict, the earlier opinion controls and is the binding precedent in this circuit." *United States v. Wheeler*, 322 F.3d 823, 828 n.1 (5th Cir. 2003) (internal quotation marks omitted). The panel opinion fails to address *Knowles* in light of this precedent or reconcile our conflicting precedents. For this reason, I recommend en banc consideration of this issue to provide clarity on when plain error should be evaluated.

If our court were to follow the First, Second, Sixth, and Eleventh Circuits and hold that plain error is always evaluated at the time of appeal, the district court's opinion would be reversed. The Supreme Court's decision in *Tapia* establishes that at the time of appeal, the district court's error was plain. I submit that Henderson easily meets the other requirements for plain error because the district court, in granting a longer sentence, considered a factor the Supreme Court has stated is an impermissible consideration.

Whichever way this court ultimately would come out on the "timing issue," it is worthy of the full court's attention. We deal almost daily with issues of plain error, and it is certainly not an unusual occurrence for a claim of plain error to be made where the law was unclear at the time of the trial court's decision but is clear by the time of appeal. *See*, *e.g.*, *United States v. Newson*, No. 11-10073, 2011 U.S. App. LEXIS 23181, at *2-3 (5th Cir. Nov. 17, 2011) (per curiam) (unpublished) (noting that "the lack of a published opinion from this court at the time of the district court proceedings rendered any [error] neither clear nor obvious legal error"); *United States v. Gloria*, 2011 U.S. App. LEXIS 18589, at *4 (5th Cir. Sept. 7, 2011)

(per curiam) (unpublished) (addressing a different sentencing issue and judging plain error at the time of sentencing); *United States v. Graves*, 409 F. App'x 780, 781 (5th Cir. 2011) (per curiam) (unpublished) (addressing such a situation on habeas review and noting that "it is enough that the error be plain at the time of appellate consideration" (internal quotation marks omitted)). How we address such a situation should be uniform. Without doubt, Henderson was sentenced based upon an impermissible consideration. Given the discord within our own circuit (and that among our sister circuits), I submit that the full court should resolve this question. Because it fails to do so here, I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-30571

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARMARCION D. HENDERSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

[Filed Jan. 30, 2012]

ON PETITION FOR REHEARING

Before SMITH, SOUTHWICK, and GRAVES, Circuit Judges.

PER CURIAM:

The petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
JERRY E. SMITH

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	*	Criminal Action
	*	No. 09-111
vs.	*	
	*	Shreveport, Louisiana
ARMARCION D. HENDERSON	*	June 2, 2010
	*	2:30 p.m.

* *

Sentencing

Certified transcript of proceedings held before the Honorable S. Maurice Hicks, Jr., United States District Judge.

* * * * *

[7]

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THE COURT: All right. Now let's deal with the sentencing memorandum that was filed today.

It appears to the Court that the most important request out of that is to ask for credit for time served. It appears to the Court that he's been in custody since January 13, 2009, having been held in Claiborne Parish from January to July, 2009. A federal detainer was then placed on him, as this case was picked up and prosecuted by the U.S. Attorney's Office in July of 2009.

Accurate so far, Ms. Gilley?

MS. GILLEY: Yes, Your Honor.

THE COURT: Mr. Gillespie, do you contest that?

MR. GILLESPIE: Your Honor, I believe he was first in federal court on June 17, 2009.

THE COURT: June 17?

[8] MR. GILLESPIE: Yes, sir. And he was arrested by the Claiborne authorities, my notes indicate, January the 19th of 2009. He wasn't in state court custody – there was also a parole violation hold, Your Honor, based on –

THE COURT: And that was by the State –

MR. GILLESPIE: Yes, sir.

THE COURT: – at this point.

He's subject to revocation on that proceeding, as I understand it.

MR. GILLESPIE: He is, Your Honor. I called Claiborne Parish today, but I did not inquire – I was inquiring about the status of the felon with a firearm charge to make sure that we're – to determine whether it was dismissed already or they would dismiss it as they had agreed. It has not been dismissed, I've been assured it will be dismissed as soon as they get a copy of your judgment.

THE COURT: All right. The request is that – or the contention is that U.S. Sentencing Guideline Section 5(g)(1.3)(B) allows the Court to impose an imprisonment sentence on the current offense to run concurrently with his prior undischarged term in Claiborne Parish.

Here's where I have difficulty with that, Ms. Gilley. He doesn't have an undischarged term in Claiborne Parish. Had his sentence been revoked – or had his parole been revoked, he would then have an undischarged term.

[9] In looking at the way that this fits together, there is an application note to subsection C, and under subsection C's application note to this particular citation by you to the Guidelines is paragraph C, that the situation is, in fact, that this sentence, in fact, could run consecutive to the sentence imposed for the revocation.

We don't have a revocation pending. We have only a petition for revocation, if you will, pending. There is no undischarged term and – within the ambit of the section of the Guidelines that you referred to. That's my problem.

And at this particular point, I will accept at face value Mr. Gillespie's assertion that he expects that the pending state charges will be dropped as soon as the authorities receive a copy of the judgment of this court with respect to the sentencing today.

Now, any comment? That's how I see this coming down.

MS. GILLEY: Your Honor –

THE COURT: She goes first, Mr. Gillespie.

MR. GILLESPIE: Yes, sir.

MS. GILLEY: I agree that the – the problem I had – and I found it very – a gray area. Because I was pondering for months whether I should go ahead and work with the Claiborne Parish people to revoke that, in which case he may have already gotten credit for time served and then there would be no undischarged sentence, so there would be nothing; or [10] leave it open with the possibility that it might be interpreted to be an undischarged sentence because there's something that

is going to happen when they finally have that hearing on the motion to revoke the probation.

So I was really in a quandary, because it was very clear that if I actually had it revoked and they gave him credit for time served, then he was done, then there would be nothing to attach this to and there would be nothing for me to invoke the 5(g).

THE COURT: All right. Mr. Gillespie?

MR. GILLESPIE: Your Honor, I don't know the status of the parole – probation violation – or as I understand it, it's been held open pending resolution of this case or – either in state or federal court.

THE COURT: That's the Court's understanding as well.

MR. GILLESPIE: Yes, sir. And the agreement with Jim Hatch, who is the assistant D.A. in connection with this case, is he will move to dismiss the same charges we have here, felon with a firearm. But I don't think that that will stop the state court judge from ruling on his – the petition –

THE COURT: That's either Judge Fallin or Judge Clason, either a "he" or a "she."

MR. GILLESPIE: Yeah. I don't know which judge it is, Your Honor.

THE COURT: I don't either.

[11] MR. GILLESPIE: But, again, my suggestion is we have a certain date that he appeared in federal court, and that date is June 17.

THE COURT: Denise, would you pull up on our system the docket sheet in this case.

MS. GILLEY: If I might, Your Honor?

THE COURT: Yes.

MS. GILLEY: Another issue that I had with this is that the sentence that he would be revoked on was a three-year sentence, and he served about 17 months already. So that's why I thought there would be a good chance that that "credit for time served and call it complete" was out there.

THE COURT: I'm reluctant to tread on the decision of the state court in this particular case. If there wasn't a true undischarged term, that would be one thing. In this instance, even though the charge – I'll call it the "twin charge" on the firearm, state level and federal level. Assuming that this judgment from this court arrives with the prosecutor in Claiborne Parish, if that prosecutor dismisses this charge – or excuse me, the state charge, then the matter of the revocation is still pending without any assurance of resolution. Am I understanding that correctly, Mr. Gillespie?

MR. GILLESPIE: Yes, sir.

THE COURT: Those are two independent issues. The motion and order for hearing to revoke probation in the Second [12] Judicial District Court, Claiborne Parish, Judge Clason, is signed on January 13, 2009. The order is signed on January 15, 2009, so that's the start date of the proceedings, period.

With respect to the record in this proceeding, the initial appearance was set for June 17, 2009, and was accomplished on that date by this presiding judge, in the absence of Judge Hornsby.

So the federal case begins with the 17th of June, 2009. The state case begins January 15, 2009, per the order.

The issue still left to be resolved and which will be the decision of the state court is to whether the sentences run concurrently or consecutively. And I am the first sentencing judge arising out of the problems that your client has gotten himself into, and I'm reluctant to tread on the authority of the state court in making the ultimate decision on the pending probation revocation or parole revocation, whichever it may be.

MS. GILLEY: It's probation, Your Honor.

THE COURT: – to make that decision for her or him, whether it's Judge Fallin or Judge Clason. And that's kind of where we are right now.

I have no problem in making a recommendation that this individual participate in some level of drug rehab program while incarcerated. I do not think he is going to be in federal custody long enough to qualify for participation in the so-called one – excuse me, 500-hour treatment program. He may [13] be in the system long enough for the so-called 100-hour drug treatment program. And there are waiting lists on both of those.

Here's one other little wrinkle. The Bureau of Prisons has a sufficiently high enough rate of success in their drug treatment programs, but there needs to be ade-

quate time for them to work. If I were to give him credit for time served – that is, the interval between the order and/or the arrest made within a couple of days of each other in January of 2009, to June – he may not have enough time to even complete the 100-hour program. So it works against him.

Because he needs the drug use. He's had a fog of marijuana for a long time. And I don't deny that there is a logical and easy connection to make between his criminal activities and drug use. His brother stayed on the path; your client didn't, and it's because of the drug use that he messed up his life. And I think he could be playing basketball in Europe with his brother, except for the drug use. And that's a problem. That's another consideration to take into account.

I am in the position of considering how best to assist him with obtaining a drug treatment program, but I cannot require the Bureau of Prisons to provide him with drug treatment rehab programming. I can only recommend it to them.

But I can almost assure you that because of the waiting list for those programs that have developed – because [14] not every facility has each of those programs or either of those programs. I don't know whether he's going to be housed at a facility that even offers that.

I've seen this in Laredo, Texas, when I sat on dockets down there before. And it's not only a gray area, it's a difficult area. Because for me to help him, I have to deny credit for time served in order to give him a long enough time in the federal system to complete the 100-hour program. There is no equivalent in the state system.

And that's a concern that I have, and that falls to me to make that decision. I simply posit that wrinkle, if you will, to be considered in the overall sentencing context of what we face here today.

And it is a gray area, and I think I'm accorded fairly wide discretion in making those kinds of calls based on what I see in this record. I don't think there's any question that when BOP reviews this Presentence Report, they're going to see drug use all over it. And he obviously, if there's time, would benefit from what the Bureau of Prisons has.

Wrinkle No. 2: I can't guarantee he'll finish the drug treatment program or even qualify for enrollment based on the waiting list, even if I don't give him credit for time served. That's for whatever "X" number of months he's going to be confined. I still can't guarantee that he'll go through the program.

[15] And certainly I can't guarantee he will successfully finish the program once he starts it. That's up to him. And that's wholly within his process of deciding what he wants to do and who he wants to try to be when he's out of prison – state or federal, or both.

And those are the kinds of decisions that I puzzled over a long time. Because he is a young man – 26. And I am convinced, Ms. Gilley, if he doesn't get a hold of his drug program right now, he will be one of the people in the future whose life will be thrown away and he'll face perpetual incarceration, which I think is absolutely the wrong thing for this young man to fall into.

I mean, it's obvious he didn't exercise judgment in what's right and what's wrong, what should I do, what shouldn't I do. And that judgment may have been clouded by drugs when this "scheme" or "promise" or "pact" or whatever you want to call it was carried out. He wasn't thinking.

And I trust that you have explained to him just how broad the definition is of "possession" under federal statutes as related to firearms.

That's where I am on this. Those are the considerations that I have to address that I see that are present in this particular case. And this is not a unique case, but it falls into the category of the "I don't see this very often" kind of case. But when it does, it makes me [16] concerned about what I can do to help the defendant get his life back on track.

And it may be that it's a longer sentence and a denial of that particular credit-for-time-served request. Not out of a sense of punishment, but out of a sense of "I'm not helping him here." I need – whatever he was in state custody, I'm going to leave up to the state. Federal custody begins when he was brought in. And under the Guidelines, he's looking at 33 to 41 months.

Are there other considerations? I can click into a 3553(a) consideration immediately (snaps fingers) for the need for drug rehabilitation treatment to occur. And I can put him there for a non-Guideline sentence longer than the Guideline sentence to be sure that he gets one of those programs.

Now, I am informed that it takes a minimum of 36 months once he's in BOP custody to qualify for one of those drug treatment programs. And we've already

chewed up a bunch of time with him cooling his heels in state and federal custody. And with the federal detainer operating as of 6/17/2009, we're essentially a year into that sentence. I'm already potentially below the time that I need for him to qualify for participation in that program.

Here's my dilemma. Do I put him in longer to help him – because he needs that treatment – under 3553(a) and those factors that are set forth there, or do I shorten his [17] sentence just to get him out of the system more quickly?

I will tell you, from my perspective, it makes more sense from this individual's viewpoint of trying to get his train that has derailed back on a track – hopefully the right one. But, obviously, he's not equipped enough with respect to potential drug addiction, much less substance abuse, to really give me a good feeling that he ought to be just let go sooner. And that's my concern.

I'll be happy to hear your comments, but I wanted to share with you how I look at this and how – I don't have a responsibility to help him, but it's a factor I need to consider. And if I can keep him there long enough to get him through those programs, I will have done all that I can do and all that the system can do to help get him on a life path that doesn't involve substance abuse. Doesn't mean he won't, but he's got a much better chance of success in those BOP programs than any other program out there. Any comment?

MS. GILLEY: I do, Your Honor. First of all, I would like to thank you for your really extensive analysis of Mr. Henderson here, my client, and your thoughtful analysis into what BOP does once they get our people that we send their way.

I would like to point out a few things.

Mr. Henderson, Armarcion, was actually doing pretty well when he was in – on probation in 2008. He was being [18] drug-screened by Mr. Franklin Evans, his probation officer. He did very well.

THE COURT: And that's recited in your May 6 letter, which I've attached –

MS. GILLEY: Yes, sir.

THE COURT: – to be sure, to the Presentence Report. I understand that.

MS. GILLEY: And he was doing very well. He got a job in late October/ November working as a night security guard. And I attached the W- – his work end-of-the-year W-2 form showing that he actually had done that. And he was being drug-tested for that.

So I think that the purpose of my memo was to show that there were ups and downs in Armarcion's life. He went for periods when he did well, and he was a star basketball player.

THE COURT: I agree. I'm not contesting any of that. I'm trying to –

MS. GILLEY: And then fell off the wagon.

THE COURT: The falling off the wagon is what concerns me. Because at his age, he ought not to be falling off the wagon. And he was doing well at the time that we got into the firearms business, so to speak –

MS. GILLEY: And Your Honor –

THE COURT: – it appears, based on what you submitted to me. But, you know, we've got to have judgment [19] operating on multiple levels – on drugs, on

retrieving firearms for somebody else under some kind of promise or agreement or pact, or whatever the heck it was.

MS. GILLEY: And my purpose –

THE COURT: I can't cure that kind of judgment, and I'm not sure that anybody can cure that kind of judgment except by insight and realization of what adult behavior requires of an individual.

MS. GILLEY: And I think that perhaps Armarcion needs more than just substance abuse. I think the loss of his friends in the tragic accident had an impact –

THE COURT: I mean, there's no psych report indicating what that is. Certainly, it's a tragic incident.

MS. GILLEY: Right. And his brother having left the country. You know, there –

THE COURT: His brother may be back here soon enough to kick his butt.

MS. GILLEY: Your Honor, that's what I wanted to bring up. And I have other people back here that – two people that I would maybe even suggest a couple of minutes of testimony from. Mr. A.D. Williams, he's the octogenarian that I mentioned in there. He has watched this young man grow up. He has been there by his side. He has –

THE COURT: I agree. Your client has all the potential in the world. For right now, his actions have [20] screwed up his life. And the question is, okay, how do we clip it here and let him go on? And to do that, he does need to be equipped

with copying mechanisms and adult decision-making mechanisms that are not clouded by drug use from here on out. I mean, that's the bottom line of what sentencing has to do from the perspective of can I help rehabilitate him into something other than what he was.

And there are not many people with his athletic prowess that simply chose to flush their toilet, flush the toilet and their dreams and their potential down the drain. We're now at life number two. I hope that past is past. By the time he gets out of federal prison, no matter what the sentence is, he's going to be too old to play pro basketball and break in and do it.

MS. GILLEY: And he realizes that, Your Honor. That is –

THE COURT: So that part and phase is over with.

MS. GILLEY: And I –

THE COURT: What is the next phase? And I'll be the first to tell you I don't think your client has the slightest, foggiest idea at this point. But he's got a support system out there, if he'll pay attention to it, of family and friends and a brother to help him out. But none of those people are able to give him or equip him, if you will, with what programming within the BOP can provide, especially on substance abuse.

[21] I would like to believe he can be cold turkey and quit and do it all on his own. It's much harder to get drugs in the state prison where he's currently confined. It's much harder to get drugs in BOP custody with the prison facilities that they have. If he pops up with drugs and he gets caught, I can't help him.

What I'm trying to do is split that difference between what the Guidelines recommendations are and how much time is there left. And right now there's not enough time to get him into a program. Because it's moved from 24 to 36 months over the last two years. There's that many people that not only want to be, need to be in those substance abuse treatment programs.

If I can get him into a 500-hour one, it would be great. He's not going to lop any time off of the sentence because of the firearm problem. You don't get credit for one year off of your sentence if you're in there because of a firearms issue. But you can still pass that successfully and equip yourself for doing something better and doing something different. That's where I am.

MS. GILLEY: Well, your Honor, there's another aspect of the case that has recently developed. It's my understanding that his brother suffered an injury and is not going to be able to continue to play and, in fact, is coming home. I've had emails – a phone call from him, in fact, from wherever he was [22] at the time in Europe, and he expressed to me his desire to be close and stand by his brother and to guide him. Because he won't be going out of the country and doing things. It was his hope that he would be back here.

All of these folks (indicating) are family or friends –

THE COURT: They're part of the support structure that are willing to help, provided he is willing to help himself and can help himself.

MS. GILLEY: And, Your Honor, I think that another aspect of this case is that I think it's a pretty well-known fact that the generation that Armarcion

Henderson is in is maturing at a much slower rate than the generation even 10, 15 years ahead of it. He, at 24, was not as mature as the folks 15 years ahead of him were when they were 24.

I think – and I have spent – and you will see this when I submit my voucher – hours and hours talking with Armarcion, and I have found a very mature young man at this point. I found a different man than I met last July when I was first appointed to represent him. I do believe that he does see the difference now. I think that he has realized that he's just lucky to be alive at this point, considering the path he was on.

He has expressed to me his desire to go back to college, try it again. He would love to be a teacher in the [23] elementary school level. I talked to Mr. Williams, sitting behind me here in the seats, and he said – he has expressed to me the times that he would see Armarcion, when he was in high school, out there on the basketball court working with these youngsters.

Mr. Williams is the head of the Housing and Urban Development Office –

THE COURT: I don't disagree. He's got all the potential in the world. The question is he's off track now, getting back on track and how to do that.

MS. GILLEY: Right. And I really believe that with his family, I think he – they would certainly support him and –

THE COURT: He can't do it until he has substance abuse rehabilitation treatment.

MS. GILLEY: Right. And I think his family, including his brother, is willing to help get him the treatment that he needs.

THE COURT: I'm going to make sure that he gets it, if I can, within the BOP system. What happens in the private systems afterwards – because he's going to be on supervised release after he's out. He screws up with drugs again after he's out and I'm going to find him right back where he's sitting right now, dressed in the same clothing, with you as his lawyer, and then I'll get to be punitive.

[24] I am not trying to be purely punitive with his activities right now. My goal is to try to help him. And under Section 3553(a)(D), it says "to provide the defendant with needed educational-vocational training, medical care, or other correctional treatment in the most effective manner." And if I sentence him to too little, he'll never get that chance again, to be perfectly frank with you.

MS. GILLEY: Well, Your Honor, I think you hypothesize that he won't, but we don't know what his –

THE COURT: I'm not willing to speculate. I've got control over him, Ms. Gilley, right now. I've got him, and I can direct where he goes. And I'm unwilling to turn him over to the private sector without penalty for what he has done.

Now, the penalty under what I need to consider is rehabilitative treatment, substance abuse treatment, and other programming that is going to be available to him during the BOP. But first and foremost is substance abuse treatment.

Was he on the better at the time that all this came down? Yes. Is he cured? No. Is he equipped to be cured on a consistent, long-term basis? In my opinion, no,

not from what I see in my Presentence Report. This has been a long time. I mean, for a kid who is 26, he's had substance abuse programs a long time.

MS. GILLEY: He hasn't had any programs yet, Your Honor.

[25] THE COURT: I mean, sorry, substance abuse for a long time. And when it starts as early as it started with him, it's not that easy to kick. That's where I am right now.

Do you have any closing comments, or does your client wish to address me before –

MS. GILLEY: I have one other comment, Your Honor.

THE COURT: Make it quickly.

MS. GILLEY: Yes, sir. This is in relation to the charge on which he's actually being sentenced. And Mr. Vernon Jackson is here and is prepared to say that, in fact, the reason that Mr. Henderson came and got the gun was that his son, John Michael, and Armarcion had agreed that if John Michael got in jail –

THE COURT: Dumb is dumb, no matter how you look at it, when you've got a criminal record and you handle a firearm.

MS. GILLEY: I understand that, Your Honor.

THE COURT: And I don't care whether it was out of a brotherly love, a sense of forever friendship. He is guilty of the crime that he pleaded guilty to. There is no defense to it. He acted stupidly. Could he have acted better? Yes. Should he have realized that a pact like that was not in his best interest? Yes. Did he? No. That's where we are.

MS. GILLEY: Yes, sir. But the point that I wanted to make is that we're supposed to look at more than just the element – there was no element of the defense that we could [26] make. We pled guilty. The point is, he wasn't getting a gun to go out and rob a bank. He wasn't getting –

THE COURT: It does not matter, Ms. Gilley.

MS. GILLEY: Well, it –

THE COURT: You could argue until 56 extra minutes go by. He is guilty of the crime that he pled to.

MS. GILLEY: We don't dispute that.

THE COURT: It is not an ameliorating factor that he didn't intend to use it. It's a strict liability crime.

MS. GILLEY: I understand. But when sentencing issues arise, I think that it behooves us –

THE COURT: I disagree in this set of circumstances, Ms. Gilley. I whole-heartedly disagree with this.

MS. GILLEY: Yes, sir. I wanted, also, for the purpose of mending fences, to make it known that Mr. Jackson was prepared to go on the stand today and he, at great inconvenience to himself, is here to do that.

THE COURT: I understand. No problem with there at all.

Now, does your client wish to address the Court?

MS. GILLEY: I don't believe so, Your Honor. We had talked about –

THE COURT: He'll waive it?

(Defense Counsel confers with Defendant.)

MS. GILLEY: He will waive allocution.

[27] THE COURT: All right. Allocution is hereby waived.

Mr. Gillespie, any comment by the Government?

MR. GILLESPIE: No, Your Honor. Ms. Gilley, in her memo, says that the – Mr. Jackson placed the weapon on the floorboard of the truck. Mr. Jackson gave it personally to the defendant, and it was placed on the floorboard of the truck. I don't think it has anything to do with the sentencing, but I just – that fact is –

THE COURT: I understand.

All right. What I'm going to do is adopt the factual findings of the probation office as contained in the Presentence Report and the addendum.

So that the record is clear, the Court has considered the May 6 filing, which we currently can't find a record of having found its way into the system. Nonetheless, I have reviewed that. That being the submittal of Ms. Gilley on behalf of her client. It did not contain specific objections to the PSR but did contain a preservation of the right to contest certain facts and also pointed out drug – test results or drug screening results while he was on parole in the state system.

The Court has also considered the memorandum, sentencing memorandum, that was filed and hand-delivered to my office today, and has been taken into account.

Pursuant to the Sentencing Reform Act of 1984, it is [28] the judgment of this Court that the defendant, Armarcion D. Henderson, is hereby committed to the custody of the Bureau of Prisons for a term of 60 months as to the single count.

This sentence was selected after consideration of the defendant's personal history, his characteristics, prior criminal record, his need for substance abuse treatment within the Bureau of Prisons program – hopefully the 500-hour program, because it will be the best available for him. The government is going to pick up that cost.

When his brother returns and wants to keep an eye on him, he is free to enroll him in any other care facility that's available after his confinement sentence.

I want the record to reflect that this sentence is a 3553(a) sentence, particularly under subparagraph (2)(D), because this defendant needs training, he needs counselling, and he needs substance abuse treatment within the confines of that system.

I will not credit the time served from the time he was arrested on the state charges to the time of the federal detainer. I want him available for as long as possible within the Bureau of Prisons system to be sure that he gets treatment. Any shorter period of time – I will grant him credit, of course, from the time of the federal detainer until now, which is almost a full year. So we're already down to 49 months in custody in a BOP facility, because it will be designated [29] sometime in the next month. But I've got to give him that length of time to do the programming

and the treatment and the counselling that this defendant needs right now. And that is the reason for that sentence under 3553(a)(2)(D).

After release from imprisonment, Armarcion Henderson is placed on supervised release for a term of 3 years as to the single count. All standard conditions of this court are applicable.

In this instance, I'm going to attach a special condition to your supervised release, Mr. Henderson. As a special condition of your supervised release, you are ordered to participate in a substance abuse treatment program as directed by the U.S. Probation Office, to include Antibuse, drug surveillance, if indicated, and/or inpatient treatment, as deemed necessary by the probation officer.

Within 72 hours of your release from custody of the Bureau of Prisons, you shall report in person to the U.S. Probation Office in the district into which you are released.

While on supervised release, you shall not commit another federal, state, or local crime, and shall comply with all standard conditions adopted by this court. You shall not possess a firearm, ammunition, or a destructive device while you are on supervised release.

Due to the confinement sentence, no fine is ordered. The defendant, however, is ordered to pay $100 to the Crime [30] Victim Fund for the single count, payable immediately to the U.S. Clerk of Court.

The defendant is remanded to custody of the U.S. Marshals Service.

I need to notify you of your right to appeal, Mr. Henderson. In the event that you file an appeal under Section 3742 of Title 18 of the U.S. Code for a review of your sentence, the clerk is directed to transmit the Presentence Report under seal to the Court of Appeal.

Ms. Gilley, it will fall upon your shoulders to timely file said notice of appeal.

I need to tell you that there is a short period of time for accomplishing that – approximately 14 days. Ms. Gilley will step you through that process and will counsel with you, Mr. Henderson, about the advisability of filing an appeal in connection with any issue raised during the course of this proceeding, including sentencing.

Is there any reason why that sentence as stated should not be imposed, Ms. Gilley?

MS. GILLEY: Procedurally, no, Your Honor.

THE COURT: All right. Mr. Gillespie, any reason why that sentence as stated should not be imposed?

MR. GILLESPIE: No, sir.

THE COURT: The sentence is hereby imposed as stated. Any further business to come before this Court this [31] afternoon?

(No response.)

THE COURT: Hearing nothing, we are adjourned.