No. 11-9307

IN THE SUPREME COURT OF THE UNITED STATES

ARMARCION D. HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an error is "plain" for purposes of review under Federal Rule of Criminal Procedure 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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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 646 F.3d 223. The order of the court of appeals denying the petition for rehearing en banc (Pet. App. 8a-18a) is reported at 665 F.3d 160. The order of the district court denying petitioner's motion to correct his sentence (Pet. App. 5a-7a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2011. A petition for rehearing was denied on December 15, 2011 (Pet. App. 8a). The petition for a writ of certiorari was filed on

March 14, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Louisiana, petitioner was convicted of one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 60 months of imprisonment, to be followed by a three-year term of supervised release. The court of appeals affirmed. Pet. App. 1a-4a.

1. On January 13, 2009, a police officer in Haynesville, Louisiana, initiated a traffic stop of a truck that had been weaving and crossing the center line. As he approached the car to obtain the driver's information, the officer observed a rifle magazine protruding from under the passenger seat, where petitioner was sitting. The officer instructed petitioner and the driver to step out of the vehicle for safety reasons. The driver then fled on foot, and the officer detained petitioner. When the officer returned to the truck, he found a loaded semiautomatic rifle under the passenger seat. Petitioner later admitted to the officer that he was a convicted felon and said that he would "take the gun charge." Presentence Investigation Report (PSR) para. 6; see PSR paras. 4-7; 5:09-cr-00111, Doc. No. 53, at 7-11 (W.D. La. July 14, 2010) (change of plea hearing) (Doc. No.).

2. Petitioner was charged in a single-count indictment with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). After the district court denied his motion to suppress the firearm found during the traffic stop, petitioner entered a conditional plea of guilty, reserving his right to appeal the denial of his motion to suppress. See Doc. No. 41, at 1-2 (Feb. 1, 2010).

a. The PSR prepared by the Probation Office calculated petitioner's range under the advisory Sentencing Guidelines as 33 to 41 months, based on a total offense level of 19 and a criminal history category of II. See PSR para. 45. The PSR noted that petitioner, who was then 26 years old, had admitted to using marijuana since age 14 and to doing so "daily prior to his arrest for the instant offense." PSR para. 39.

Petitioner did not object to the advisory Guidelines range, but did seek to clarify in a letter to the Probation Office that drug tests administered near the time of his offense showed that he had not been using marijuana at that time. See 10-30571, Doc. No. 511313422, at 1 (5th Cir. Dec. 6, 2010). Petitioner stated, however, that he "ha[d] had a drug problem for many years," "was never in a drug treatment program," and "may very well benefit from such a program at this point in his life." Ibid. In a subsequent sentencing memorandum, petitioner further stated that he "needs professional treatment for drug abuse" and urged the court, on

behalf of "his family and friends," to "do whatever is in its power to have treatment ordered for [petitioner]." Id. at 8.[1]

b. The district court sentenced petitioner to an above-Guidelines sentence of 60 months of imprisonment, to be followed by three years of supervised release. See Pet. App. 39a-40a; see also Doc. No. 54, at 28-29 (July 14, 2010) (sentencing transcript). The court was "convinced" that if petitioner did not address his drug-abuse problem immediately, he would "be one of the people in the future whose life will be thrown away and he'll face perpetual incarceration." Id. at 15. The "dilemma," the court explained, was that a term of imprisonment within the advisory Guidelines range would not leave petitioner in federal custody long enough to qualify for placement in the Bureau of Prisons' 500-hour Residential Drug Abuse Program (RDAP). Id. at 12-13, 16, 21. The court therefore questioned whether it should order a longer period of imprisonment "because he needs that treatment," or instead "shorten [petitioner's] sentence just to get him out of the system more quickly?" Id. at 16-17.

The district court ultimately decided to impose the longer period of imprisonment. The court stated that it was "not trying

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[1] Petitioner's letter to the Probation Office and his subsequent sentencing memorandum were not docketed in the district court. That court, however, considered them. See Doc. No. 54, at 2-6 (July 14, 2010) (sentencing transcript). In addition, the court of appeals granted the government's unopposed motion to supplement the record on appeal with both filings. See 10-30571, Doc. No. 511315922 at 1 (5th Cir. Dec. 7, 2010).

to be purely punitive," but was acting to provide petitioner "with needed * * * medical care, or other correctional treatment in the most effective manner." Doc. No. 54, at 24 (quoting 18 U.S.C. 3553(a)(2)(D)). The court explained that it was imposing a non-Guidelines sentence pursuant to 18 U.S.C. 3553(a) "because this defendant needs training, he needs counselling, and he needs substance abuse treatment within the confines of that system." Doc. No. 54, at 28; see id. at 29 (explaining that the court had "to give him that length of time to do the programming and the treatment and the counselling that this defendant needs right now"). The court further explained that the 500-hour treatment program "will be the best available" for petitioner, and it expressed its hope that he would receive treatment within that program. Id. at 28. When the court asked defense counsel whether any reasons indicated "why that sentence as stated should not be imposed," counsel replied, "[p]rocedurally, no." Id. at 30.

c. Eight days after the sentencing hearing, petitioner filed a motion to correct his sentence pursuant to Federal Rule of Criminal Procedure 35. Rule 35 provides that, "[w]ithin 14 days" of a sentencing court's oral announcement of its sentence, "the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a); see Fed. R. Crim. P. 35(c). Petitioner argued, as relevant here, that the district court had committed a "clear error" within the meaning of

Rule 35 when it had increased his sentence to make him eligible for drug treatment. According to petitioner, that increase was not permitted by 18 U.S.C. 3582(a), which states that "imprisonment is not an appropriate means of promoting correction and rehabilitation." Following briefing from the parties, the court denied petitioner's motion. The court concluded that it "no longer ha[d] jurisdiction to correct any alleged error in [petitioner's] sentence pursuant to Rule 35(a), as almost sixty days have passed since the oral announcement of sentence." Pet. App. 6a.

3. a. The court of appeals affirmed. Pet. App. 1a-4a. The court first held that its review was for plain error, because petitioner's Rule 35 motion had not preserved his claim. Id. at 3a-4a.[2] Conducting plain-error review, the court recognized that, under this Court's intervening decision in Tapia v. United States, 131 S. Ct. 2382 (2011), "it is error for a court to 'impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation.'" Pet. App. 4a (quoting Tapia, 131 S. Ct. at 2393). The court of appeals therefore agreed with petitioner that the district court had erred in increasing his sentence so that he would be eligible for the Bureau of Prisons' drug treatment program. The court of appeals reasoned, however, that the error was not plain, "because an error

[2] Petitioner does not dispute (Pet. 6 n.2) the court of appeals' conclusion that his Rule 35 motion failed to preserve his claim of error and that the claim was therefore forfeited.

is plain only if it 'was clear under current law at the time of trial.'" Ibid. (quoting United States v. Jackson, 549 F.3d 963, 977 (5th Cir. 2008), cert. denied, 130 S. Ct. 51 (2009)). Because at the time of petitioner's sentencing this Court "had not yet decided Tapia" and the court of appeals "had not yet addressed the question," the court of appeals concluded that "any error cannot be plain" and affirmed petitioner's sentence. Ibid.

b. The court of appeals denied rehearing en banc by a divided vote. Pet. App. 8a. Judge Haynes, joined by Judge Dennis, dissented from the denial of rehearing en banc. Id. at 9a-18a. Judge Haynes argued in relevant part that the case was "worthy of the full court's consideration," because in her view the question of "whether the 'obviousness' of [an] error made is judged at the time of the error or at the time of appeal" is the subject of both an intra-circuit and inter-circuit conflict. Id. at 12a-13a, 18a.

DISCUSSION

Petitioner contends (Pet. 7-29) that, for purposes of plain-error review, an error is plain when the law is unsettled at the time the error is committed but becomes clear by the time of a subsequent appeal. The court of appeals correctly held to the contrary that when the relevant law is unsettled at the time of trial but is clarified by a judicial decision issued during the pendency of a defendant's appeal, the plainness of the asserted error is to be measured at the time that the defendant forfeited

his claim of error. Nevertheless, the circuits disagree on that question, the conflict merits this Court's resolution, and this case would be an appropriate vehicle for review. Alternatively, because the court of appeals recently granted initial hearing en banc to reconsider the sole question presented in this petition, the Court may wish to hold this case pending the Fifth Circuit's en banc decision and then dispose of this case as appropriate in light of that decision.[3]

1. a. Rule 52(b) of the Federal Rules of Criminal Procedure provides that "[a] plain error that affects substantial rights may be considered, even though it was not brought to the court's attention." This Court has held that, to obtain relief under plain-error review, a criminal defendant must establish that (1) the district court committed an error; (2) the error was "clear or obvious, rather than subject to reasonable dispute"; (3) the error "affected [his] substantial rights"; and (4) a reviewing court should exercise its discretion to remedy the error only if the error "seriously affect[ed] the fairness, integrity or public reputation of [the] proceedings." Puckett v. United States, 556 U.S. 129, 135 (2009) (quoting in part United States v. Olano, 507 U.S. 725, 736 (1993)).

[3] The same issue is presented in the petition for a writ of certiorari in Davis v. United States, No. 11-9422 (filed Mar. 20, 2012).

Although the Court has held that an error must be "clear or obvious" to be "plain," it has not addressed the correct point in time for measuring the obviousness of an error in the circumstances presented here, i.e., when the law is unsettled at the time the error is committed but becomes clear by the time of a subsequent appeal. The Court explained in Olano that, "[a]t a minimum, a court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law." 507 U.S. at 734. The Court recognized, however, that requiring an error to be clear at the time of its correction on appeal did not dispose of "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." Ibid. The Court in Olano expressly reserved and did not decide that "special case." Ibid.

In Johnson v. United States, 520 U.S. 461 (1997), the Court held that an error is "plain" under the law at the time of appeal in the circumstance "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal." Id. at 468. The Court reasoned that requiring an objection in such a case would be pointless and "would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." Ibid. As in Olano, however, the Court in Johnson did not address the situation in which the law at the time of trial is unsettled but becomes

clear by the time of a subsequent appeal. Petitioner thus correctly observes that "[t]his Court's decisions on plain-error review * * * leave open the important question presented here." Pet. 7; see ibid. ("In Johnson * * *, the Court again left open Olano's 'special case.'").

b. The court of appeals correctly held that an error is not "plain" when the law is unsettled at the time of forfeiture but becomes clear by the time of appeal. Pet. App. 4a. 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." The rule's second clause, which is in the past tense, employs "backward-looking language" that suggests that the error subject to correction must be of the same character -- i.e., it must be "plain" -- both at the time of forfeiture and at the time that it is "considered" on appeal. Cf. Greene v. Fisher, 132 S. Ct. 38, 44 (2011) (use of "backward-looking language" in federal habeas statute required assessing law as of time that state courts rendered their decision).

That reading of Rule 52(b)'s text is consistent with the understanding of the plain-error rule expressed in United States v. Frady, 456 U.S. 152 (1982), where this Court stated that "recourse may be had to [Rule 52(b)] only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance

in detecting it." Id. at 163. The courts of appeals have often repeated that characterization of the narrow scope of plain-error review, see, e.g., United States v. Delgado, 672 F.3d 320, 330 (5th Cir. 2012) (en banc); United States v. Turner, 651 F.3d 743, 748 (7th Cir.), cert. denied, 132 S. Ct. 863 (2011); United States v. Boyd, 640 F.3d 657, 669 (6th Cir.), cert. denied, 132 S. Ct. 271 (2011); United States v. King, 559 F.3d 810, 814 (8th Cir.), cert. denied, 130 S. Ct. 167 (2009); United States v. Villafuerte, 502 F.3d 204, 209 (2d Cir. 2007), and that focus on participants in the trial court proceedings necessarily forecloses relief under the plain-error standard where an error becomes "plain" only at the time of appeal. See United States v. Turman, 122 F.3d 1167, 1170 (9th Cir. 1997) (plain error means "error that is so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection") (Kozinski, J.).

As the District of Columbia Circuit has explained, a time-of-forfeiture rule thus furthers the interests underlying plain-error review by encouraging the parties to alert the district court to potential error at a time when that court can take remedial action. See United States v. Mouling, 557 F.3d 658, 664 ("[T]he interest in requiring parties to present their objections to the trial court, which underlies plain error review, applies with full force."), cert. denied, 130 S. Ct. 795 (2009). The decision below is therefore fully consistent with Johnson, supra, because unlike in

the circumstance where the law at the time of trial is settled against the would-be objector and any objection would be pointless, requiring an objection in the face of unsettled law is "far from pointless" and instead "serve[s] a valuable function." Mouling, 557 F.3d at 664.[4]

As an initial matter, the objection "affords the judge an opportunity to focus on the issue and hopefully avoid the error." Turman, 122 F.3d at 1170; see United States v. David, 83 F.3d 638, 643 (4th Cir. 1996) (Luttig, J.); Toby J. Heytens, Managing Transitional Moments in Criminal Cases, 115 Yale L.J. 922, 958 (2006) (Heytens) ("[A]n objection may prevent an error from happening in the first place, either because the judge sustains the defendant's objection or the prosecutor backs off."). In addition, requiring a contemporaneous objection serves to deter a defendant from "'sandbagging' the court -- remaining silent about his

[4] This case involves a claim of sentencing error under Tapia v. United States, 131 S. Ct. 2382 (2011). It therefore does not present the question of whether an error should be corrected on plain-error review, even when the law was unclear when the alleged error occurred, because an intervening decision establishes that the defendant was convicted "for an act that the law does not make criminal," which "inherently results in a complete miscarriage of justice." Davis v. United States, 417 U.S. 333, 346 (1974) (granting relief on that basis under 28 U.S.C. 2255); cf. Frady, 456 U.S. at 166 (making clear that "to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal" under the plain-error rule); Bousley v. United States, 523 U.S. 614, 623 (1998) (noting that actual innocence is an exception to procedural default on direct appeal). Petitioner's claim is not one of actual innocence based on an intervening decision.

objection and belatedly raising the error only if the case does not conclude in his favor." Puckett, 556 U.S. at 134. Moreover, "even when the judge and prosecutor disagree with the defendant's view of the law, a timely objection will sometimes yield benefits by spurring the prosecutor to supplement the record, or prompting the trial court to seek additional information, make predicate factual findings, [] state on the record the basis for [the court's decision]," or even provide alternative grounds for that decision. Heytens at 958; see Puckett, 556 U.S. at 134.

2. Petitioner is correct (Pet. 7-17) that the courts of appeals are divided on the question of whether, when the law is unsettled at the time of an error but settled by the time of appeal, the obviousness of the error is measured at the time the claimed error was forfeited or at the time of appeal. That conflict -- which is on an issue that this Court has twice noted and reserved in Olano and Johnson, see pp. 9-10, supra -- merits resolution.

As petitioner points out (Pet. 8-15), the court of appeals' conclusion that the obviousness of an error is measured at the time of forfeiture when an intervening decision settles previously unsettled law accords with decisions of the Ninth and District of Columbia Circuits. See Mouling, 557 F.3d at 664; Turman, 122 F.3d at 1170; see also United States v. Greer, 640 F.3d 1011, 1023 (9th Cir.) (reaffirming rule stated in Turman), cert. denied, 132 S. Ct.

834 (2011). By contrast, the First, Second, and Tenth Circuits have extended the rule in Johnson to cases in which circuit law was unsettled at the time of the mistake. These courts apply "a blanket rule that plain error is measured at the time of appeal." United States v. Cordery, 656 F.3d 1103, 1107 (10th Cir. 2011); see United States v. Farrell, 672 F.3d 27, 36-37 (1st Cir. 2012); United States v. Garcia, 587 F.3d 509, 520 (2d Cir. 2009).[5]

Petitioner suggests (Pet. 11-12 & n.4) that the court of appeals' decision is also in conflict with the rule applied by the Sixth Circuit. That is incorrect. The principal decision that petitioner cites (Pet. 11-12), United States v. Brown, No. 97-1618, 2000 WL 876382 (6th Cir. June 20), cert. denied, 531 U.S. 1057 (2000), is unpublished and therefore not precedential. See 6th Cir. R. 206(c); United States v. Utesch, 596 F.3d 302, 312 (6th Cir. 2010). Petitioner asserts (Pet. 12 n.4) that "[t]he Sixth Circuit has since reaffirmed its support for the time-of-appeal standard in dicta," but he cites only an opinion by a single judge concurring in the judgment in that case. See United States v. Gabrion, 517 F.3d 839, 875 (6th Cir. 2008) (Moore, J., concurring

[5] The Eleventh Circuit has indicated agreement with the First, Second, and Tenth Circuits, but its only on-point decision addressed the issue in dicta, see United States v. Smith, 459 F.3d 1276, 1283-1284 (2006), cert. denied, 549 U.S. 1137 (2007), and relied exclusively on an earlier opinion in the same case that had been vacated by this Court. See id. at 1284 (discussing United States v. Smith, 402 F.3d 1303, 1315 n.7 (11th Cir.), vacated on other grounds, 545 U.S. 1125 (2005)).

in the judgment), cert. denied, 129 S. Ct. 1905 (2009). The lead opinion in that case, which did not command a majority of the panel, declined to address the issue. See id. at 842 n.3 (Batchelder, J.).[6]

3. The division among the circuits is sufficiently important to warrant this Court's review. As in this case, the issue can be dispositive of whether defendants are eligible to receive relief. It also implicates matters of judicial efficiency, i.e., whether an appellate court is able to reject a forfeited claim without engaging in the fact-intensive inquiry usually required to determine whether the third and fourth prongs of the plain-error test are satisfied. Here, for instance, it was not difficult for the court of appeals to determine that a Tapia error was not plain at the time of sentencing because the law was unsettled at that time, see Pet. App. 4a, but under a time-of-appeal rule the court would not have been able to resolve the Tapia claim without a thorough review of the record to determine whether the error was prejudicial in the context of the entire sentencing and whether the

[6] Petitioner is correct (Pet. 17) that other courts have addressed the timing question in dicta, but those courts did so either before this Court's decision in Johnson, see United States v. Ross, 77 F.3d 1525, 1539 (7th Cir. 1996), or in circumstances that fall within the exception recognized in Johnson -- that is, where the law at the time of the error was settled and clearly contrary to the law at the time of appeal, see, e.g., United States v. Moody, 664 F.3d 164, 166-167 (7th Cir. 2011); United States v. Crosgrove, 637 F.3d 646, 654-657 (6th Cir. 2011); United States v. Davidson, 551 F.3d 807, 808 (8th Cir. 2008).

court should have exercised its discretion to correct the error. See, e.g., United States v. Broussard, 669 F.3d 537, 551-552, 555 (5th Cir. 2012). In addition, the number of recent circuit court decisions indicates that the issue arises frequently.

4. Shortly after the filing of the petition in this case, the court of appeals sua sponte granted initial hearing en banc to consider in another case the sole question presented in this petition. See United States v. Escalante-Reyes, No. 11-40632, Doc. No. 511798245 (5th Cir. Mar. 22, 2012). The court of appeals' en banc order noted an intra-circuit conflict and sought supplemental briefing on the question

> whether, when the law at the time of trial or plea is unsettled in this circuit, but becomes clear while the case is pending on appeal, review for the second prong of the "plain error" test properly considers the law as it stood during the district court proceedings or at the time of the appellate court's decision.

Ibid. The order further stated that the case would be submitted without oral argument at the May 3, 2012 court session. Ibid.

Although this Court could elect to defer resolution of this issue until the court of appeals has decided Escalante-Reyes, plenary review of this case is warranted at this time. As petitioner observes (Pet. 29), the forthcoming en banc decision in Escalante-Reyes will not eliminate the inter-circuit conflict. Regardless of how the Fifth Circuit rules, other circuits will continue to disagree, and it is unlikely that the conflict will be resolved without this Court's intervention. Further, petitioner's

sentence is currently set to expire on May 22, 2013, which suggests that deferring review may not be warranted.[7]

Alternatively, this Court may wish to hold this petition pending the en banc decision in Escalante-Reyes. If the court of appeals adopts a position contrary to the panel in this case, the Court could grant the petition, vacate the judgment, and remand for reconsideration in light of Escalante-Reyes. If the court of appeals reaffirms the position taken in this case, the Court could decide at that time whether plenary review is warranted.

[7] If this Court were not able to resolve the case by the time of petitioner's release from prison, a serious question of mootness would arise. See Rhodes v. Judiscak, No. 10-2268, 2012 WL 171917 (10th Cir. Jan. 23, 2012), petition for cert. pending, No. 11-1177 (filed Mar. 26, 2012).

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending the court of appeals' en banc decision in United States v. Escalante-Reyes, No. 11-40632 (5th Cir.), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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