No. 11-9307

In The
Supreme Court of the United States

ARMARCION D. HENDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER AND URGING REVERSAL

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QUESTION PRESENTED

Whether an error is "plain" for purposes of review under Fed. R. Crim. P. 52(b) when the law is unsettled at the time the error is committed but becomes clear by the time of a subsequent appeal.

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INTEREST OF AMICUS CURIAE[1]

Amicus National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Because plain error review under Fed. R. Crim. P. 52(b) occurs frequently on appellate consideration of federal criminal

[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.2(a).

convictions and the nature of that review may be outcome-determinative, NACDL believes that its views on the question presented here will be of value to the Court.

SUMMARY OF ARGUMENT

In *Johnson v. United States*, 520 U.S. 461 (1997), eight Justices agreed that "in a case such as this--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." *Id.* at 468. The issue here is whether the language of Fed. R. Crim. P. 52(b) or its underlying policies require a different rule--measuring "plainness" at the time of trial rather than at the time of appeal--when the law was unsettled at the time of trial.

As a majority of the courts of appeals have recognized, including the en banc Fifth Circuit (in a decision rendered after the panel decision here), the answer is no.[2] The term "plain" should receive a consistent interpretation, regardless of whether the law is settled at the time of trial. As the government acknowledged in its *Johnson* brief, nothing in the text of the rule permits the meaning of the word

[2] In the wake of the en banc Fifth Circuit's adoption of the "time of appeal" rule, *United States v. Escalante-Reyes*, 2012 U.S. App. LEXIS 15385 (5th Cir. July 25, 2012) (en banc), only the Ninth and D.C. Circuits continue to follow the "time of trial" rule, *see 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).

"plain" to vary depending on the settled or unsettled state of the law at the time of trial.

Nor does any policy justify varying from the *Johnson* "time of appeal" rule when the law is unsettled in the district court. The "time of appeal" rule advances Rule 52(b)'s policy of permitting obvious injustices to be corrected on appeal. It serves the goal of treating similarly situated defendants equally. And it avoids wasteful appellate litigation over whether particular issues were "settled" or "unsettled" at the time of trial. A "time of trial" rule would thwart all of these important interests.

The sole interest that a "time of trial" rule would support--encouraging contemporaneous objections--is adequately served by other aspects of the strict four-prong plain error standard set out in *United States v. Olano*, 507 U.S. 725 (1993).

For these reasons, the Court should extend the *Johnson* "time of appeal" rule for measuring "plainness" to all cases, regardless of whether the law was settled when the district court ruled.

ARGUMENT

I. THE TEXT OF RULE 52(b) REQUIRES A UNIFORM INTERPRETATION OF THE WORD "PLAIN."

Rule 52(b) provides that "[a] plain error that affects substantial rights may be considered even

though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). The government argued in *Johnson* that the text of the rule requires that the error be "plain" both at the time of trial and at the time of appeal. *Johnson v. United States*, No. 96-203, Brief for the United States at *30-*33, 1997 U.S. S. Ct. Briefs LEXIS 452 (Jan. 29, 1997) ["G. *Johnson* Br."]. The Court's holding that an error need only be plain at the time of appeal necessarily rejected the government's textual argument.

Johnson establishes that the text of Rule 52(b) permits plainness to be measured at the time of appeal when the law is clear at the time of trial. That same text cannot receive a different meaning when the law is unsettled at the time of trial. *See United States v. Escalante-Reyes*, 2012 U.S. App. LEXIS 15385, at *3-*5 (5th Cir. July 25, 2012) (en banc). This Court has made clear that a statutory term must receive the same interpretation in each of the statute's applications, even if one of those applications requires a limiting construction. As the Court put it, "It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). Under this principle, the *Johnson* interpretation of the term "plain" governs not only the

"application" at issue there, but also the "application" here.[3]

The government made this very point in its *Johnson* brief. Noting that this Court in *Olano* had described the "unsettled at trial" circumstance as a "special case" that did not have to addressed, *see Olano*, 507 U.S. at 734, the government argued:

> Petitioner's position would require the courts of appeals to draw an amorphous distinction between the "special case" [where the law is unsettled] 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.

G. *Johnson* Br. at *32-*33.

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[3] Because the Federal Rules are "legislative enactment[s]," this Court interprets them using the "traditional tools of statutory construction." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988) (Fed. R. Evid. 106) (quotation omitted); *see, e.g., United States v. Vonn*, 535 U.S. 55 (2002) (Fed. R. Crim. P. 11(h)).

On this point, the government is correct. There is no textual basis to draw the "amorphous distinction" between the "settled at trial" circumstance in *Johnson* and the "unsettled at trial" circumstance here. Instead, in the government's words, "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 in which an error was not 'plain' at the time of trial." *Id*. at *33. In accord with this reasoning, and with the principles set out in *Martinez*, the *Johnson* "time of appeal" rule should apply in all cases, regardless of the settled or unsettled state of the law at trial.

II. THE POLICIES OF REMEDYING OBVIOUS INJUSTICE, TREATING SIMILARLY SITUATED DEFENDANTS EQUALLY, AND CONSERVING JUDICIAL RESOURCES SUPPORT THE "TIME OF APPEAL" RULE.

The "time of appeal" rule serves three important interests: it advances Rule 52(b)'s central purpose of permitting appellate courts to remedy obvious injustice; it ensures that similarly situated defendants are treated equally; and it conserves judicial resources that otherwise would be wasted trying to determine whether obsolete law was "settled" or "unsettled" at the time of trial.

A. The "Time of Appeal" Rule Permits Appellate Courts to Remedy Obvious Injustice.

Rule 51 of the Federal Rules of Criminal Procedure establishes the contemporaneous objection rule. It provides that a party "may preserve a claim of error by informing the court--when the court ruling or order is made or sought--of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b); *see also, e.g.*, Fed. R. Crim. P. 30(d); Fed. R. Evid. 103(a). The plain error doctrine of Rule 52(b) "tempers the blow of a rigid application of the contemporaneous-objection requirement" by permitting "obvious injustice" to be corrected on appeal. *United States v. Young*, 470 U.S. 1, 15 (1985) (quotation omitted); *see, e.g., United States v. Frady*, 456 U.S. 152, 163 (1982) ("Rule 52(b) was intended to afford a means for the prompt redress of miscarriages of justice.").

It is irrelevant to the correction of "obvious injustice" whether the obviousness of the injustice becomes apparent before or after trial. As long as the injustice is obvious when the appellate court considers the case, the function of the plain error rule is implicated. *See, e.g., United States v. Farrell*, 672 F.3d 27, 36-37 (1st Cir. 2012).

The "time of appeal" rule reflects this point. It permits the correction of obvious injustice on direct appeal regardless of when the injustice becomes obvious. The "time of trial" rule, by contrast,

thwarts a core purpose of Rule 52(b) by categorically barring an appellate court from correcting an injustice that is obvious to that court, merely because it may not have been obvious to the district court. *See United States v. Smith*, 402 F.3d 1303, 1315 n.7 (11th Cir.) ("In practice, [the 'time of trial' rule] is the same as no plain error review at all, as error will never be 'plain' under 'unsettled' law."), *vacated on other grounds*, 545 U.S. 1125 (2005).

B. The "Time of Appeal" Rule Treats Similarly Situated Defendants Equally.

This Court has often recognized the basic principle that similarly situated defendants should be treated equally. That is the fundamental premise of the Court's retroactivity doctrine, which holds that new decisions must be applied equally to all cases pending on direct appeal. As the Court explained, an approach that "fish[ed] one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitt[ed] a stream of similar cases subsequently to flow by unaffected by that new rule" would "violate[] the principle of treating similarly situated defendants the same." *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) (quotation omitted).

The "time of trial" rule for determining the plainness of error similarly "violates the principle of treating similarly situated defendants the same." That rule requires disparate treatment of defendants who forfeit error based solely on the happenstance of

when during the trial and direct review process the error becomes plain. Consider, for example, two defendants who, like petitioner here, are given longer prison terms to afford time for rehabilitation, in violation of 18 U.S.C. § 3582(a). Neither defense counsel objects to the error. One defendant is sentenced on June 15, 2011, the day before this Court decides *Tapia v. United States*, 131 S. Ct. 2382 (2011). The other is sentenced on June 17, 2011, the day after *Tapia* is decided. Both appeal.

Under the "time of trial" rule, the first defendant could not obtain review under Rule 52(b), because his error would not be "plain," while the second defendant could. That difference in treatment cannot be justified. Some line-drawing is essential in the criminal justice system; for example, a defendant on direct appeal gets the benefit of a new decision under *Griffith*, while a defendant whose direct appeal ended before the new decision may not get its benefit on collateral review. But such lines generally serve some purpose, such as promoting finality. The line that the "time of trial" rule draws between the two defendants in the example above serves no such purpose. It is an arbitrary distinction that categorically cuts off certain defendants from the "obvious injustice" safety valve of Rule 52(b).

By contrast, the "time of appeal" rule treats the two defendants equally; both can establish that the district court's error is "plain" in light of *Tapia*. That rule thus advances the goal of "evenhanded

justice" for similarly situated defendants. *Teague v. Lane*, 489 U.S. 288, 300 (1989).

C. The "Time of Appeal" Rule Avoids Wasting Judicial Resources on Determining Whether Law Was "Settled" at the Time of Trial.

The "time of appeal" rule has a third benefit: it "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." *Farrell*, 672 F.3d at 37; *see, e.g., Escalante-Reyes*, 2012 U.S. App. LEXIS 15385, at *18.

As the government acknowledged in *Johnson*, the distinction between settled and unsettled law is "amorphous." G. *Johnson* Br. at *32. In this case, for example, one could argue that 18 U.S.C. § 3582(a) had settled the rule that a prison sentence could not be lengthened merely to permit rehabilitation even before *Tapia*. That decision, after all, was unanimous and involved a straightforward application of the statute's plain language. The issue was so devoid of dispute that the Solicitor General joined the defendant-petitioner in seeking vacatur of the court of appeals' decision, and the Court had to appoint an amicus to defend the ruling below. *See Tapia*, 131 S. Ct. at 2386 n.2. Under these circumstances, it is certainly debatable whether the law was "unsettled" when Henderson was sentenced. But such a backward-looking debate

over the status of obsolete law serves no purpose and should not detain the appellate courts.

Another example illustrates the time-consuming and ultimately pointless determinations that the "time of trial" rule forces the courts of appeals to undertake. In *United States v. Mercado-Ortiz*, 380 Fed. App'x 565 (9th Cir. 2010) (unpublished), the Ninth Circuit applied the "time of trial" rule to determine whether it should consider two recent decisions in assessing whether the district court's error at sentencing was "plain." The court first analyzed whether its decisons at the time of trial settled the law against the defendant--which would have triggered the *Johnson* rule--but found that they did not. It then analyzed whether those decisions 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. It again concluded that they did not. *Id.* Having undertaken this laborious analysis, the court determined that the law was unsettled at the time of trial and that the district court's error, although obvious at the time of appeal in light of the recent decisions, was not "plain" for purposes of Rule 52(b).

Under the "time of appeal" rule, none of this analysis of obsolete law, divorced from the merits of the case or the purpose of the plain error rule, would have been necessary. Judicial economy thus supports adoption of the *Johnson* approach in "unsettled at trial" cases. *See Smith*, 402 F.3d at 1315 n.7 ("time of appeal" approach "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").

III. THE "TIME OF APPEAL" APPROACH DOES NOT UNDERMINE THE CONTEMPORANEOUS OBJECTION RULE OR UNFAIRLY IMPUGN DISTRICT JUDGES.

The preceding part shows that the "time of appeal" rule permits appellate courts to remedy obvious injustice, ensures that similarly situated defendants are treated equally, and advances judicial economy. No countervailing interest weighs against the rule.

A. The "Time of Appeal" Approach Does Not Undermine the Contemporaneous Objection Rule.

Courts rejecting the "time of appeal" approach maintain that it undermines the contemporaneous-objection rule of Rule 51(b). *See, e.g., United States v. Mouling*, 557 F.3d 658, 664 (D.C. Cir. 2009); *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997). This concern is misplaced.

"Plainness" is only one of the requirements to obtain relief under Rule 52(b). An appellant must establish error; he must show that the error was "clear" or "obvious"; and he must persuade the court that the error "affect[ed] substantial rights." *Olano*,

507 U.S. at 733-34. Even if the appellant meets these requirements, the court of appeals has discretion to deny relief unless the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id*. at 736 (quoting *United States v. Atkinson*, 297 U.S. 57, 160 (1936)).

Given these stringent requirements for plain error review, defense counsel have ample incentive to comply with the contemporaneous objection rule. A timely objection may permit the defendant to obtain a favorable ruling from the district court. If that court denies relief, an objection gives the defendant the benefit of the ordinary standard of review on appeal. These are substantial incentives to make contemporaneous objections; adopting the "time of appeal" rule, rather than the "time of trial" rule, will not significantly reduce them.

Adopting the "time of appeal" rule in "unsettled law" cases does not increase the risk that counsel will "sandbag"--remain silent at trial for tactical reasons. *Puckett v. United States*, 556 U.S. 129, 134 (2009). As the en banc Fifth Circuit observed, "In the vast majority of plain error cases, there will be no intervening Supreme Court decision, meaning that establishing a 'time of appeal' rule would not significantly alter trial counsel's incentive to object." *Escalante Reyes*, 2012 U.S. App. LEXIS 15385, at *16. Even in the rare case where a party knows at trial that an appellate decision on a contested issue is imminent, the party would be unwise to withhold objection, because it "would be taking a risk that the appellate court would not rule

in its favor on the unsettled issue." *Id.* at *15-*16. And even if the appellate court *did* resolve the unsettled issue in the party's favor between trial and appeal, the party still would run the risk that the court of appeals would not find the third and fourth plain error prongs satisfied.

With so many incentives to lodge timely objections, the risk of sandbagging is minimal, with or without the "time of appeal" rule.

B. The "Time of Appeal" Approach Does Not Unfairly Impugn District Judges.

Some appellate courts have concluded that the "time of appeal" rule unfairly impugns district judges, by finding "clear" or "obvious" error even where the law was unsettled at the time of trial. *See, e.g., Turman*, 122 F.3d at 1170 ("[W]e expect district judges to be knowledgeable, not clairvoyant."); *Escalante-Reyes*, 2012 U.S. App. LEXIS 15385, at *92-*93 (Garza, J., dissenting). If this argument were valid, it would apply with even greater force in the *Johnson* circumstance, where the law at the time of trial was settled in favor of the district court's ruling. But the government advanced the argument in *Johnson* as a reason to adopt the "time of trial" rule, G. *Johnson* Br. at *34-*35, and the Court was unpersuaded.

The argument did not carry the day in *Johnson*, and it should not prevail here, because it misconstrues the purpose of Rule 52(b). The plain

error rule permits an appellate court to prevent obvious injustice; its purpose is not to grade the trial judge's work. Accordingly, "[T]he focus of plain error review should be 'whether the severity of the error's harm demands reversal,' and not 'whether the district court's action . . . deserves rebuke.'" *Farrell*, 672 F.3d at 36 (quoting *United States v. Ross*, 77 F.3d 1525, 1539-40 (7th Cir. 1996)); *see Escalante-Reyes*, 2012 U.S. App. LEXIS 15385, at *16-*17. Appellate courts finding error that is plain at the time of appeal should not forego correcting obvious injustice merely to spare the feelings of the district judge; those courts should correct the injustice and note, if appropriate, that no rebuke is intended.

CONCLUSION

For these reasons, the Court should extend the *Johnson* "time of appeal" rule to all cases. Petitioner's sentence should be vacated.

Respectfully submitted,

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