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

REPLY BRIEF FOR ARMARCION D. HENDERSON

PATRICIA A. GILLEY
Counsel of Record
GILLEY & GILLEY
820 Jordan Street, Suite 206
P.O. Box 52011
Shreveport, LA 71135-2011
Telephone: (318) 226-4989
Facsimile: (318) 226-4502
padg48@aol.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

OVERVIEW OF FEDERAL RULES OF CRIMINAL PROCEDURE 51 AND 52

The more perplexing a problem seems to be, the more important it is to break it into its component parts and trace them to their origins. Using this approach to resolve the issue before this Court in *Henderson v. United States*, it is clear that the two component parts are Federal Rules of Criminal Procedure 51 and 52. Their origins go back to the earliest years of our country's judicial system. Each is a major principle of law and each must be preserved.

Petitioner Armarcion Henderson contends the principle at the root of Rule 51 is akin to the purpose of Robert's Rules of Order. Our earliest judicial proceedings required a structure which would inform all participants how things would operate. As anyone who has considered the workings of trial courts would agree, errors occur all the time. They are inevitable. Some are minor; some are major. Some deserve redress; some do not.

Rule 51 codifies the common sense rule that if you believe an error has occurred and if you want it to be remedied, you must make notice of the error at the time it occurs. This will put your opposing counsel on notice who will then be in a position to rebut your contention. The matter will be "fleshed out" and the trial judge will be able to address it at a time when the least amount of time, energy and funds will be required to resolve the issue. This is a great principle and for the most part it works very well. But it has a

harsh component too. If trial counsel fails to raise the putative error, his client is faced with a forfeiture of that error and it is lost for all time. He is stuck with a ruling that if correctly decided might have resulted in a much more favorable resolution for him.

Our forefathers also believed in a system that first and foremost protected the fundamental rights of each petitioner who found his way to the court. It was unthinkable that anyone should be forced to suffer infringement of such a right merely due to his lawyer's inattentiveness, lack of competence, or the outright rigors of trial and heat of battle that cannot address each and every issue that arises. And, therefore, an exception to the contemporaneous objection rule and its corollary of forfeiture was established.

The principle supporting Rule 52 is that there must be a mechanism which offers relief to a petitioner who only becomes aware of a putative error after the trial is complete and the time of appeal is available to him. This principle has found application beginning in the earliest years of our judicial system as will be discussed later in this brief. It worked well and brought justice to situations which otherwise would have resulted in clearly erroneous rulings applied unjustly to a party who was at the mercy of his attorney who left him to suffer the results as he himself moved on to the next client.

In 1936 in *United States v. Atkinson*, 297 U.S. 157 (1936), this Court used straightforward language to formally state what our courts had been doing for

over 100 years to ensure that justice prevailed as much as reasonably possible. It was a civil case in which the petitioner was the United States which was arguing for a more favorable ruling on a government insurance contract. Petitioner had not raised the objection at trial and was denied relief on the basis of the contemporaneous objection/forfeiture rule. Judicial economy was emphasized as the basis for the rule.

In dicta which was codified by this Court eight years later as Rule 52, the Court noted that there could be exceptions to this rule – especially in criminal cases where the substantial rights of a person were jeopardized. "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.* 159-160. It could be argued that *Atkinson* was the one and only time the two principles underlying Rules 51 and 52 were clearly distinguished.

By the time *Olano v. United States*, 507 U.S. 725 (1993), was decided, the two principles underlying Rules 51 and 52 as discussed in *Atkinson* were so conflated that their sparse words frequently caused confusion when the issue arose. The circuit courts were perplexed as to when the claimed error had to be clear. Some held it was time of trial and others held time of appeal. This resulted in disparity in applications of Rule 52 across the country. This Court

was unsure of exactly how it felt about application of the rule. In "*Olano*" it did find that though the putative error had not been preserved at trial, petitioner was properly before the Court for review because the error was clear at trial and continued to be so. So we had application of Rule 51 tempered by application of Rule 52. That was as it should be. But then the waters became murky. This Court went on to note that it was not sure how it would rule in the "special case" where the error was not clear at trial but became clear by the time of appeal. *Id*. 734. That was an issue that was a Rule 51 "Robert's Rules of Order" type of question. It should have had nothing to do with the question of whether the petitioner had suffered grave injustice and was deserving of a remedy. An appellate court would be remiss if on direct appeal it applied a law it knew to be wrong. See Chief Justice Marshall's words in *The United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801).

The waters were further muddied in 1997 with the decision of *Johnson v. United States*, 520 U.S. 461 (1997). Here the two major principles were further conflated resulting in an outcome allowing petitioner to proceed with her appeal under Rule 52(b) even though no error existed at time of trial and there was nothing to which her lawyer could have objected. This Court created yet another route for a petitioner to traverse the muddy waters of "plain error review" and reach review of his putative error – if the error was plain/clear/obvious at the time of appeal.

So as it presently stands, federal criminal petitioners have three potential routes which might lead

to review and eventual remediation by a court of appeal even though no objection was made and preserved at the trial court:

> Route No. 1: The error is *plain/clear/obvious at time of trial* but petitioner's attorney fails to preserve the error because he does not object and raise the issue to the trial court;
>
> Route No. 2: There is *no error at the time of trial* to which trial attorney can object since the putative error only becomes known at time of appeal;
>
> Route No. 3: The putative error is *unsettled at the time of trial* and the trial attorney fails to object and preserve the error.

Befuddling to Armarcion Henderson and his counsel is the fact that Routes 1 and 2 lead to a chance of review and remediation by an appellate court and yet his route does not. Route 1 could most easily be argued as an example of the infamous "sandbagging." Route 2 makes no sense at all because there was no error about which counsel could object. Yet they get their chance of review. Armarcion Henderson's counsel failed to object to a putative error at his sentencing at a time when the issue was not decided definitively one way or the other. He does not understand why he should be deprived of the same Rule 52(b) review to which Guy Olano and Joyce Johnson were entitled.

DISPUTES BETWEEN THE PARTIES

Respondent contends under Federal Rule of Criminal Procedure 52(b) "an error is not plain when the law is unsettled at the time the claim of error is forfeited." (Br. 10). In essence, respondent contends there can *never* be a Rule 52(b) remedy for a petitioner who failed to raise an objection at the trial court if the point of law was *unsettled* at the time of trial.

Respondent correctly points out that the basic premise of the common law rule set forth in Rule 51 is that to preserve a claimed error, a defendant *must* put the trial court on notice of his objection to the court's ruling and the grounds for that objection at the time of trial itself, or his claim of error will not be preserved. This is indeed a harsh rule. But for well over a hundred years before the Federal Rules of Criminal Procedure even existed, our courts have tempered that principle. When this Court adopted the Federal Rules in 1944, it included in Rule 52 not merely a remedy for the petitioner whose lawyer adroitly raised the putative error in the trial court, [52(a)] we also find a remedy for a petitioner who was not so lucky, but whose lawyer finally did raise the error on appeal, [52(b)].

Rule 52. Harmless & Plain Error

> **(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.**

> **(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.**

Advisory Committee Notes to the 1944 adoption of Rule 52 note that 52(b) is a restatement of existing law dating back to *Wiborg v. United States*, 16 S.Ct. 1127 (1896); *Hemphill v. United States*, 112 F.2d 505, C.C.A. 9th, reversed 312 U.S. 657, cert. denied 314 U.S. 627 (1940). The Committee felt it was worth mentioning that Supreme Court Rule 27 provided for the Supreme Court itself to notice plain error whether assigned, specified, or not; and that similar provisions were found in the rules of several circuit courts of appeals at the time.

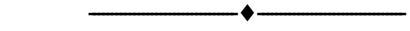
Respondent contends "*Johnson relaxed* the plain-error standard when a timely objection would be pointless under contrary controlling precedent." (Br. 9) Emphasis added. That characterization of this Court's ruling in *Johnson* seems questionable at best as will be discussed later.

Respondent further argues that as to *Griffith v. Kentucky's*, 479 U.S. 314 (1987) "principles of retroactivity, [they] are relevant to the substantive law that applies at the first prong of plain-error review (i.e. whether error occurred), but they shed no light on the second prong of plain-error review (i.e. whether the error was obvious."). (Br. 10). Respondent seems to have conflated two very different principles – i.e. the requirements of contemporaneous objection/forfeiture as opposed to the question of the remedies which might be available to the petitioner who suffered

prejudice to substantial rights but who had not preserved the objection.

Lastly respondent contends that the underlying purposes of Rule 52(b) "cut strongly in favor of correcting only forfeited errors whose plainness would have been apparent at trial," (Br. 10) and, that "Rule 52(b) provides a narrow and limited exception to that general rule when an objection would be futile (because the law is settled against the defendant) or when an objection should be unnecessary (because the error is obvious under existing law." (Br. 11) This analysis leaves respondent in the inexplicable position of holding out hope of remedy; first, to a petitioner who had the law absolutely in his favor at the time of trial but who did nothing to point this out until the time of appeal; and second, hope of a remedy to a petitioner who had nothing to raise as an objection at the time of trial because at that point there was no error as the law was clearly against him and the trial judge did exactly as he should. This analysis leaves the poor soul who was in trial while the error was still unsettled as the only petitioner who has no hope of receiving a remedy on appeal. Such an outcome does not comport with the underlying purpose of Rule 52(b) which is to act as a safety valve for injustice occurring at the trial court but which was not preserved. The only reasonable resolution to this awkward and unjust interpretation of Rule 52(b) is for this Court to find that error which is clear and obvious at the time of appellate consideration satisfies the

requirements of "plain error" as discussed in prongs one and two in the *Olano* analysis.



THE STRUCTURE, TEXT, HISTORY AND PURPOSES OF RULE 52(b) INDICATE THAT AN ERROR IS SUFFICIENT FOR APPLICATION OF RULE 52(b) REMEDIATION REVIEW IF IT IS CLEAR AND OBVIOUS AT TIME OF APPELLATE REVIEW

1. The history of appellate courts tempering the harsh principle of contemporaneous objection/ forfeiture requirements of common law are as old as our country.

Who could resist a review of *The United States v. The Schooner Peggy* found at 5 U.S. (1 Cranch) 103, 2 L.Ed. 49 (1801). The ship sailed under the French flag and was captured as a prize on April 24, 1800, by an armed vessel commanded by David Jewitt, Esq. The captors' victory was short-lived, however and they were ordered by the district court of Connecticut to return the ship and her cargo to her owner. But in September 1800 the captors appealed to the Connecticut circuit court which reversed the district court's decree and condemned the "Peggy" and her cargo as prize. "Peggy's" owners then appealed to the U.S. Supreme Court by way of a writ of error. As the matter languished in the court, a convention between the United States and the French Republic was signed and eventually ratified by the President of the United States on December 21, 1801.

But why is this case of any concern to us today? – Because of the words written by Chief Justice Marshall in the Court's decision.

> "It is in the general true that the province of an appellate court is only to inquire 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 . . . In such a case the court must decide according to existing laws and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." *Id.* 110

Clearly the issue of superceding laws and clarifying decisions is nothing new to our judicial system. Our history tells us justice may require overruling a lower court even if it may have been correct at the time it ruled.

Ninety years after *The Schooner Peggy* the words "plain error" began to appear in our jurisprudence. Long before this Court adopted the first Federal Rules as we now know them, criminal defendants had the benefit of a "plain error" rule. In a lengthy and passionate dissenting opinion Mr. Justice Field referred to Section 997 of the Revised Statutes which required specific assignment of errors by any petitioner who sought review by the court. Defendant John O'Neil of Whitehall, New York who engaged in

the sale of intoxicating liquors across the state line in Rutland, Vermont, was convicted of 307 offenses and sentenced to 54 years of imprisonment. In the matter of *O'Neil v. U.S.*, 144 U.S. 323, 360 (1892), Justice Field pointed to Rule 21 of the Court and urged: "We should allow additional assignments to be filed, or take notice of the error of our own motion under rule 21 . . . that injustice and wrong may not be perpetrated." He argued that rule 21 permitted "the court at its option to notice a plain error not assigned or specified. 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." *Id*. 360. Justice Field was particularly concerned by the severity of the punishment: "for these transactions . . . which no power of the human intellect can accurately describe except as transactions of interstate commerce." *Id*. 365. The foundation of plain error review of sentencing errors was already being set down. Note that this case did not involve a clarifying law or decision.

On March 3, 1891, Congress passed the act creating our federal circuit courts of appeals. It also created the statutes previously mentioned in *O'Neil*. See also *In re Claasen*, 140 U.S. 200, 202 (1891) which was one of the first cases in which a petitioner's right to appeal to the Supreme Court was affirmed (noting that the case was not yet final) as well as discussing the waiving and abandoning of certain of his alleged trial court errors. *Id.* 204. Once again the concern was fairness and justice to the defendant.

In the same time frame, 1891, William Caldwell filed a writ before this court seeking a reversal of his murder conviction based on an alleged error in the indictment. He was denied his remedy but the case is worth noting for its discussion of the lack of evidence to show any of his substantial rights were prejudiced. See *Caldwell v. State of Texas*, 137 U.S. 692, 696 (1891).

The preceding cases support petitioner's contention that this court has always been amenable to consider appeals of petitioners who had not preserved alleged trial court errors. The early cases made no mention of the need to be concerned about judicial efficiency and the impact such appeals and potential reversals might have on the trial courts or judges. The focus has always been on whether an injustice had befallen the petitioner and if it had, was it serious enough to warrant reversal.

2. The text and structure of Rule 52(b) support an interpretation that the putative error had only to be clear at time of appeal. The government's briefs both in *Henderson* and in *United States v. Escalante-Reyes*, 689 F.3d 415 (5th Cir. 2012) (en banc) (in which the Fifth Circuit recently reversed its position on when "error" must be plain for purposes of Rule 52(b) review to bring it in line with the majority of the circuits) stress the need for judicial efficiency as the primary reason for the contemporaneous objection rule. Petitioner has no quarrel there. But the government loses historical factual support (and petitioner's concurrence) when it expands the argument to say

"An examination of the history and development of the plain-error rule confirms that it was designed to promote judicial efficiency with error correction permitted only in 'exceptional circumstances.' *United States v. Atkinson*, 297 U.S. 157, 160 (1936)." See Government's Supplemental Brief in *Escalante-Reyes*, 13-16. This simply is not supported by the jurisprudence.

The government argues that the text of Rule 52(b) requires that the error must be plain at the time of forfeiture as well as on appeal. (Gov. Br. 18) There simply is nothing to support this conclusion. The government focuses attention on the second and subordinate clause of Rule 52(b) and argues that the pronoun "it" must be read to refer not merely to the noun "error" but to the noun and its modifying adjective i.e. "plain error." This is quite a stretch. The "backward looking" and the "forward looking" analysis seems inapplicable in discussing Rule 52(b) in our situation where petitioner is on direct appeal under the Federal Rules of Criminal Procedure and not under the civil rules of habeas corpus.

Once again, there is no textual basis in Rule 52(b) for giving the word "plain" a different meaning in cases where the law is unsettled at the time of trial (Henderson's situation) as opposed to flat-out contrary (Joyce Johnson's situation) to the law at time of appeal. As Judge Owen stated in her (concurring and dissenting) opinion in *Escalante-Reyes*, the word "plain" can't mean one thing in *Johnson* and another in cases like this one.

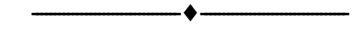
Moreover, the government itself has recognized and argued this position. See its brief in *Johnson v. United States*, No. 96-203 (O.T. 1996). (This brief is available on Westlaw at 1997 WL 37887. See page 11, headnote 21.)

> Petitioner's position would require the courts of appeals to draw an amorphous distinction between the "special case" [described in *Olano* where the law was unsettled at the time of trial] and the other class of cases in which an error becomes "plain" only on appeal: cases, such as this one, in which the district court action later challenged as error was, at the time of trial, compelled (rather than merely suggested or allowed) by circuit precedent. **But nothing in the text of Rule 52(b) contemplates or permits any such distinction: an error is either "plain" (because it is clearly barred by controlling law) or it is not. It is more faithful to the text of Rule 52(b), and simpler for the courts of appeals, to obviate that distinction altogether by treating alike all cases is which an error was not "plain" at the time of trial.** (Emphasis added.)

The Court made it clear that whether there was an "error" for purposes of Rule 52(b) was to be assessed only at the time of appeal. *Johnson* at 467. This Court considered the government's interpretation requiring plain error to exist both at trial and at appeal in *Johnson*. It rejected that approach. There is no reason

why it should apply that standard in Armarcion Henderson's situation.

It bears noting that during the oral argument in the *Johnson* case, several justices seemed to favor an interpretation of Rule 52(b) and the definition of "plain error" which is in line with petitioner Henderson's. Justice Scalia pointed out that the rule doesn't refer to "errors that were plain . . . It says plain errors may be noticed. I think that's susceptible of the interpretation that errors that at the time you evaluate them are plain." (Oral argument *Johnson* p. 16) Available at 1997 WL 92112 (U.S.) A little later in the argument the Court posed a solution where cases such as *Johnson* weren't reviewed as truly a plain error case, but with a new rule for new rule cases and go right to something like the fourth prong of *Olano*. Mr. Dreeben, the Solicitor General, responded that if the Court would ultimately ask the same question that is comprehended by the fourth prong of *Olano*, "I think the Government could live with a formulation such as Your Honor is describing." *Id.* 15-16.



CONCLUSION

Petitioner believes Justice Breyer may well have come up with the best description of what Rule 52(b) was created to do. Oral argument, *Johnson*, p. 14:

> "[I]t sounds from the history of the plain error rule that it was meant to codify cases from this Court that described it as a kind of

> grab bag, not having a clear definition but designed to permit a court of appeals to correct a really serious problem . . . described in one case as a matter of fairness, integrity, or public confidence in the proceeding. You know, general, but what it shares in common is that something really important went wrong."

A few minutes later when a justice noted, "I think plain error can be like a grab-bag, including errors that are plain only to the court of appeals . . . on that assumption, then do you lose?" Mr. Dreeben responded "No. We then proceed to our second argument on why this case does not entitle petitioner to relief under the plain error rule. The fourth and final prong of *Olano* requires the court to examine whether correcting the error serves the fairness, integrity and public reputation of judicial proceedings." Oral argument, *Johnson* p. 17.

There is no support to find that the second prong of *Olano* was meant to serve as a way to punish a petitioner for not having preserved his error at trial. Nor is it meant to sift through errors that merit review based on their clarity at trial. Just as the concern of *Griffith v. Kentucky*, 479 U.S. 314 (1987), is with equality of treatment, not equality of outcome, requiring that an error need only be plain at the time of appeal for Rule 52(b) assessment leaves the third and fourth prongs of *Olano* to determine the ultimate outcome.

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

PATRICIA A. GILLEY
Counsel of Record
GILLEY & GILLEY
820 Jordan Street, Suite 206
P.O. Box 52011
Shreveport, LA 71135-2011
Telephone: (318) 226-4989
Facsimile: (318) 226-4502
padg48@aol.com

November 2012

ERRATA

Counsel humbly apologizes for the following errors in the Merits Brief filed earlier in this proceeding and hopes they did not result in significant confusion or distraction:

1. Page 6: The last paragraph of "Summary of Argument" incorrectly states "time of trial standard" when is should state "time of appeal standard."

2. Page 16: Justice Kennedy's opinion was referred to as a dissenting opinion in *Olano*, when in fact it was a concurring opinion.

3. Page 25: Justice Clark was incorrectly referred to as Chief Justice Clark.