No. 11-9307

# In The
# Supreme Court of the United States

ARMARCION D. HENDERSON,

*Petitioner,*

v.

THE UNITED STATES OF AMERICA,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF FOR PETITIONER ARMARCION D. HENDERSON

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## QUESTION PRESENTED

Whether for purposes of Rule 52(b) review, 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 apply a "time-of-appeal" standard or "time-of-trial" standard in assessing plainness of error.

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The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 646 F.3d 223.

## JURISDICTION

The judgment of the court of appeals was entered on July 18, 2011. A petition for an en banc hearing was denied on December 15, 2011 (Pet. App. 8a-18a) and a petition for a panel rehearing was denied on January 30, 2012 (Pet. App. 19a). The petition for a *writ of certiorari* was filed on March 14, 2012 and was granted on June 25, 2012. This Court has jurisdiction based on 28 U.S.C. § 1254(1).

## RULE INVOLVED

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

## STATEMENT

Armarcion Henderson (hereafter "Henderson") was indicted for being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). He entered a plea of guilty in the United States District Court for the Western District of

Louisiana on June 2, 2010 and was sentenced to 60 months of imprisonment. The court of appeals affirmed the lower court's judgment on July 18, 2011. Pet. App. 1a-4a. Request for panel hearing was denied on January 30, 2012.

1. On January 13, 2009, Henderson was arrested for being a felon in possession of a firearm and charges were filed in state court. On May 29, 2009, he was indicted in federal court on the same charges. Henderson filed a motion to suppress, a hearing was held on the motion, and it was denied. On February 1, 2010, Henderson withdrew his earlier plea in federal court, entered into a conditional plea of guilty as charged, but preserved his right to appeal the ruling on the motion to suppress. A pre-sentence report (PSR) was submitted to which Henderson had no objections except for those related to his motion to suppress. The sentencing guideline range was 33-41 months. A sentencing hearing lasting nearly one hour took place on June 2, 2010.

2. Despite the fact that the PSR stated there was nothing which would warrant a departure from the recommended sentencing guidelines and no reasons were ever supplied by the trial court judge prior to the hearing, the court sentenced Henderson to 60 months of imprisonment. The sentencing judge took great care to note that the extra time was not intended as additional punishment but was to ensure Henderson was in the Bureau of Prison system long enough to enroll in and complete the 500-hour drug treatment program. Pet. App. 2a & 39a-40a. No

specific objection was made by Henderson at the sentencing hearing.

3. Eight days after the sentencing, Henderson filed a motion relying on Federal Rule of Criminal Procedure 35(a) seeking to correct the sentence for clear error. He argued that the district court had violated 18 U.S.C. § 3582(a) which requires the court to "recognize that imprisonment is not an appropriate means of promoting correction and rehabilitation." The district court denied the motion. Pet. App. 5a-7a. Henderson timely filed a notice of appeal. His brief was filed with the Fifth Circuit Court of Appeals on October 18, 2010.

4. While Henderson's case was pending at the Fifth Circuit, this court decided *Tapia v. United States*, 131 S.Ct. 2382 (2011), which 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 ("The Sentencing Reform Act precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation").

5. At the time Henderson was sentenced, the courts of appeals were divided on whether a district court may impose a longer sentence to promote a defendant's rehabilitation. The Fifth Circuit had not yet addressed the issue. Pet. App. 4a & 7a. Less than a month after *Tapia* was decided, the Fifth Circuit affirmed Henderson's sentence. The panel recognized

that Henderson was "correct that district court erred" in "giving him a longer sentence to promote his rehabilitation." Pet. App. 1a. However, the panel held that he could not avail himself of that ruling to prove the error was "clear or obvious" because it was not plain at the time of trial. The court of appeals found the same to be true for application of Henderson's Rule 35(a) motion seeking a correction to his sentence. Pet. App. 4a, citing *United States v. Jackson*, 549 F.3d 963, 977 (5th Cir. 2008). The Court used a Rule 52(b) standard of review despite Henderson's suggested Rule 52(a).

6. Henderson sought both a panel and an en banc rehearing. On December 15, 2011, the court denied en banc hearing by a 10-7 vote over Judge Haynes' published dissent (joined by Judge Dennis). Pet. App. 8a-18a. A panel hearing was denied without comment a month and a half later, on January 30, 2012. Pet. App. 19a.

7. The dissent by Judge Haynes stressed the importance of resolving the issue of *when* the error must be "plain" in order to satisfy the requirement of Rule 52(b). She noted 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 trial court's decision but it is clear by the time of appeal." Pet. App. 17a.

## SUMMARY OF ARGUMENT

The rule at issue did not originate with Congress. It will do little good to seek legislative intent. This Court submitted and adopted each of the rules.

The "plain error" or "forfeited error" of Rule 52(b) has existed within the federal criminal judicial system for over 200 years. Because of our deep and abiding quest for justice, the system has found ways to give the injured and deserving defendant a remedy.

In 1944, the first edition of our Federal Rules of Criminal Procedure was adopted by this Court. With the advent of the Warren Court followed by the Rehnquist Court and now the Roberts Court, as well as by the introduction of the United States Sentencing Guidelines in 1985, Rule 52(b) has become one of the most frequently cited rules in appellate courts.

*United States v. Olano* established the criteria used in all federal courts for reviewing direct appeals. It requires the appellate court to make four determinations before granting the remedy requested.

Transitional moments have occurred throughout the history of our legal system. These are the periods when changes are happening so fast from either adjudicative or legislative laws that defendants who committed crimes under the previous laws had not seen their cases finalized.

*Olano* was modified by *Johnson*, 520 U.S. 461 (1997), to allow a remedy for Defendant Johnson.

With *Griffith v. Kentucky*'s (479 U.S. 314 (1987)) mandate to apply all new laws to defendants whose cases were not yet final, use of forfeiture rules came to be a way to slow down the granting of reversals. Some Justices began to question the system of doing so. The theory of retroactivity and forfeiture of rights to complain of error began to develop in tandem. Numerous cases were decided and continue to multiply especially within the context of federal sentences.

*Tapia* was decided while Petitioner Henderson's case was at the Fifth Circuit. With that decision, Henderson should have had his sentence corrected to eliminate the excess time given for rehabilitation. Because the Fifth Circuit refused to join the majority of the circuits and use a time of appeal standard, Henderson's appeal was denied.

There seems to be no basis for concern of throwing open the prison doors if a time of trial standard is adopted as the correct standard by this Court. This Court should clarify the question where law is unsettled at the time of trial but becomes clear by time of appeal. There is no compelling reason not to do so.



## ARGUMENT

### I. Examining Rule 52(b) for Legislative Intent Will Not Work in This Instance

The Federal Rules of Criminal Procedure are not the product of legislative committees in which multiple views, agendas, biases, etc. were part of the

creative process. At the request of Congress in 1940 this Court created and adopted what came to be designated as the Federal Rules of Criminal Procedure. "West's Criminal Code and Rules" still begins with a reprint of this Court's order of December 26, 1944, in which it adopted the first portion of those rules and the Chief Justice was authorized and directed "to transmit the Rules as prescribed to the Attorney General and to request him . . . to report these Rules to the Congress. . . ." To be sure, this Court had input from others in drafting and finalizing those first rules. But it was this Court which adopted them as its own and asked Congress to accept them as presented. *See* West's Law, *2012 Revised Edition of the Federal Criminal Code and Rules*, p. 14.

It is noted that Justice Black stated he did not approve of the Court's adoption of the Rules. Nor did Mr. Justice Frankfurter "join in the Court's action." This was not because he disapproved of the rules themselves (to which he "express[ed] no opinion on the merits), but because he believed the Court was not an "appropriate agency for formulating the rules of criminal procedure for the district courts." *Id.* at 15.

Looking back over the years, since the country's beginning, Justice Frankfurter reminded his fellow Justices of days when Court members "rode circuit." This provided them with "intimate, first-hand experience with the duties and demands of trial courts." Beginning shortly after the Civil War, he noted such opportunities became less frequent. By his day they were largely denied the "first hand opportunities for

realizing vividly what rules of procedure are best calculated to promote the largest measure of justice." He found that regrettable because such considerations "are especially relevant to the formulation of rules for the conduct of criminal trials . . . [which] closely concern the public security as well as the liberties of citizens." *Id.* at 15.

Additionally, Justice Frankfurter felt it unwise for the Court to adopt rules which undoubtedly would at a later date be the source of questions of adjudication by the Court. A third reason was apparently equally important to the Justice. He was concerned how the "responsibility for fashioning progressive codes of procedure and keeping them current" might take precious time from the Court's primary duties which no one else could do. *Id*.

Of course, this Court now has Advisory Committees and Standing Committees on the various rules for which it is responsible, but it is, nevertheless, this Court which has been and continues to be responsible for each and every of the sixty Rules which now compose the Federal Rules of Criminal Procedure. There is no legislative body which takes responsibility for them.

In 1966, Mr. Justice Black and Mr. Justice Douglas each dissented from the Order of the Chief Justice on February 28th in which new amendments and additions were to be delivered to Congress. Justice Douglas objected because the rules were to go into effect "without requiring any affirmative consideration,

action, or approval of the rules by Congress or by the President." They each noted specific objections to certain of the amendments and additions. *Id*. at 16-18. The same justices dissented to the Order of April 24, 1972 and the Order of November 20, 1972. Justice Douglas objected again to the Order of April 22, 1974. He was "opposed to the Court being a mere conduit of Rules to Congress since the Court has had no hand in drafting them and has no competence to design them in keeping with the times and spirits of the Constitution." *Id.* at 20.

Rule 52 was never amended until 2002 when the entire Code was amended as part of the "general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules." The changes were intended to be "stylistic only." For Rule 52(b) that meant deleting the words "or defect" after the words "plain error." West's Law, *2012* at 215.

## II. Forfeited Error and Exceptions Thereto Have Been an Accepted Part of Our Legal System Since Its Inception

A straight forward reading of Rule 52(b) informs that it is at its core a "forfeiture rule." It would have been particularly helpful if Rule 52(a) and 52(b) would have been titled "Preserved Claims" and "Forfeited Claims," respectively. It would have been easier to remain focused on their individual differences and the importance of their specific words and phrases.

But we have become accustomed to referring to them as the "Harmless Error" and "Plain Error" rules which seems to focus more attention on the error itself and when it became plain as opposed to timing differences between preserved and forfeited error.

Federal criminal convictions have been reviewed by appellate courts and overturned in spite of rules of forfeiture and "plain error" requirements since the early days of our legal system. The valuable works of Professor Toby J. Hytens, former assistant to the Solicitor General will be referred to frequently in this brief. *See* Toby J. Hytens, "Managing Transitional Moments in Criminal Cases," THE YALE LAW JOURNAL, Vol. 115, pp. 922-994 (2006) at p. 945, n. 119.

In *Wiborg v. United States*, 163 U.S. 632 (1896), two shipmates were convicted of leaving the United States for the purpose of conducting a military expedition against a foreign country. Though not raised at trial, the defendants argued insufficiency of evidence at the appellate stage. This Court granted them a reversal. Well before the existence of Rule 52(b), Chief Justice Fuller, writing for the Court, "asserted a power to 'take notice of what we believe to be a plain error' with respect to 'a matter so absolutely vital to defendants.'" *Id*. at 946 n. 121. It is interesting to note that the importance of this power of judicial review is still recognized in Supreme Court Rule 24 which states "[a]t its option . . . the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." Supreme Court Rule 24(1)(A).

Consider also *O'Neil v. State of Vermont*, 144 U.S. 323, 360 (1892) where a defendant who had forfeited a right was nevertheless granted relief on appeal. Once again doing justice to the defendant trumped the forfeiture of an error at trial. This Court responded to his plea:

> This rule seems to provide for a case like the present, and I do not think we should be astute to avoid jurisdiction in a case affecting the liberty of the citizen. . . . In opening the record . . . we see that a cruel, as well as an unusual, punishment was inflicted upon the accused. . . .

*Id*. at 360.

Shortly before the Federal Rules of Criminal Procedure came into being, this Court decided *United States v. Atkinson*, 297 U.S. 157 (1936). The case lends further historical perspective to the forfeiture rule as we understand it in Rule 52(b). The Court held:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.

*Id*. at 160. As will be discussed later in this brief, the common thread running through these earlier cases was the notion that an injustice should be remedied.

## III. In the Past Fifty Years Rule 52(b) Has Become More Widely Used

There was little notice paid to Rule 52(b) and its "plain error review" from 1945 until the 1980s. However, two cases should be noted. *United States v. Frady*, 456 U.S. 152 (1982) is frequently cited for its discussion of whether Rule 52(b) should be applied to petitioners coming before appellate courts on collateral challenge to a criminal conviction brought under 28 U.S.C. § 2255. This is one of the earliest cases where "time" was a significant point of discussion. Justice O'Connor writing for the majority found that "because Rule 52(b) was intended for direct appeal Frady could not avail himself of its benefit while making a collateral attack." *Id*. at 164. There were two concurring opinions and one dissent.

Another noteworthy case in this analysis is *United States v. Young*, 470 U.S. 1 (1985). The issue presented was whether the prosecutor's remarks in closing argument rose to the level of "plain error" such that a reviewing court could act on absent an objection by the defendant at the time of trial." *Id*. at 6. The Court looked to *Atkinson* as "codified in . . . Rule 52(b)" to determine the rule was correctly applied by the Court of Appeals. The Court reversed and found the prosecutor's conduct definitely rising to the level of error, it did not, however, rise to the level necessary to result in a reversal of the conviction. *Id*. at 15-16. The Court's discussion as to how circumscribed the appellate court's authority was on this

issue is seen again in *United States v. Olano*, 507 U.S. 725 (1993).

## IV. *United States v. Olano* Established the Standard for Receiving Relief Under Rule 52(b) Error

*United States v. Olano*, 507 U.S. 725 (1993) sets the framework for Rule 52(b) analysis of plain error relief. The Court began by revisiting the rules already established on the issue of Rule 52(b) "plain error" review: Any right could be forfeited if a defendant failed to timely raise the issue during the trial stage; Rule 52(b) provides a court of appeals a limited and circumscribed right to correct forfeited errors; Rule 52(b) had remained unchanged since originally written and was merely a restatement of existing law when adopted; Rule 52(b) is properly paired with Rule 52(a) which governs preserved or non-forfeited errors; fundamental justice requires courts of appeal to sometimes consider forfeited errors; Rule 52(b) leaves it to courts of appeals to exercise their discretion in deciding whether or not to correct a forfeited error; "the appellate court must consider the error, putative or real," (dare we say unsettled or real?) "in deciding whether the judgment below should be overturned"; the phrase "error or defect" is more simply read as error; and finally, any forfeited error "may be noticed" only if it is "plain" and "affects substantial rights." *Olano*, 507 U.S. at 732.

From these principles the Court set forth the four criteria which are generally referred to as the "four

prongs" of *Olano*'s "plain error" review. In *Olano*, two co-defendants came before the Court seeking corrections in their cases pursuant to Rule 52(b). The case of *United States v. Olano* and *United States v. Gray*, 507 U.S. 725 (1993). Guy Olano and his co-defendant complained that the trial court's permission to the two alternate jurors to be present while the twelve jurors deliberated and reached a verdict violated the rights of the defendants. The court of appeals vacated the convictions finding that the alternate jurors' presence in violation of Federal Rule of Criminal Procedure 24(c) was inherently prejudicial and reversible per se under the "plain error" standard of Rule 52(b). The government sought and was granted writs. This Court held that while the presence of the alternate jurors was plain error, it was not an error that the Court of Appeals could correct under Rule 52(b) because Olano and Gray could not prove they suffered prejudice from the error.

Applying these general principles, the Court then gave us the four criteria which have come to be called the "four prongs" of the *Olano* test for "plain error." The *first* requirement is that there be an actual error. Deviation from a legal rule is "'error'" unless the rule has been waived. The *second* limitation on appellate authority under Rule 52(b) is that the error be "plain." "Plain" is synonymous with "clear" or, equivalently, "obvious." Citing *Young*, supra, and *United States v. Frady*, 456 U.S. 152, 163 (1982). Aware of the dissensus in the legal community as to exactly when the error must be "plain," the Court found that

to be subject to 52(b) correction, "the error must, at a minimum, be clear under current law." It specifically left unanswered 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. The *third* numbered limitation required that the plain error "'affect substantial rights,'" which it noted "is the same language employed in Rule 52(a), and in most cases is meant that the error must have been prejudicial: It must have affected the outcome of the District Court proceedings." *Olano*, *id.*

As to the third prong, the Court makes it clear that in 52(b) it is the defendant who bears the burden of proving an error took place which resulted in harm to a substantial right. This is a subtle shift from Rule 52(a)'s language where once the defendant adequately proved the existence of an error, the burden was on the government to prove the error was harmless. The Court noted it chose not to address that special category of error that can be corrected regardless of proof of substantial harm. This category would include cases in which the error involved a right so basic that any infringement would make it impossible to fairly determine guilt or innocence.

A fourth, though non-enumerated prong, limits a court of appeal from correcting any error unless it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736.

Applying the four criteria to the two respondents Olano and Gray, the Court found the first two criteria were met based on concessions by all parties. Then the court focused on whether the error affected substantial rights within the meaning of Rule 52(b). It found it did not. The dissenting opinion by Justice Kennedy in *Olano,* presents several valuable insights. At page 741, Justice Kennedy compliments the majority in the wording of the opinion relative to burden of proof. Justice Kennedy:

> . . . the Court's opinion is phrased with care to indicate that burden of proof concepts are the normal or usual mode of analysis of error under Rule 52 . . . this gives operative effect to the difference under Rule 52 between those cases where an objection has been preserved and those where it has not.

## V. Transitional Moments in Criminal Law Resulted in Modifications to *Olano*

*Johnson v. United States,* 520 U.S. 461 (1997) is the next case that must be carefully considered in order to resolve Henderson's claim. Joyce Johnson was convicted by a jury of giving false testimony under oath before a Grand Jury thereby violating 18 U.S.C. § 1623. Materiality is an element of that crime. At the time of trial, circuit precedent left it to the trial judge to decide the materiality question and this Court had not yet spoken on the issue. Joyce Johnson did not object to the judge's affirmative finding nor to his instructions to the jury stating the

same. Johnson was convicted and appealed. After her conviction but before her appeal to the Eleventh Circuit, this Court decided *United States v. Gaudin,* 515 U.S. 506 (1995) which dictates that materiality be decided by the jury, not the court. *Id.* at 463. Johnson urged that the Eleventh Circuit not apply the "limited" and "circumscribed" structures of *Olano* to her case because the error of which she complained was "structural" and a "special" case. The appellate court rejected her argument and applied the Rule 52(b) analysis established in *Olano.* The appellate court made no independent finding as to prongs one or two, but assumed arguendo they had been met. Apparently, the appellate court believed a retroactive application of *Gaudin* was appropriate for determination of prongs one and two of *Olano*'s criteria. Regardless, the defendant lost when the third prong of *Olano* was used to determine whether the error had substantially affected her substantial rights. That conclusion was based on "the court's independent review of the record and determination that there was 'overwhelming' evidence of materiality. . . ." *Id.* at 465. Ms. Johnson eventually made it to this Court.

Joyce Johnson relied on a number of cases in which this Court did not apply Rule 52(b) analysis to the petitioners' alleged errors. *Id.* at 465. In those cases this Court referred to the petitioners' errors as "structural." This Court distinguished the cited cases as not having come to the Court by way of a direct appeal from a judgment of conviction in a federal court, and therefore, they were not subject

to the provisions of Rule 52. *Id.* at 466. The Court cautioned against any unwarranted expansion of the Rule or exceptions to the Rule "which we have no authority to make." Citing *Carlise v. United States,* 517 U.S. 416 (1996). Up to this point, all Justices were in agreement. The Rule 52(b) analysis then began. A unanimous Court agreed that because Johnson was still on direct review from a federal conviction, *Gaudin* should be applied retroactively (as required by *Griffith v. Kentucky*), thereby satisfying the first prong of the test. The majority had no doubt that if Johnson's trial had occurred that day, the failure to submit materiality to the jury would be error. They also felt that because petitioner was still on direct review, *Griffith v. Kentucky*, 479 U.S. 314 (1987) required them to follow its directive and apply it to the case before them.

The second prong of the test presented problems. Was the error plain "under current law?" The majority concluded "the error was certainly clear under current law, but it was by no means clear at the time of trial." *Johnson*, 520 U.S. at 467.

Eventually all but Justice Scalia were persuaded by Petitioner's argument that it would be unreasonable to require a defendant to lodge an objection at trial to each and every conceivable issue that was not open to debate in hopes it would be overturned before her case became final. The majority agreed that in this situation (i.e., where the law was clearly against her at trial but clarified by a ruling while the matter was still on direct appeal), it was sufficient that the

error was plain at the appeal stage. The second prong was therefore satisfied. *Johnson*, 520 U.S. 461, provided a further refinement of Rule 52(b) as analyzed in *Olano.*

*Johnson*, *supra*, provides a further refinement of Rule 52(b) stating "[i]n a case 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." In other words, a petitioner who forfeited an objection can be granted a Rule 52(b) remedy if objecting at the trial stage would have been futile and a clarifying law or adjudication was in place at time of appeal.

Johnson now had the burden of proving her substantial rights had been affected. She argued that the error was "structural" as explained in *Arizona v. Fulminante,* 499 U.S. 310 (1991) because it affected "the framework within which the trial proceeds, rather than simply an error in the trial process itself. *Johnson*, 520 U.S. at 469. The Court chose to "pass" on deciding that question and moved on to the final, third prong. The Court had no problem in finding the record provided overwhelming evidence supporting materiality. Therefore, though there had been error which was plain at the time of appeal, petitioner was not entitled to a Rule 52(b) remedy due to a lack of harm caused by the error.

## VI. *United States v. Cotton* Leads the Way for Forfeiture to Overwhelm *Griffith v. Kentucky*'s Mandate

*United States v. Cotton,* 535 U.S. 625 (2002) is one of the few Supreme Court cases since *Johnson* to address plain error review in the changed-law context. *Cotton* followed the chaos of *Apprendi.* The government conceded that the error (i.e., the trial judge's making findings as to quantity of the drugs involved which resulted in a much lengthier sentence than otherwise could have been imposed) was "plain" because "'the law at the time of trial was settled and clearly contrary to the law at the time of appeal.'" The Court assumed without deciding that the error had affected the defendants' substantial rights, but it nonetheless denied relief under the third *Olano* factor because the evidence of drug quantity was "overwhelming and essentially uncontroverted." *Id.* at 633. In other words, the error caused no harm which otherwise wouldn't have been inflicted.

## VII. Justice Stevens Questions the Need to Rethink Retroactivity and Rule 52(b)

A more recent case sheds more insight on Rule 52(b) – *United States v. Marcus*, 130 S.Ct. 2159 (2010). This Court reversed a Second Circuit finding that when reviewing for "plain error" it must reverse "whenever there *is any* possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct," – an error involving *Olano*'s third prong but with a much less

stringent requirement. The lower court was reversed and the government was granted its writ. *Id.* at 2164. Marcus had relied on *Puckett v. United States*, 129 S.Ct. 1423, 1429 (2009), for the proposition that "certain errors, termed 'structural errors' might 'affect substantial rights' regardless of their actual impact on an appellant's trial." *Id.* at 1432; *Marcus*, 130 S.Ct. at 2164. This Court stated "that . . . while the rights at issue in this case are important, they do not differ significantly in importance from the constitutional rights at issue in other cases where we have insisted upon a showing of individual prejudice . . . " citing *Fulminante*, 499 U.S. at 306.

This case is especially important for concerns expressed in Justice Stevens' dissenting opinion. All sides agreed that the charging indictment was in error in failing to eliminate conduct which took place before the law made it illegal. However, Justice Stevens believed the majority was in error in believing that there must be a finding that an error of constitutional magnitude occurred in order for Marcus to be eligible for relief. He also questioned the need for remanding the case for further Rule 52(b) Plain Error analysis by the Second Circuit (on the third prong limitation). *Marcus*, 130 S.Ct. at 2167. He noted that the four separate inquiries required by *Olano* each required a distinct form of judgment and that several of which had generated significant appellate-court dissensus. *Marcus*, 130 S.Ct. at 2167.

Justice Stevens opined, "I am more concerned with this Court's approach to, and policing of Federal

Rule of Criminal Procedure 52(b)." *Id.* at 2167. He found the language of Rule 52(b) "straightforward," and noted that it "'is the mirror image of Rule 52(a), which instructs courts to disregard any error that does not affect substantial rights.'" He continues, "In our attempt to clarify Rule 52(b), we have, I fear, both muddied the waters and lost sight of the wisdom embodied in the Rule's spare text. Errors come in an endless variety of "'shapes and sizes.'" *Ante*, 130 S.Ct. at 2165-2166. Because error-free trials are so rare, appellate courts must repeatedly confront the question whether a trial judge's mistake was harmless or warrants reversal. They become familiar with particular judges and with the vast panoply of trial procedures, they acquire special expertise in dealing with recurring issues, and their doctrine evolves over time to help clarify and classify various types of mistakes. These are just a few of the reasons why federal appellate courts are "allowed a wide measure of discretion in the supervision of litigation in their respective circuits. Citing *Olano* at 725 (Stevens, J., dissenting)." *Marcus*, 130 S.Ct. at 2168. He continued, "This Court's ever more intensive efforts to rationalize plain-error review may have been born of a worthy instinct. But they have trapped the appellate courts in an analytic maze that, I have increasingly come to believe, is more liable to frustrate than to facilitate sound decision making." *Id.*

## VIII. Development and Connection Between the Forfeiture Rule and the Rule of Retroactivity

Consider *Linkletter v. Walker*, 381 U.S. 618 (1965) which was decided after *Mapp v. Ohio,* 367 U.S. 643 (1961). *Mapp* had overruled *Wolf v. State of Colorado*, 338 U.S. 25 (1949), and created the exclusionary rule for evidence seized in violation of the Fourth Amendment's search and seizure prohibitions. The question which quickly arose was whether *Mapp* should be applied retroactively. The Court had already been applying *Mapp* (without comment) to other cases (including Mapp's wife). *Linkletter*'s holding was straightforward:

> All that we decide today is that though the error complained of might be fundamental it is not of the nature requiring us to overturn all *final convictions* based upon it. After full consideration of all the factors we are not about to say that the *Mapp* rule requires retrospective application.

*Linkletter*, 381 U.S. at 639-640. (*Emphasis added*.)

The court had considered a multitude of positions before reaching that holding. There was considerable disagreement based on philosophical differences between those Justices holding to a Blackstonian theory of law as opposed to those holding to the Austinian approach. The Court considered a number of earlier cases where each of the theories had at one time been the controlling theory. *See United States v. Schooner Peggy,* 1 Cranch 103, 2 L.Ed. 49 (1801); *Gelpcke v.*

*City of Dubuque,* 1 Wall. 175, 17 L.Ed. 520 (1863); *Norton v. Shelby County*, 118 U.S. 425 (1886); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 371 (1910); *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358 (1932); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940). *Linkletter*, 381 U.S. at 622-625.

Particularly worth noting for our purposes are the words of Chief Justice Marshall quoted at page 626 in *Linkletter*:

> It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied * * * the court must decide according to existing laws, and if it be necessary to set aside a judgment * * * which cannot be affirmed but in violation of law, the judgment must be set aside.

This same approach was subsequently applied in instances where a statutory change intervened, *Carpenter v. Wabash R. Co.,* 309 U.S. 23 (1940); where a constitutional amendment was adopted, *United States v. Chambers,* 291 U.S. 217 (1934); and where judicial decision altered or overruled earlier case law, *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941). *See Linkletter*, 381 U.S. at 626.

Chief Justice Clark drew the following conclusions from the discussions in *Linkletter*:

> Under our cases it appears (1) that a change in law will be given effect while a case is on direct review, *Schooner Peggy, supra,* and (2) that the effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set "'principle of absolute retroactive invalidity'" but depends upon a consideration of "particular relations * * * and particular conduct * * * of rights claimed to have become vested, of status, or prior determinations deemed to have finality"; (3) and "of public policy in the light of the nature both of the statute and of its previous application."

*Linkletter*, 381 U.S. at 627. (Internal footnotes and citations omitted.)

## IX. A Multitude of Cases Addressing the Issue of Retroactivity Follow *Linkletter*

The year after its decision in *Linkletter,* the Court decided *Johnson v. New Jersey,* 384 U.S. 719 (1966), which came before the court on collateral review. The Court held that its three-pronged analysis established in *Linkletter* was to be applied to convictions that were final as well as to those that were still pending on direct review.

The following year the Court decided *Stovall v. Denno,* 388 U.S. 293 (1967) announcing a general test for deciding whether and to what extent a new ruling

should operate retroactively: "(a) the purpose to be served by the new standard; (b) the extent of the reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of the new standards." *Id.* at 297.

In 1969 the Court decided *Desist v. United States,* 394 U.S. 244 (1969) – a case perhaps most frequently cited for Justice Harlan's dissenting opinion.

## X. 1971 Cases Begin a Steady Rise in Cases Addressing Retroactivity

Next the analysis needs to address two consolidated cases, *Williams v. United States* & *Elkanich v. United States*, Nos. 81 & 82, 401 U.S. 646 (1971), in which the Court was asked to decide whether *Chimel v. California,* was to be applied retroactively either to the direct review of *Williams* or the collateral proceeding initiated by *Elkanich*. This was another case where the clarifying law (the *Chimel* decision in this case) was announced after their trials. Reaffirming its recent decisions in like situations, the court held *Chimel* was not retroactive to either of the petitioners – neither of whom had suggested that his conviction was unconstitutionally obtained based on the law at the time of their arrests. The Court noted that it was

> [holding] to the course that there is no inflexible constitutional rule requiring in all circumstances either absolute retroactivity or complete prospectivity for decision construing the broad language of the Bill of Rights.

> Nor have we accepted as a dividing line the suggested distinction between cases on direct review and those arising on collateral attack.

*Id.* at 651-652. The Court continued:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application to those circumstances.

*Id.* at 653.

On the same day it decided the above two cases, the Court decided *Mackey v. United States,* 401 U.S. 667 (1971), in which the petitioner asked the court to reverse his conviction based on its recent decision in *Marchetti & Grosso,* invalidating the registration and gambling tax provisions because they compelled petitioners to incriminate themselves by the use of the documents at trial. Mackey lost on appeal as the Court found no reason to apply its recent decision to him retroactively. This caused Justice Harlan to write a concurring opinion in which he stated in part:

> Today's decisions mark another milestone in the development of the Court's "retroactivity"

> doctrine, which came into being somewhat less than six years ago in *Linkletter v. Walker* . . . That doctrine was the product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation in the criminal field. Some members of the Court, and I have come to regret that I was among them, initially grasped this doctrine as a way of limiting the reach of decisions that seemed to them fundamentally unsound. Others rationalized this resort to prospectivity as a "technique" that provided an "impetus . . . for the implementation of long overdue reforms, which otherwise could not be practicably effected."

Citing *Jenkins v. Delaware,* 395 U.S. 213, 281 (1969), but at *Mackey*, p. 676, Justice Harlan continued, "What emerges from today's decisions is that in the realm of constitutional adjudication in the criminal field the Court is free to act, in effect, like a legislature, making its new constitutional rules wholly or partially retroactive or only prospective as it deems wise. I completely disagree with this point of view." *Id.* at 677.

In 1982 the Court decided *United States v. Johnson,* 457 U.S. 537 (1982) in which, to a large extent, it shifted course – reviewed at length the history of the Court's decisions in the area of retroactivity and embraced the views of Justice Harlan as expressed in *Desist* and *Mackey*: "Retroactivity must be rethought." The Court concluded that the retroactivity analysis for convictions that have become final must

be different from the analysis for convictions that are not final at the time the new decision is issued.

In *Batson v. Kentucky,* 476 U.S. 79 (1986), the petitioner came before this Court on collateral attack of his state court conviction. He established a prima facie case of racial discrimination violating the Fourteenth Amendment due to the prosecutor's peremptory challenges as to potential black jurors. He was granted the relief he requested.

## XI. *Griffith v. Kentucky* Mandates Retroactivity to All Cases Still on Direct Review or Not Final

A few months later, companion cases *Griffith v. Kentucky* and *Brown v. United States,* 479 U.S. 314 (1987), came before the Court on *Batson* issues. Griffith had been tried in the same courthouse by the same judge and the same prosecutor as had defendant Batson three months earlier. Brown had been tried in federal court. The now well-known holding issued " . . . 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*, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id.* at 328. (*Emphasis added*.)

This then brings the confluence of two directives meant to assure that justice will be done to criminal defendants who at earlier times would have seen no hope for remedial action. The first, Rule 52(b) which

permits a remedy for a forfeited error under circumscribed circumstances now gets the assistance of the holding of *Griffith* which directs all clarifying rules are to be retroactive.

## XII. *Tapia v. United States* Provides the Clarifying Law Needed by Henderson

*Tapia v. United States,* 131 S.Ct. 2382 (2011), is the clarifying decision which satisfied petitioner Henderson's need for a "plain error" in his Rule 52(b) review. It was decided after the filing of his Rule 35(a) motion and his appeal brief with the Fifth Circuit. The *Tapia* Court was unanimous in its interpretation of the relevant statutes which conclusively prohibit a sentencing judge from considering a defendant's need for rehabilitation in deciding whether to impose a prison term at all or whether to lengthen a prison term to allow more time for rehabilitation. The only question left unanswered in *Tapia* comes in its final paragraph. What aspect of Rule 52(b) was the Court referring to in its directive for the appellate court to "consider the effect of Tapia's failure to object to the sentence when imposed?"

The final case petitioner specifically chooses to discuss is *Dorsey v. United States,* 567 U.S. ___, 132 S.Ct. 2321 (June 21, 2012), which held the Fair Sentencing Act's new, lower mandatory minimums apply to the post-Act sentencing of pre-Act offenders. The underlying question before the Court was congressional

intent as revealed in the Fair Sentencing Act's language, structure, and basic objectives. The majority rest[ed] their "conclusion primarily upon the fact that a contrary determination would seriously undermine basic Federal Sentencing Guidelines' objectives such as uniformity and proportionality in sentencing." *Id.*, slip. op. at 2. Both petitioner and respondent agreed that the FSA should apply to those individuals sentenced in the narrow window of time between August 3, 2010 (the day the order creating the FSA was signed) and November 1, 2010 when the amended guidelines went in to effect.

This Court was particularly concerned about the impact of applying the FSA only prospectively. The notion of "transitional moments" in criminal law was nothing new. However, in this case the very narrow prechange/postchange period was extremely short – almost contemporaneous. *See Dorsey*, slip. op. at 15. The Court felt it would "highlight a kind of unfairness that modern sentencing statutes typically seek to combat." *Id.* It would also result in unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." *Id*. "Further, it would involve imposing upon the pre-Act offender a pre-Act sentence at a time after Congress had specifically found in the Fair Sentencing Act that such a sentence was unfairly long." *Id.* Furthermore, the Court could find no "countervailing consideration." *Id*., slip. op. at 18.

## XIII. What Statistics Suggest About Forfeiture and Retroactivity

It is difficult to discern precisely what impact the forfeiture rules might have on petitioners forced to appeal under Rule 52(b). Professor Hytens presents some interesting statistics at page 944 n. 111 of his article. "During the most recent four years for which data is available, the reversal rate in federal criminal appeals has never exceeded 6.4%." This figure includes defendants whose appeals were "dismissed due to procedural defects, rejected on the merits, or failed because any error was harmless, as well as those who lost because of forfeiture rules." Looking next to two data points which were less systematic in nature, Professor Hytens provided numbers which focused solely on the operation of forfeiture rules in federal criminal appeals.

> A Westlaw search performed on October 9, 2005 revealed 1717 decisions issued by federal courts of appeals during the previous three years that cited at least one of the following: (1) Federal Rule of Criminal Procedure 52(b), the provision that governs review of forfeited claims; (2) *United States v. Olano*, 507 U.S. 725, the decision that first announced the four-factor test used to review such claims, *see infra* notes 129-136; (3) *Johnson v. United States*, 520 U.S. 461 (1997), the first Supreme Court decision to discuss the proper manner of applying plain error review in the changed-law context, *see infra* notes pp. 138-148; or (4) *United States v. Cotton*, 536 U.S. 625 (2002) which applied the *Johnson*

> [520 U.S. 461] analysis to review of forfeited claims based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *see infra* notes at pp. 149-157. Second, notwithstanding the fact that *Apprendi* was one of the most significant law-altering decisions issued by the Supreme Court during the last several decades . . . the United States Court of Appeals for the Eleventh Circuit – which hears the third largest number of criminal appeals of any circuit in the nation – appears to have never granted relief based on a "forfeited" *Apprendi* claim.

Toby J. Hytens, "Managing Transitional Moments in Criminal Cases," THE YALE LAW JOURNAL 115:932 (2006) at 944, n. 111. (Citations omitted.)

> A Westlaw Keycite search performed on December 8, 2005 indicated *Apprendi* had been cited by courts 13,225 times. As of the same date, *Dickerson v. United States*, 530 U.S. 428 (2000), which reaffirmed the constitutional status of the *Miranda* warnings and was decided on the same day as *Apprendi*, had been cited by courts 575 times; *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), which upheld the Scouts' claim of constitutional entitlement to expel an openly gay Scoutmaster and was decided two days after *Apprendi* and *Dickerson*, had been cited by courts a mere 99 times.

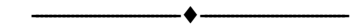
*See* Hytens at 935, n. 58.

In her dissenting opinion in *Apprendi*, Justice O'Connor predicted a massive transitional moment as

a result of the Court's new decision in *Apprendi*. There were predictions "the [*Apprendi*] decision may have rendered unconstitutional then-prevailing sentencing practices under at least fifty-seven federal and sixteen state statutes." Hytens at 935, n. 57.

A 2004 compendium of federal justice statistics suggests "over 95% of all federal criminal prosecutions are terminated by a plea bargain." Hytens at 939-940, n. 90. Further statistics indicate that "in 1971 the federal courts disposed of 32,103 criminal cases by trial or guilty plea; in 2004, the number was 73,616." Hytens at 940, n. 94. "During 2002, 42% of all federal felony convictions were for drug offenses." Hytens at 941, n. 98.

It is difficult to make any sound conclusions from these statistics. But it does seem unlikely that using a "time of appeal" test for Rule 52(b) plain error determination is likely to make a profound difference in the number of reversals on direct appeal.



## CONCLUSION

The court of appeals erred in holding that Federal Rule of Criminal Procedure 52(b) requires the error to be plain at the time of forfeiture in addition to the time of appeal. Its judgment should therefore be reversed and the case remanded for application of the correct standard.

The forfeiture approach as governed by Rule 52(b) has become one of the dominant means by

which federal courts limit the disruptive effects of legal change in the context of direct review of federal criminal cases. In petitioner's case, the Fifth Circuit's decision to follow *Griffith*'s directive and apply clarifying law to the first prong of *Olano* but to withhold it when considering the second prong, does not comply with the purpose of Rule 52(b) which was to see that petitioners are treated justly. This Court should conclude that the clarifying law must also be applied to the second prong of *Olano* making the error which is now extant also "plain" for purposes of Rule 52(b) review. Those purposes generally cited in support of forfeiture rules – avoiding error by trial judges, deterring sandbagging by defense counsel, and encouraging the creation of complete appellate records – have little application when the rules have changed dramatically between the time of trial and the time of appeal. In addition to the obvious primary cases addressing this issue, petitioner has relied on two especially relevant and helpful law review articles: Toby J. Hytens, "Managing Transitional Moments in Criminal Cases," THE YALE LAW JOURNAL, Vol. 115: 922-999 (2006) and Professor Alison LaCroix, "Temporal Imperialism," The Law School, The University of Chicago, as published in UNIVERSITY OF PENNSYLVANIA LAW REVIEW, Vol. 158, 1329 (2010).

The First, Second, Tenth and Eleventh Circuits have explicitly held that the plainness of error should be determined at the time of appellate review when the law is unsettled at the time of trial but becomes clear by the time of appeal. The Third, Sixth, Seventh, and Eighth Circuits state that they would

evaluate the plainness of error at the time of appeal, although these circuits have not expressly decided the issue of whether this principle applies when the error is unclear at the time of trial. As of July 25, 2012, the Fifth Circuit in an en banc ruling, joined the ranks of the majority circuits in *United States v. Escalante-Reyes*, No. 11-40632.

The Ninth and the District of Columbia Circuits are the only circuits squarely holding that if the law is unclear at the time of trial and later becomes clear, the error is evaluated based on the law as it existed at the time of trial.

Though not convinced the forfeiture approach is the best means for coping with transitional moments in the direct review context, Professor Hytens believes "the reviewing court's assessment of whether any error was plain (that is clear or obvious) should still be as of the time of appeal." Hytens at 959. He believes using the time of appeal evaluation is the only way the *Olano* standard will work. *Id*. at 971. He is nevertheless concerned that the formula has lead to a situation where the right hand giveth and the left hand taketh away. *Griffith* provides the plain error and prongs three and four of *Olano*'s structural forfeiture rule eliminates their usefulness. Hytens at 979. But that discussion is for another day.

The rulemaking history of this Court relative to Rule 52(b) reflects its focus on preventing miscarriage of justice rather than evaluating the correctness of district courts' decisions. Applying a time of appeal

standard comports with such a goal at least until a case has become final.

Respectfully submitted,

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