

11-9307 HENDERSON V. UNITED STATES

DECISION BELOW: 646 F.3d 223

LOWER COURT CASE NUMBER: 10-30571

QUESTION PRESENTED:

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

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

CERT. GRANTED 6/25/2012