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IN THE SUPREME COURT OF THE UNITED STATES

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ARMARCION D. HENDERSON, :
Petitioner : No. 11-9307
v. :
UNITED STATES :

- - - - - x

Washington, D.C.
Wednesday, November 28, 2012

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:02 a.m.

APPEARANCES:

PATRICIA A. GILLEY, ESQ., Shreveport, Louisiana;
appointed by this Court.
JEFFREY B. WALL, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.;
on behalf of Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 11-9307, Henderson v. United States.

Ms. Gilley.

ORAL ARGUMENT OF PATRICIA A. GILLEY

APPOINTED BY THIS COURT

MS. GILLEY: Mr. Chief Justice, and may it please the Court:

There are three primary points I would like to focus on this morning during my argument. First, the question presented by Mr. Henderson involves a very small subset of cases which are -- which come before the Court under Rule 55 -- 52(b) each year.

These are the cases that were referred to as the special case in the Olano decision. They have errors which, at the time of trial, were unsettled or unclear; but, by the time they made it to the appellate court, they had become clear by a clarifying rule or a decision.

Second --

JUSTICE SCALIA: What -- what about the time they come up here? 52(b) applies to every court, does it not?

1 MS. GILLEY: Yes, Your Honor.

2 JUSTICE SCALIA: So suppose there's been --
3 been no objection to a uncertain question of -- on an
4 uncertain question of law until the case gets here.
5 Can -- can counsel argue that this Court should
6 nonetheless review the case because, if we agree with
7 counsel, thereupon, the law would be clear? When we
8 issued our decision, the law would be clear.

9 MS. GILLEY: I believe that the Court would
10 have the authority to do that because it says if it is
11 on direct appeal or not yet final. So it would not yet
12 be final unless the time had expired for the petitioner
13 to get to the Supreme Court.

14 JUSTICE SCALIA: I -- I wonder how we would
15 go about deciding whether we would take such a case or
16 not. We'd take all -- all those cases where counsel
17 says, I didn't -- we didn't raise any of these
18 objections, neither in the court of appeals nor in the
19 district court; but, if you agree -- if you agree with
20 me, Your Honors, that the law is thus and so, once you
21 say that, that will make the decisions below clear
22 error, and, therefore, you should be able to reverse it.

23 Makes sense, right?

24 MS. GILLEY: Well, I believe the Supreme
25 Court has, under its own special rules, the -- the

1 ability to take an argument in -- a petition that has
2 not been raised before, but on its own could accept it
3 if it is clear at the time --

4 JUSTICE GINSBURG: But then what your --
5 your first answer was that this is a very small set of
6 cases that you're dealing with. If your answer to
7 Justice Scalia is yes, this Court could take a case
8 that's unsettled and, by settling it, make the error
9 plain. That would open the door to a huge number of
10 cases, wouldn't it?

11 MS. GILLEY: I don't believe so, Your Honor.
12 I believe that the provisions to get to the Supreme
13 Court -- frankly, I don't know the answer as to if you
14 had skipped the -- the appellate court, and -- and we're
15 still in that window of time, that transition period
16 after the appellate court had ruled, and only then the
17 clarifying error came, I think you could still come to
18 the Supreme Court.

19 But the very narrow -- the very narrow --

20 JUSTICE KENNEDY: Well, it would be narrow
21 in the sense that substantial rights would have to be
22 affected and the other conditions of Olano met.

23 But I think, consequent on Justice Scalia's
24 question is, that itself would be another issue in every
25 case. Is this one of those cases: Number one, it was

1 wrong; number two, it's new; number three, is it clear
2 under all the Olano criteria. And that would have to be
3 decided in every case.

4 MS. GILLEY: Well, Your Honor, I think --

5 JUSTICE KENNEDY: So at the end of the day,
6 it could be a small subset of cases, but the number that
7 would be presented, both to this Court and the court of
8 appeals, would be quite substantial.

9 MS. GILLEY: Well, I think there would be
10 very few that would come directly to the Supreme Court.
11 The vast majority of the cases obviously would come
12 through the circuits.

13 And what I was referring to as a very small
14 subset would be those cases where there is actually an
15 unsettled error -- an unsettled claimed error at the
16 trial.

17 There are very few cases that would come out
18 of the Supreme Court during the period of time of appeal
19 that would allow for the petitioner to -- to say, well,
20 now it's clear.

21 CHIEF JUSTICE ROBERTS: Well, this is a -- I
22 mean, the time from the district court decision in this
23 case to today is how long?

24 MS. GILLEY: It's -- well, this case started
25 in 2009. My client pled guilty in June of 2010.

1 CHIEF JUSTICE ROBERTS: So it's 2 years --
2 in any case in which -- in a typical case in which this
3 happens, you've got 2 years of cases, right?

4 MS. GILLEY: I think that my -- this case,
5 Mr. Henderson's case, is unusually long. In fact, it
6 was a year between the time he was sentenced in June of
7 2010 until 2000 -- June of 2011, when Tapia was decided.

8 So he was actually waiting between the
9 period of the trial stage to -- into the Fifth Circuit
10 for over a year before Tapia was even decided, and then
11 several months after that before the Fifth Circuit ruled
12 on the issue.

13 So this is an unusually long period of time.
14 I don't think that that's common. I think the vast
15 majority of the cases do not come within that
16 transitional period. As -- as the Fifth Circuit noticed
17 after Mr. Henderson's case in Escalante-Reyes, they sua
18 sponte had their own -- they called for an en banc in
19 Escalante-Reyes and changed the position that they had
20 in Mr. Henderson's case.

21 JUSTICE ALITO: May I ask you what you think
22 is the purpose of the Plain-Error Rule?

23 Suppose that it was proposed to amend
24 Rule 52(b) to take out the word "plain," so that the
25 rule would read simply, "an error that affects

1 substantial rights may be considered even though it was
2 not brought to the Court's attention."

3 So what does -- in your judgment, what does
4 the word "plain" add? What -- what purposes does it
5 serve?

6 MS. GILLEY: Your Honor, it serves a very
7 important purpose. And I must say that my understanding
8 of that has evolved considerably since I started
9 researching this issue.

10 I think it's very important. And it
11 certainly is helpful to -- to the practitioner because
12 when you come to the appellate court, and you say, now,
13 I have a -- a decision, it is now plain, or I have a
14 rule -- a statute, that now makes this plain, it -- it
15 is a very important prong in the Olano --

16 JUSTICE ALITO: But what purpose does it
17 serve? Why should the rule not be that if -- if some --
18 if there was an error, and it was a really -- it was an
19 error that really badly hurt the defendant, then it can
20 be considered, even though it wasn't raised at whatever
21 time it has to have been -- it wasn't raised, there
22 wasn't an objection? What purpose does that serve?

23 MS. GILLEY: The purpose of -- of 52(b)
24 is -- is a safety belt for the very extreme measures of
25 Rule 51, which says if you -- if you fail to raise

1 contemporaneously --

2 JUSTICE ALITO: Well, but I'm not asking
3 why we have -- why we permit plain errors to be raised.
4 I'm asking why do we require that the error be plain in
5 order for it to be considered?

6 Let me suggest two purposes it serves. It
7 follows from the adversary system, and it serves
8 judicial efficiency.

9 Would you agree with that; those are the
10 purposes of it?

11 MS. GILLEY: I absolutely would. Yes. Yes,
12 Your Honor.

13 JUSTICE ALITO: All right. Does it serve
14 those purposes better as applied at the time of trial or
15 at the time of appeal?

16 MS. GILLEY: The finding, the assessment of
17 plain error; is that the question you're --

18 JUSTICE ALITO: Yes.

19 MS. GILLEY: I think that it very much helps
20 to assess and evaluate the plainness of the error at the
21 time of appeal. That -- that is where it can really be
22 helpful. And that, in fact, is what the Court did in
23 both Olano and --

24 JUSTICE ALITO: Does it serve -- does it
25 serve judicial efficiency better to say that we apply

1 the Plain-Error Rule at the time of trial or at the time
2 of appeal?

3 MS. GILLEY: I think that it serves judicial
4 efficiency very much better, as amicus very well stated
5 in his brief, the example of the Ninth Circuit, where,
6 if you don't have plain error, and then the appellate
7 court must go back to the trial level, the trial stage,
8 and determine was this, was this clear at the time of
9 trial? Was it clearly against the defendant? Was it
10 clearly --

11 JUSTICE ALITO: Well, if you apply it at the
12 time of trial, it may -- eliminate the need for an
13 appellate court, under some circumstances, to get to the
14 ultimate question of whether there was error; or, it
15 could say, there might have been error, but it wasn't --
16 it's not plain to us, I suppose. So you have that
17 efficiency.

18 But if you apply it at the time of trial,
19 you avoid retrials. So which is -- which of those two
20 is more consistent with the purpose of serving judicial
21 efficiency?

22 MS. GILLEY: Well, I'm not sure that that
23 would be a correct assessment. I think that the
24 judicial efficiency would be more at the time of appeal
25 because, as many of the circuits have noticed, that's

1 what they are going -- they agree. I think it's -- you
2 know, 8 to -- 8 to 2 that they find --

3 JUSTICE SCALIA: But when, as is the
4 situation in this case, the law is uncertain at the time
5 of trial, and there are some circuits that have gone one
6 way, some circuits that have gone the other way, surely
7 it greatly serves efficiency to bring that situation to
8 the attention of the judge.

9 He has a 50 percent chance of getting it
10 right. And if he gets it right, then the case is done.
11 Instead, your -- your client did not raise any
12 objection, and the judge just went ahead.

13 Now, if -- if the error was plain, you can
14 say, well, he didn't need an objection, any -- any dumb
15 judge would have -- would have known this. Okay? So
16 you make that kind of an exception. But I don't see the
17 reason for making that exception, where you could have
18 brought this to the judge's attention, and he could have
19 solved the problem; or, if he didn't solve it, maybe the
20 prosecutor could have, by making some alteration in what
21 he was demanding as a -- as a punishment or whatever.

22 That -- that seems to me such a -- such a
23 clear efficiency in the system. I don't know what the
24 efficiency is when you do it at the court of appeals
25 level. All you tell me is that, well, it saves you the

1 trouble of going back and figuring out what -- what the
2 situation was at the trial -- at the time of trial,
3 right? But you've got to go back to the time of trial
4 anyway to decide whether -- whether substantial rights
5 have been affected, don't you?

6 MS. GILLEY: Well, I think, Your Honor,
7 multiple parts to that question.

8 First of all, I think there -- I think that
9 the cases -- the solicitors, the responders --
10 Respondents have conflated the idea of why we have
11 52(b). It's not primarily for the efficiency of the
12 judicial system. It's to -- it's to correct a very
13 serious wrong, an injustice that was incurred by the
14 defendant. That's the primary purpose of 52(b).

15 And then, if you look at it the way the
16 Court would -- the solicitors would have -- have the
17 Court decide at time of trial, there would be no remedy
18 for --

19 JUSTICE SCALIA: But -- but there's -- this
20 brings you back to Justice Alito's question. There's
21 always an injustice when the district court has gotten
22 it wrong. The district court got it wrong, applied the
23 wrong rule. Justice has not been served.

24 But we don't say, we want to do justice. We
25 say, we're only going to do justice if it was clear.

1 Now, why -- why would you -- why would you
2 have that limitation on it? The only -- the only reason
3 that limitation makes sense to me is -- is because when
4 it is clear, it doesn't have to be raised below. The
5 judge ought to know better, anyway, and so you're not
6 sacrificing any efficiency.

7 But if the whole purpose of it is just to do
8 justice, I don't understand the reason for the clear
9 limitation. Why should it only be when it's clear?

10 MS. GILLEY: Well, we have the rules going
11 back to the Atkinson case. And the question was what
12 happens when we have the very serious Rule 51, if you
13 don't have contemporaneous objection, you're out of
14 luck?

15 Fortunately, we have the safety belt of
16 52(b).

17 And then this Court, looking at the --
18 what -- what was codified from Atkinson, has the
19 four-prong test. First, we have an error. It must be
20 clear. The -- the reason for having it clear, first of
21 all, it -- it creates efficiency in the -- in the
22 appellate level court. The practitioner can now come
23 and say, my client has a clear error. Tapia has now
24 been decided, and it is clear. It was only unclear and
25 unsettled at the time we were in court.

1 JUSTICE KENNEDY: I suppose one answer to
2 Justice Scalia's question is that, well, if you require
3 an objection, and you have to have a laundry list of
4 everything that might change, but the answer to that,
5 in turn, is, if -- if you use that rationale, then we're
6 just asking the attorney to conceal from the judge
7 every -- everything that's important.

8 MS. GILLEY: Well --

9 JUSTICE KENNEDY: It would seem to me the
10 laundry list, even though that's perhaps an initial
11 objection to Justice Scalia's concern, is, frankly,
12 preferable to a system where we just don't -- don't talk
13 about what might be clear error.

14 MS. GILLEY: Well, I think we must talk
15 about clear error. And -- and I think that in my -- my
16 briefing, in my -- in my beginning to the closing brief,
17 and certainly in the amicus brief, which is an excellent
18 source on this point. When the Court looked at both --
19 52(b) in both Olano and Johnson, they looked to the
20 text, that this Court looked to the text of 52(b). And
21 the clear error that they looked at was they decided
22 those cases on the basis that the error was clear at the
23 time of trial.

24 CHIEF JUSTICE ROBERTS: Where in Johnson did
25 they -- I'm looking at the para -- two paragraphs the

1 Court spent on this in Johnson. Where did they look at
2 the text?

3 I mean, obviously, they quoted the text, but
4 the analysis seems to me to be based solely on judicial
5 efficiency.

6 MS. GILLEY: I think -- and -- and I would
7 like to refer to Judge Owens' concurring and dissenting
8 opinion in Escalante-Reyes in the Fifth Circuit. She
9 addressed this quite well in three pages of her -- of
10 her opinion, where the Justice did, in a unanimous
11 opinion, state in -- let's see, I think footnote 5 --

12 CHIEF JUSTICE ROBERTS: No. I'm looking at
13 where they talked about this particular question, the
14 second prong, as they -- they put it.

15 MS. GILLEY: Well, I believe that what
16 Justice Rehnquist looked to was the text of --

17 CHIEF JUSTICE ROBERTS: He was the Chief
18 Justice, by the way.

19 MS. GILLEY: I'm sorry. Chief Justice
20 Rehnquist.

21 CHIEF JUSTICE ROBERTS: It matters to one of
22 us.

23 (Laughter.)

24 MS. GILLEY: Yes, Your Honor.

25 JUSTICE SCALIA: That's okay.

1 (Laughter.)

2 MS. GILLEY: And -- and I noticed in my
3 record that I, in fact, had promoted Justice Clark in my
4 brief, which the errata shows, and so I'm -- I'm not
5 perfect.

6 But the -- Justice Rehnquist looked -- and
7 he talked specifically about looking at -- at 52(b) and
8 saying, "We're not going to expand on it. We're not
9 going to cut it out of new cloth. We're not going to
10 make new exceptions. We looked for it as -- as -- as it
11 is."

12 And I think that was just a couple of lines
13 after acknowledging the fact that the petitioner said,
14 well, it would have been a laundry list, and that's
15 inconvenient, and it's futile, and it's a waste of time.
16 But that, I think, was more of an argument that went
17 along with what the Chief Justice wrote, that we're
18 looking at the text, and it just doesn't make any sense.

19 We've got Olano that says, at the very
20 minimum, the error must be clear at the time of appeal.

21 JUSTICE BREYER: I want to go back to
22 Justice Alito's question for a moment because I
23 thought -- and Justice Scalia. I thought, in your
24 brief, you -- you said that their point's a good point.
25 Their point is that the system works in a way that

1 requires the lawyer to object at the trial. Alright.
2 And that is an efficiency because the trial judge has to
3 -- has to correct -- he has to -- has an opportunity to
4 correct mistakes. He can't be sandbagged.

5 But, you said, that's theoretically always
6 true, but, in your case, as a practical matter, it's
7 really never true because no lawyer is ever going to
8 think, oh, I would object, but I'm not going to object
9 because maybe the law will become clarified by the
10 Supreme Court, and I'll be able to get a plain error
11 thing on appeal. The lawyer who thought that is like
12 the unicorn, he doesn't really exist.

13 (Laughter.)

14 Okay. And you then said, on the other hand,
15 there's an efficiency on the other side. The efficiency
16 on the other side is if you don't take your rule, when
17 you get to the court of appeals, you're going to have to
18 decide in real cases whether the law was so clear that
19 the plain error doctrine still does apply at the trial
20 level before. Either it was clear that the judge was
21 wrong, or it was clear the judge was right, and there is
22 no point to objecting.

23 So now we have to decide, was he clearly
24 wrong, was he clearly right, or was it a middle case.
25 And when you get to real legal cases that have tough

1 issues, you discover that that's a hard question to ask
2 -- answer case by case, court by court. Now, didn't you
3 say all that?

4 MS. GILLEY: Yes.

5 JUSTICE BREYER: Okay. Well, then why
6 didn't I hear you say it again.

7 JUSTICE ALITO: Then let me ask you this
8 question. Counsel, then let me ask you this related
9 question. Something happens at trial. There isn't an
10 objection. It goes up on appeal. And the -- the
11 appellate court, there is an argument about whether it's
12 a plain error or not.

13 And the appellate court says, first of all,
14 we think it was an error, but it's a -- it was a close
15 question. We had trouble with this. So it wasn't
16 plain, and, therefore, this defendant is out of luck.
17 What's the justification for that?

18 MS. GILLEY: I think that the four prongs of
19 Olano are the justification. That's where I would have
20 been --

21 JUSTICE ALITO: No, I mean in real world
22 terms. What -- what purpose is served by that?

23 If the court has concluded that there was an
24 error, and it affected substantial rights, but it wasn't
25 plain, what -- what justification is there for saying,

1 that's too bad? You know, you really got hurt, but it
2 wasn't clear until -- you know, it wasn't plain until we
3 decided this case, so go back to prison.

4 What's the purpose for that?

5 MS. GILLEY: Well, there -- there is no
6 purpose for that. And -- and the --

7 JUSTICE ALITO: Then why should it have to
8 be plain at the time of appeal?

9 MS. GILLEY: But the appellate court has the
10 responsibility of applying the law as it is current.

11 That's what the appellate court is directed to do.

12 That's what Atkinson -- that's what -- even what
13 Atkinson said. You apply the law at -- as it is
14 current.

15 And so what you're doing by interpreting
16 time of trial as a point of determining the clarity
17 of -- of the error, you are completely eliminating the
18 ability for the appellate court to even rule on that
19 question because there will never, ever be a plain error
20 if you apply the time of trial as the point of
21 determining whether it was clear or not.

22 People like Armarcion Henderson would never
23 have an opportunity to -- to have plain error because it
24 would never be clear. We have to have --

25 JUSTICE ALITO: You could promote efficiency

1 at the appellate stage by having a rule like the rule
2 that we have in qualified immunity cases, which gives a
3 court the discretion to decide whether something was
4 clear or go to the -- to the merits of the -- of the
5 argument. You could -- that's -- you can serve
6 efficiency by having that.

7 But the Plain-Error Rule doesn't do that.
8 In the situation I gave you, the court would say there
9 was an error, it really affected your substantial
10 rights, but we can't say it was plain to us until we
11 decided this case, and, therefore, you get no relief.
12 And -- and maybe there's a reason for that. I'm waiting
13 for you to tell me what the reason for it is.

14 MS. GILLEY: Well, the -- the reason would
15 be similar to what Mr. Henderson faced in the
16 three-judge panel. The -- the judge -- the panel said
17 that the error was -- was clear, as far as they -- they
18 know it happened. Tapia said it happened, and -- and
19 there was no question about that; but, the fact that it
20 was not clear at the time of trial defeated
21 Mr. Henderson's ability to get relief.

22 So even though the -- the Congress said, you
23 shouldn't put these people in jail for the purpose of
24 rehabilitation, it was clear -- everybody agreed it was
25 wrong, but my client, instead of having the recommended

1 33 to 41 months, received a 60-month sentence. That's
2 unjust.

3 JUSTICE GINSBURG: Was there a reason -- I
4 think you represented your client at the trial.

5 MS. GILLEY: Yes, Your Honor.

6 JUSTICE GINSBURG: Is there a reason why you
7 didn't bring this up when the judge imposed that
8 sentence?

9 I mean, there was -- one thing is Tapia;
10 but, before that, there was a statute that says, judge,
11 don't lengthen sentences for purposes of rehabilitation.
12 And you didn't call that statute to the attention of
13 the -- of the judge, did you?

14 MS. GILLEY: I did not, Your Honor. And
15 that was a -- I knew that there was -- certainly, I was
16 concerned, and I was -- that the -- the sentence was so
17 much beyond what the sentencing guidelines had -- had
18 recommended.

19 There was -- the situation was I knew that
20 at that point the guidelines were advisory. I couldn't
21 figure -- at that point --

22 JUSTICE GINSBURG: Were you -- were you
23 aware of the statute at the time?

24 MS. GILLEY: I was not. In fact, I was not
25 aware of that statute. And when I -- I did file a Rule

1 35(a) motion eight days later. After I went and did my
2 research, I realized there was only one case that I
3 could find, In re Sealed out of the District of Columbia
4 circuit, which had addressed that particular statute.

5 And so I did file a Rule 35(a) motion
6 timely, eight days after, and asked the trial court,
7 based on 35(82)(a) to please correct that error in the
8 sentencing.

9 JUSTICE KENNEDY: And let me ask you, I
10 don't wish to sidetrack the discussion on the
11 metaphysics of the Plain-Error Rule, because it's
12 important and it's the -- part of the case, but in this
13 case, there wasn't going to be a new trial. There
14 wasn't going to be a new jury. It's just the sentence.

15 Has any argument been made that we should
16 have a different rule for sentences than for errors that
17 would require a new -- a complete new trial?

18 MS. GILLEY: Your Honor, certainly
19 Petitioner has not made that; but, there are so many law
20 review articles out there right now on ways of changing
21 plain-error review, it might --

22 JUSTICE SOTOMAYOR: Some circuits have even
23 said that. Some circuits have even said that.

24 MS. GILLEY: Yes. That is --

25 JUSTICE SOTOMAYOR: The Second Circuit says

1 that if it's a sentencing error, that the amount of
2 substantial rights and the integrity of fairness of the
3 preceding question is a different balance.

4 MS. GILLEY: That is correct.

5 JUSTICE BREYER: So you can -- if you lose,
6 you can't get through the door. If you win, you then
7 have to go on to the next part of it, which says, did
8 the error affect the fairness, integrity or public
9 reputation of judicial proceedings.

10 So if all that's at stake is a resentencing,
11 not much harm is done, and you're more likely to satisfy
12 the fourth.

13 MS. GILLEY: And the third.

14 JUSTICE BREYER: If what's at stake is a
15 whole new trial and everything, it's probably a little
16 bit harder to satisfy that prong.

17 So it's possible to build what Justice
18 Kennedy was referring to into the present rule, isn't
19 it?

20 MS. GILLEY: It could -- it could be
21 possible, and it could be --

22 JUSTICE SCALIA: Why -- why is that so? Why
23 is that so? Why does -- does the effect upon the
24 fairness of the proceedings change when it's sentencing
25 or when it's the merits? I don't understand that.

1 MS. GILLEY: Well, I think that whenever --
2 and I --

3 JUSTICE SCALIA: You're -- you're here
4 complaining about sentencing. That's a substantial
5 issue, isn't it?

6 MS. GILLEY: It is very substantial. And
7 there's a recent case out of the Eleventh Circuit that I
8 was going to call to the Court's attention, Judge
9 Gorsuch. And his -- his comment was, "This is such a
10 serious, serious situation when we sentence a man or a
11 woman to a time in prison when Congress says he should
12 not be there. That is one of the ultimate injustices
13 that we should look at."

14 And -- and I think that's looking at it from
15 the -- having a separate -- separate review system for
16 sentencing certainly might be helpful. It could
17 certainly be more speedy, although, frankly, in my case
18 it would not have helped Mr. Henderson because it took
19 Tapia a year after my client was sentenced before Tapia
20 was decided.

21 Of course, I think the argument could have
22 been made and I certainly would have made it at the
23 Fifth Circuit if Tapia had not been decided by the time
24 we made it to the Fifth Circuit, I would have argued
25 that it was clear error regardless. The statute was

1 very clear in that it was -- it was certainly -- when
2 the Court eventually did look at Tapia, they used the
3 straightforward -- you used the straightforward language
4 of it.

5 But I think that, that the main, the main
6 point -- another point that I did want to make is that
7 by deciding that plainness should be determined at the
8 time of appeal, this Court would be consistent with its
9 holdings in Olano and in Johnson, because in Olano, the
10 Court said it would be, in this case, it is adequate
11 that the error is plain at the time of appeal.

12 In Johnson, the Court said there was, in
13 fact, no error at the time of trial, but it is clear at
14 the time of appeal. And so in both of those cases, the
15 text of 52(b), which is on page 1 in my brief, the text
16 of the brief is what the Court relied on and the Court,
17 the Court said that based on that test, it's adequate
18 that the Court find the appeal -- find the error plain
19 at the time of appeal.

20 JUSTICE GINSBURG: How many months are left
21 for the defendant's sentence?

22 MS. GILLEY: He is scheduled to be released
23 in May of 2013. He never did get the, the in-depth
24 treatment program.

25 JUSTICE GINSBURG: He didn't?

1 MS. GILLEY: He did not, and it's unlikely
2 he would have ever gotten it because of the fact that he
3 had a gun charge. He pled guilty to a felon in
4 possession of a firearm, which puts the -- the
5 individual at a very low eligibility for getting into
6 the program.

7 The RDAP program is very highly coveted
8 because if completed successfully, it reduces the time
9 that you are going to be incarcerated.

10 JUSTICE GINSBURG: But the judge was not
11 aware of those impediments?

12 MS. GILLEY: The judge was very well aware,
13 and that was part of the problem that we had. I was
14 arguing at the time of sentencing for mitigating
15 circumstances that, that my client really hadn't done
16 anything and he had possessed this gun for about 10
17 minutes. The facts are not important to this Court, but
18 he had done nothing seriously wrong with this.

19 He did, in fact, commit the crime and he was
20 ready to take the punishment. The sentencing guideline
21 range was 33 to 41. I did not object, the government
22 did not object, and so I assumed it would be in that
23 range.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 Mr. Wall.

1 ORAL ARGUMENT OF JEFFREY B. WALL

2 ON BEHALF OF THE RESPONDENT

3 MR. WALL: Mr. Chief Justice, may it please
4 the Court:

5 The contemporaneous --

6 JUSTICE SOTOMAYOR: Was Justice Breyer
7 essentially correct that in most of the cases where an
8 error is not plain at the time of trial that the third
9 and fourth prong of Olano almost always take care of the
10 issue? I mean, I've been looking for a case in this
11 Court in which more substantial errors than the one that
12 occurred here -- we are going to put aside the fact that
13 I don't see how this Defendant on the third or fourth
14 could ever win, given that he was begging for drug
15 treatment during his sentencing, so how a resentencing
16 would affect the fairness or integrity of this
17 proceeding is beyond my understanding.

18 But isn't Justice Breyer right?

19 MR. WALL: No. Not in the government's
20 view. I think it's a question for another day how much
21 work the fourth prong is doing in the lower courts, but
22 I would say in all of these cases, the defendant is
23 claiming that his sentence was lengthened. I think in
24 all of them he will be able to meet the third prong and
25 show that his substantial rights were affected. It

1 becomes a fourth prong question then.

2 And in the Escalante-Reyes case, one of the
3 dissenting opinions attached an appendix in which the
4 Fifth Circuit, in 181 cases, had found that fourth prong
5 met and had found plain error satisfied. But I would
6 think it --

7 JUSTICE SOTOMAYOR: Well, I would say to you
8 that that's more in keeping with the attitude that
9 Justice Kennedy asked about, which is I think most
10 circuit courts believe the fourth prong is more easily
11 met in sentencing than in trial cases. Whether they are
12 right about that, that's not an issue we are facing
13 today.

14 MR. WALL: The Second Circuit has adopted
15 that rule. I don't know that other courts have but it's
16 really -- the prongs of the plain-error review test are
17 meant to serve different purposes. The third and fourth
18 prongs are looking at harms to the defendant and to the
19 judicial -- the integrity of the judicial proceedings.
20 The second prong is really designed to do something
21 different. It's designed to enforce the contemporaneous
22 objection requirement by isolating errors --

23 JUSTICE SOTOMAYOR: But why? The very
24 essence of 52(b) is when you don't make an objection. I
25 mean, it's treating two -- it's addressing two different

1 situations; A says when you've made an objection, you
2 just have to prove prejudice; and B says you have to
3 prove that substantial rights are affected.

4 MR. WALL: Oh, no question. The purpose of
5 that prong is to isolate out one set of errors, obvious
6 errors, from all of the other trial errors that happen
7 every day that are not correctable under Rule 52,
8 debatable errors that even reasonably experienced
9 district court judges and prosecutors might have
10 overlooked in the hustle and bustle of a trial.

11 That second prong is designed to say, "We
12 want," as the Court said in Frady, "obvious egregious
13 errors that the trial court and the prosecutor were
14 derelict in countenancing." Because there we are not as
15 worried about incentivizing the defendant to make a
16 contemporaneous objection, because every party in the
17 courtroom should have known and applied the law.

18 JUSTICE GINSBURG: Mr. Wall, why doesn't
19 that describe this case? In here is a statute, never
20 mind Tapia, the statute says to the judge, don't
21 lengthen the defendant's sentences for purposes of some
22 cure. And if the judge was not aware of that statute,
23 he surely should have been, the prosecutor shouldn't --
24 wasn't it incumbent on the prosecutor to tell the judge,
25 Judge, sorry, you can't do that?

1 MR. WALL: Justice Ginsburg, I think it cuts
2 actually exactly the opposite way. There was a
3 long-standing circuit split that the Court resolved in
4 Tapia. Courts have reached different conclusions on
5 this. And if the Defendant here had said, look,
6 district court, you shouldn't lengthen my sentence based
7 on rehabilitative purposes.

8 Some courts have found that is impermissible
9 and you should follow those courts, not the courts that
10 have permitted it, I think a fair reading of the
11 sentencing transcript is that the district court was
12 genuinely on the fence here about what to do with this
13 particular defendant and whether to lengthen his
14 sentence.

15 JUSTICE GINSBURG: But he was not aware of
16 the statute. No one called it to his attention.

17 MR. WALL: No. It is then exactly the kind
18 of debatable, open, unsettled legal question that our
19 adversarial system counts on parties to raise every day.
20 And what we do in Rule 52 is we have a narrow safety
21 valve for obvious errors that everyone in the courtroom
22 should have caught. But I don't think that we can say
23 that --

24 JUSTICE BREYER: Well, what about the -- I
25 mean, that's the question. The word "plain" of course

1 refers by and large to an error that the lower court
2 judge should have caught, so you should have objected.
3 But why limit it exclusively to that; that is, you
4 have -- you know, they quote the Schooner, Peggy and
5 Chief Justice Marshall and back to the history of
6 Hammurabi, as far as we know, that sometimes there is a
7 case where just simple fairness, plus the fact that the
8 law is now plain, means that the appellate court should
9 treat this person the same as a thousand others who now
10 will be treated according to the new law.

11 And indeed, you're complicating it even
12 further for the reason that I really meant my question
13 to be aimed at you -- you know. I mean, in fact, the
14 reason that I said that you're going to create
15 distinctions, there will be a case, the fellow is going
16 to go to jail for 50 extra years, the law is plain that
17 he shouldn't, that didn't come about until the appeal.

18 And here we have six identical people in the
19 circuit where the law was clear one way and they get the
20 new rule's advantage, and six identical people in
21 another circuit where the law was clear the other way
22 and they get the advantage. But in the one circuit
23 where the law wasn't clear, he doesn't get the advantage
24 of the new rule.

25 Now, that seems pretty unfair, and I could

1 at least make up some cases where it's just a horror.
2 And if that's so, why don't we leave plain with enough
3 wiggle room so that where it's fair, the judge on the
4 Court of Appeals can say, it is now plain and the other
5 things are satisfied so we apply it to the defendant.
6 That's the whole long question that I've got every part
7 of it in there.

8 MR. WALL: And I'll see if I can get them
9 all in. So all I can say to you, Justice Breyer, is the
10 same thing the Court has said in Puckett, Dominguez,
11 Benitez, Young, the Rule 52 has an interest in error
12 correction, egregious error correction, no question.
13 But it is balanced against a very important systemic
14 interest in judicial efficiency. And far from being a
15 horror, that's a necessary corollary of our system --

16 JUSTICE KAGAN: But, Mr. Wall, your whole
17 argument about judicial efficiency is an incentives
18 argument, and it depends upon the notion that a lawyer
19 is going to change their behavior, a lawyer is going to
20 make an objection that he otherwise wouldn't have made
21 if the rule that Ms. Gilley proposes is accepted. And
22 this goes back to what Justice Breyer said earlier.

23 I don't know of a lawyer who would say the
24 following to himself: I'm not going to make this
25 objection because I'm just going to assume that sometime

1 between now and my direct appeal the law is going to
2 change, and it's going to change in my favor, and when
3 it changes, I'm going to be able to make this objection
4 and get over not only prong two but prong three and four
5 of the test, and life will be grand for my client.

6 Now, who is going to say that?

7 MR. WALL: Justice Kagan, it's not just
8 about incentives. Even if I granted that the incentives
9 of defendants would be entirely unchanged no matter what
10 rule this Court adopted, and I don't grant that for all
11 the reasons in our brief.

12 But even if I thought that were right, every
13 time a Court of Appeals or this Court issued an
14 intervening decision of criminal law or criminal
15 procedure, a set of defendants who had not raised a
16 claim of that error at trial would come in to the Court
17 of Appeals or this Court with a claim of plain error.

18 And what we would see is a significant shift
19 of judicial resources to plain-error cases, to do
20 fact-intensive third and fourth prong review to consider
21 a set of errors that were never meant to be put on the
22 table under Rule 52(b). That's not what this safety
23 valve was designed to do.

24 JUSTICE SCALIA: I can -- I can also not
25 imagine a lawyer who intentionally makes that decision.

1 That -- that lawyer is a unicorn, I suppose.

2 But I think there are a lot of lawyers who
3 will not be as careful about finding all of the issues
4 that they should bring to the court's attention, perhaps
5 be unaware of a statute that they should have been aware
6 of.

7 If -- if we -- if we adopt the rule that's
8 being urged by the Petitioner here, it does affect
9 attorney behavior for the attorney to know that stuff
10 that he -- he ought to know but doesn't know will --
11 will not be able to be patched up on appeal.

12 MR. WALL: The government agrees with that,
13 Justice Scalia.

14 JUSTICE KAGAN: Well, should the government
15 agree with that really? Should some -- can you
16 imagine -- isn't it just as much of a unicorn for an
17 attorney to say, I'm not going to take great care
18 because I think that the law is going to change between
19 now and the appeal, and because I think I'm going to win
20 on prongs two and three -- three and four.

21 I mean, nobody can think that those
22 circumstances would arise. They're flukes when they
23 arise. And so it -- it doesn't affect either the
24 attorney's intentional conduct or his level of
25 preparation and care.

1 MR. WALL: Justice Kagan, I'm not here
2 saying that I think lawyers are sitting in -- in trial
3 courts intentionally going through the kind of thought
4 processes that you describe. But I think the effect
5 that Justice Scalia is talking about is real.

6 I think, at the margins, which is what we're
7 talking about when we're talking about these incentives,
8 I do think that in cases like this one -- I mean, this
9 is the heartland, where the district court says, I'm
10 going to give you an above-guideline sentence in order
11 for you to take a drug treatment class.

12 Now, defendants all around the country at
13 the time of Petitioner's trial were raising Tapia
14 claims. This was not some novel legal claim unknown.

15 JUSTICE GINSBURG: Why -- why was it a Tapia
16 claim? Why wasn't it simply, trial -- trial judge, the
17 statute says imprisonment is not an appropriate means of
18 promoting correction and rehabilitation? Why weren't
19 those -- why wasn't it really incumbent on the
20 prosecutor to tell the judge, just read those words?

21 MR. WALL: So, Justice Ginsburg, I didn't
22 mean by Tapia claim, depending on -- because this Court
23 hadn't issued Tapia. I mean a claim like the one in
24 Tapia, where defendants were saying, Section 3582, the
25 statute to which you're pointing, does not permit you,

1 district court judge, to do this.

2 Lots of defendants were making those claims.
3 They were percolating up through the circuits. Even
4 defendants in the Fifth Circuit were making that claim.

5 JUSTICE SOTOMAYOR: Mr. Wall, why is this
6 whole test, as you're proposing it, dependent on the
7 smartness or not smartness of a particular circuit and
8 the speed with which a particular circuit reaches an
9 issue or doesn't?

10 I mean, this -- basically, what you're
11 saying is we reward the circuits and the judges who
12 don't reach issues, because if the law is unsettled,
13 then if a substantial right is affected, that's so
14 serious that it affects the fairness and integrity of a
15 proceeding, that is not going to result in a reversal.

16 It seems to me that if I'm a district court
17 judge or a circuit court judge or anyone else or a
18 circuit court, I would try to avoid as many issues as I
19 could because there's going to be as little set of
20 reversals as possible.

21 MR. WALL: Justice Sotomayor --

22 JUSTICE SOTOMAYOR: And going back to what
23 Justice Ginsburg said, we take cases where the split is
24 8 to 1, okay, or 8 to 0, because a particular circuit
25 hasn't gotten to -- to an issue.

1 Does this mean, as Justice Breyer said, that
2 the eight circuits who got it right, the defendants have
3 a Johnson plain-error rule, and the one circuit who just
4 didn't get to it doesn't?

5 MR. WALL: It's -- it's not about rewarding
6 or faulting district courts. It's the way our system
7 works. Where a court of appeals or this Court issues a
8 decision that governs a district court, that's the law.
9 And the Court said in Frady, we count on the trial court
10 and the prosecutor to bring those kinds of egregious
11 errors to the Court's attention.

12 But where it's an open question --

13 JUSTICE SOTOMAYOR: But why isn't the focus
14 of the system on the nature of the error?

15 MR. WALL: I think the focus of the system
16 is on the contemporaneous objection requirement in Rule
17 51, which is what Rule 52 is designed to enforce.

18 JUSTICE SOTOMAYOR: But 52(b) is about not
19 making the objection. That's -- that's sort of going
20 around in a circle.

21 MR. WALL: Well, only in the sense that what
22 Rule 52(b) does is it says okay, you didn't object. We
23 will let you get a narrow form of relief, but only in
24 the cases where your objection should have been
25 unnecessary because there was governing law which

1 everyone in the courtroom should have been able to point
2 to, or where it would have been futile --

3 JUSTICE BREYER: Whoa, whoa.

4 MR. WALL: -- because there's a governing
5 precedent the other way.

6 JUSTICE BREYER: Here, that's -- it's the
7 second part.

8 I mean, I think you'd have a stronger
9 argument were it not for Johnson. But Johnson is
10 saying, look, if you're in a circuit where the law turns
11 out to be absolutely clearly wrong, then you don't have
12 to make an objection. And then what we do is we
13 consider whether the matter was clear at the time of
14 appeal.

15 Now, once I see that, it's like both
16 bookends. You don't have to make the objection, and the
17 only time you do is when the law is unclear; and, that
18 being so, we're going to have everybody doing research
19 about how clear the law is one way or the other, which
20 is going to be tough.

21 But, more importantly, it seems to me what's
22 happening is that 52 is being also used in part to
23 isolate those Peggy Schooner type cases where it is just
24 basically unfair not to apply new law. And in the words
25 of Justice Marshall, he says that should apply, and

1 sometimes it's unfair not to apply it on the appeal.
2 And -- and so I don't see how you explain Johnson on
3 your theory.

4 MR. WALL: I think Johnson -- as the Chief
5 Justice pointed out earlier, the analysis in Johnson,
6 is fairly brief. The Court did not discuss the text,
7 history of the rule or this Court's previous cases.

8 JUSTICE SCALIA: Well, more than that,
9 Johnson stood on its head, did it not, not to decide the
10 case the easy way, which was simply to say if it's clear
11 on appeal, the rule applies.

12 It could have said that. The case would
13 have been very easy. It -- it instead avoided that by
14 saying, oh, well, this is a very special case.

15 Well, it wouldn't be a special case if -- if
16 the argument presented by the Petitioner here were
17 accepted. I don't -- far from -- far from appearing
18 that Johnson supports Petitioner's case, I think Johnson
19 tends to undermine it.

20 MR. WALL: Well, in danger of running afoul
21 of Justice Kagan, I'm going to agree again. That's
22 exactly the government's argument. If Johnson had
23 resolved the broader question, it could not have set
24 aside the -- the question here.

25 JUSTICE KAGAN: Well, the government had a

1 different argument before.

2 In Johnson, the government called this
3 distinction an amorphous one. And it says, "Nothing in
4 the text of Rule 52(b) contemplates or permits any such
5 distinction. An error is either plain, or it is not.
6 It is more faithful to the text of Rule 52(b) and simpler
7 for the courts of appeals to obviate that distinction
8 altogether," said the government.

9 MR. WALL: And this Court disagreed, but
10 studiously avoided placing its decision on the text --

11 JUSTICE KAGAN: This Court did not disagree.
12 This Court took a half step. And the question before us
13 is still the question that was before you when you wrote
14 this passage, you being the government, which is should
15 we distinguish between the Johnson case and this one.
16 And you very clearly stated, both as to a matter of text
17 and to a matter of what's simpler for the courts of
18 appeals, that there should be no such distinction.

19 MR. WALL: Justice Kagan, there is no
20 question that in the briefs and in argument, the
21 government in Johnson asked this Court not to draw a
22 futility exception to Rule 52 for cases in which an
23 objection would have been pointless at trial in light of
24 governing precedent, and the Court disagreed with us on
25 that.

1 And the question here is, is the Johnson
2 tail going to wag the plain-error dog? Johnson rested
3 on a policy consideration. They're just flatly
4 inapplicable here. This is the heartland of cases in
5 which a contemporaneous objection could have been quite
6 helpful. This is not, as the Court said in Johnson, a
7 case in which the defendant was being asked to make an
8 objection that the District Court was powerless to
9 grant.

10 The District Court here, I think, was
11 genuinely on the fence about what to do, and an
12 objection could have been quite helpful. So to take --
13 I mean, either the holding in Johnson, which was limited
14 and could not have been if the Court had decided on a
15 broader ground, or the rationale. Even taking just the
16 rationale, that doesn't apply here.

17 I think the only way you could read Johnson
18 that would help Petitioner is to say it resolved the
19 broader question of what the text of the rule requires
20 regardless of context. And that's the one reading of
21 Johnson that's just not persuasive on the face of the
22 opinion.

23 JUSTICE BREYER: Yes, but the -- the - well,
24 this -- I mean, the trouble is you've run into, like,
25 four different interpretations of what Johnson really

1 means. And mine, which is, perhaps, no better or worse
2 than the competing ones, is -- is you go back to the
3 Schooner Peggy, and you see the Chief Justice, and he says,
4 in a case the law has changed, the Court must decide,
5 according to existing law, the appellate court; and, if it
6 be necessary to set aside a judgment rightful when rendered,
7 but which cannot be affirmed, but in violation of the law,
8 that judgment must be set aside.

9 So there, we seem to be -- and Johnson
10 seemed to me to bear this out; but, sometimes, you do
11 forgive the need to object because the overriding
12 principle is the principle of deciding the law as it is
13 at the time of appeal, and to do the contrary is just
14 too unfair.

15 Now, that -- reading Johnson that way, I'd
16 say, well, that rule applies here too.

17 MR. WALL: Justice Breyer --

18 JUSTICE BREYER: Sometimes.

19 MR. WALL: -- there is no question that that
20 concern animated this Court's decision -- retroactivity
21 decision in Griffith, and there is no question that that
22 is one of the concerns underneath the rule. But if it
23 were the only concern --

24 JUSTICE BREYER: No, it's not.

25 MR. WALL: The rule wouldn't say plain. As

1 Justice Alito pointed out --

2 JUSTICE SCALIA: Absolutely. I mean,
3 that -- that argument applies to whether the error was
4 plain or not. Apply the law as it is.

5 JUSTICE BREYER: Yes. Yes. And that's why
6 you make a balance. And the balance goes -- brings back
7 the first question that I put. Because, in this kind of
8 a case where the law is unsettled, we have what we'll
9 call the uniform or the hippogriff problem, and that's
10 the problem of it doesn't really make that much
11 difference to the basic policy of objecting.

12 And on the other side, you have the
13 administrative potential mess of having to figure out
14 how clear was the law in the court -- the district
15 court. Is it a circuit where you'd say the law was
16 absolutely -- is pretty clear that they were right? Or
17 was it a circuit where it's pretty clear that the law
18 was the opposite, in which case we waive the need? Or
19 is it actually mixed up and you don't know, in that
20 circuit, in which case you're arguing, don't waive the
21 need. So I see the unicorn on one side versus an
22 administrative problem on the other.

23 MR. WALL: So I -- I want to suggest that
24 the administerability problem is very small because it
25 has not been difficult for the lower courts to apply

1 this test.

2 And I want to suggest that there is a really
3 significant cost on the other side, which is you're
4 putting on the table an entire set of errors that Rule
5 52 was not designed to remedy, and you are diverting the
6 resources of the judicial system toward those
7 plain-error cases, and you will see a set of such claims
8 every time a court of appeals or this Court issues a
9 decision of criminal law or criminal procedure. In just
10 this circuit alone, it has issued five opinions in the
11 last year considering just Tapia plain-error claims.
12 And that's just Tapia. And that's just one circuit.

13 And I think the question is, what's the
14 obvious prong designed to do? What's it there for? And
15 it's got to be there to catch something. And what it is
16 there to screen out are errors that were debatable, that
17 even reasonable district court judges and prosecutors
18 might have missed and catch errors that everyone in the
19 courtroom should have recognized because they were
20 egregious under the law as it stood at the time.

21 CHIEF JUSTICE ROBERTS: Counsel, I -- it
22 strikes me that we are having a very unusual discussion,
23 in that we are competing policy considerations that have
24 been raised. This is a -- a rule with particular
25 language, and I don't think we'd be having this type of

1 a discussion if we were dealing with a statute. I think
2 there would be a different focus. Obviously, the policy
3 concerns would be raised but in a different context.

4 Do you have authority for the proposition
5 that we have more flexibility in interpreting the
6 Federal rules than we would in interpreting the statute?

7 MR. WALL: I -- not in general --

8 CHIEF JUSTICE ROBERTS: I mean, it
9 highlight -- it -- just to take a moment -- it was
10 highlighted for me in your brief when you said, well,
11 Johnson, there was a special circumstance, so they read
12 this rule, then, this way. This is not a special
13 circumstance, so we are going to read the rule a
14 different way. Is it because these are rules as opposed
15 to statutes?

16 MR. WALL: No. It's because we have
17 Johnson. I mean, I -- Mr. Dreeben stood here in Johnson
18 and said, We've got the most natural reading of the
19 rule, and you shouldn't carve out a futility exception
20 to it. And then, in our view, that is what the Court
21 did without discussing the tax.

22 JUSTICE GINSBURG: And what about what the
23 rules -- what the rules advisory committee? I mean, is
24 it -- when 52(b) was put in the statute, they -- they
25 cited a case you cite in your brief, the Wiborg -- or

1 Wiborg case. That wasn't, at the time, error. It was a
2 sufficiency-of-the-evidence error, the kind of thing you
3 would expect the counsel to bring to the attention of
4 the Court.

5 And nonetheless, the -- the advisory
6 committee put it in as an example of how 52(b) should
7 operate. And why? They said they put it in there
8 because it was a matter vital to the defendant.

9 So the objection wasn't made, so the
10 contemporaneous objection rule was -- was not observed
11 and nonetheless, the Court said, We are going to take --
12 we are going to consider it on appeal because the matter
13 is vital to the defendant.

14 I can't imagine anything more vital than
15 being deprived of 19 to 27 months of freedom.

16 MR. WALL: Well, I -- but Wiborg falls
17 squarely within what we all believe is the core of the
18 rule. There wasn't sufficient evidence at trial. That
19 would have been obvious to everyone in the courtroom
20 that the prosecution hadn't satisfied some element of
21 the offense. There is no change in intervening law like
22 what we are dealing with here.

23 And I take your point, Mr. Chief Justice.
24 We think that we've got by far the most natural reading
25 of the text. It's backed up by the history. It's

1 backed up by this Court's understanding in cases like
2 Frady, that is designed to cure errors so egregious that
3 the trial court and prosecutor were derelict in
4 countenancing them, as this Court said in Frady.

5 And I -- I don't see Petitioner or the
6 amicus really taking issue with the government on that
7 text or history or cases like Frady. I think they are
8 resting it on Johnson, and for the reasons I tried to
9 explain to Justice Kagan, I don't think any persuasive
10 reading of Johnson gets them home. It could not have
11 set aside this question if it had thought that it was
12 resolving what the text of the rule Mr. Chief Justice
13 meant, or general --

14 JUSTICE ALITO: What about Mr. Henderson
15 sitting in prison, serving a sentence that we now know
16 was imposed for a reason that is not permitted under
17 Federal sentencing law? Is there anything that can be
18 done for him? If -- if it was very clear at the time
19 that the statute prohibited this, would it have been --
20 was it ineffective assistance of counsel for his
21 attorney not to have made an objection?

22 MR. WALL: I think he could certainly raise
23 that claim in habeas and attempt to -- to get relief,
24 but I don't think there is any relief for him under Rule
25 52. And I don't --

1 JUSTICE KENNEDY: And is there any relief
2 for him in the -- in the regulations of Bureau of
3 Prisons or the government -- other than a pardon, I
4 suppose, of defendants?

5 MR. WALL: Well, he -- he been a -- not
6 specifically aimed at this, Justice Kennedy. I will say
7 he has been eligible for the RDAP in the time that he
8 has been in prison, and he has never --

9 JUSTICE KENNEDY: Eligible for?

10 MR. WALL: For the -- the -- for the
11 residential drug abuse treatment program that the
12 district court wanted him to participate in. He never
13 applied to --

14 JUSTICE SOTOMAYOR: Counsel, I guess, I -- I
15 continue to be confused about what makes error plain or
16 clear. I don't know why the pronouncement of a circuit
17 court accomplishes that. Meaning, so we said in *Tapia*
18 that the statute is perfectly plain, perfectly clear.
19 And so why shouldn't it have been clear to those
20 circuits or to that district court judge at the time of
21 trial?

22 You're equating the plainness of error with
23 what the outcome is to -- in circuit courts, and I'm
24 having trouble with that.

25 MR. WALL: I -- not invariably, Justice

1 Sotomayor. I -- it's possible to imagine a case in
2 which a district court judge was not foreclosed from
3 reaching some legal conclusion that nevertheless no
4 reasonable judge would reach. I just think it's
5 impossible to say that that's what Tapia was. You had
6 courts that had reached different conclusions, and you
7 had a sentencing practice that had been in existence for
8 decades. Now, this Court ultimately found and agreed,
9 the government confessed to her, and the Court agreed
10 that that was an impermissible sentencing practice.

11 But it was still an open, debatable, legal
12 question on which courts had reached different
13 conclusions for many, many years. And I think to say to
14 a district court judge in a circuit that has decided the
15 question against the defendant, well, that's not clear
16 law. I think a district court would look at you like,
17 What are you talking about? I have an on-point Court of
18 Appeals decision that tells me to do X or Y.

19 JUSTICE KAGAN: Mr. Wall, can -- can I ask
20 you about footnote 4 of your brief? This is the
21 footnote in which you say that this case involves only a
22 claim of sentencing error, and it doesn't involve a
23 claim of actual innocence based on an intervening
24 decision.

25 Is that footnote meant to suggest that you

1 think, or at least that you contemplate the possibility
2 that where there is an intervening decision making clear
3 the conduct that a person had been convicted of was in
4 fact not criminal, that you would think a different rule
5 should apply? That the Johnson rule should apply?

6 MR. WALL: We are leaving open, if the Court
7 says that there is an actual innocence exception in
8 habeas to procedural default rules, that whatever it
9 covers, acts that are no longer criminal, sentences
10 beyond the statutory maximum, that whatever that
11 exception covers, we leave open the possibility that you
12 could also get relief for that under Rule 52. That --
13 that those cases could -- those exceptions could trap
14 each other.

15 JUSTICE KAGAN: Because then that creates
16 yet another complication in this interpretation of Rule
17 52. And one might say, we just want a uniform rule,
18 that it should all be at one time, and having said which
19 time it should be at in Johnson, and having suggested
20 that it should also be in the time of appeal for actual
21 innocence claims, that it would be strange to carve out
22 this single set of cases involving intervening changes
23 of the law, and say those should be at the time of
24 trial.

25 MR. WALL: Justice Kagan, I think far

1 stranger than letting the Johnson tail wag the
2 plain-error dog would be letting the --

3 JUSTICE SCALIA: I agree that that was a bad
4 footnote. I think you're -- you know...

5 (Laughter.)

6 MR. WALL: Now, I'm going to go the other
7 way.

8 JUSTICE KAGAN: But -- an honest footnote,
9 an honest footnote in that you're saying there is this
10 other category of cases that's lurking out there, and
11 that category seems as though we should have the Johnson
12 rule.

13 MR. WALL: But actual innocence isn't the
14 tail, it's like the nub or the tip of the tail. And
15 whatever the Court decides to do with actual innocence,
16 it shouldn't dictate the interpretation of procedural
17 rules more generally.

18 JUSTICE KAGAN: But now we have two tails.
19 But -- you know, the one tail is Johnson and one tail is
20 actual innocence, but this is just a tail, too.

21 MR. WALL: One tail, one nub. But the --
22 the --

23 (Laughter.)

24 MR. WALL: Justice Kagan, this has not been
25 difficult to apply the lower courts doing this have not

1 found it difficult to determine because the vast
2 majority of cases, frankly, in the real world, are like
3 this one. Courts have reached different conclusions on
4 a legal question, and this Court --

5 JUSTICE BREYER: Then what harm does it do,
6 in the interest of simplicity, in reading a word to mean
7 what it says? The word is "plain error." It doesn't
8 say whether they mean plain error at the time of trial,
9 or plain at the time of appeal.

10 Olano says it means plain at the time of
11 appeal. If we say that's what it means, then that's
12 what it means always. And what harm will that do, given
13 the fact -- but, still, there's a plenty of a good
14 reason, and appellate judges know their job, not to send
15 things back, where it's some technical matter, where
16 he's trying to sandbag the judge, where, in fact -- now
17 we have all the Rule 4, the fourth prong consideration.

18 MR. WALL: Justice Breyer --

19 JUSTICE BREYER: The words mean what they
20 say.

21 MR. WALL: -- I agree. And the rule --

22 JUSTICE BREYER: Well, if you agree, then --

23 MR. WALL: No. The rule suggests -- by far,
24 the most natural reading, is that the plain error could
25 have been brought to the court's attention, the district

1 court, the one that committed the egregious error, and
2 neither Petitioner nor Amicus has advanced any other
3 textual interpretation.

4 I mean, if we're deciding about that --

5 JUSTICE SOTOMAYOR: I don't understand how
6 you get that from the rule. The rule says any plain
7 error that affects substantial rights, even if it wasn't
8 brought to the judge's attention.

9 MR. WALL: That's right. Even -- so that
10 that's the first clause. And the second clause is, even
11 if not brought to the court's attention, which suggests
12 that that plain error, that egregious, obvious error,
13 could have been brought to the district court's
14 attention; not that it was debatable at the time, and it
15 became clearer later because an appellate judge opined.

16 JUSTICE BREYER: That is Mr. Dreeben's
17 excellent argument.

18 And then Olano -- rather, Johnson says the
19 contrary.

20 MR. WALL: Again, Justice Breyer, Johnson
21 did nothing, either as a matter of its holding or its
22 rationale, to say what the rule requires more generally
23 in cases like this one, where a contemporaneous
24 objection could have been quite helpful to the district
25 court.

1 JUSTICE SCALIA: I joined Johnson, and maybe
2 I have to repudiate it if it leads -- leads to that
3 conclusion.

4 MR. WALL: Justice Scalia, you did not join
5 the relevant portion of Johnson.

6 JUSTICE SCALIA: Oh, I didn't? Oh, thank
7 God.

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: Counsel --

10 JUSTICE SCALIA: It didn't sound like me. I
11 believe in the slippery slope. And we're proving that
12 today, aren't we?

13 MR. WALL: It's fully open to you to agree
14 with the government here.

15 JUSTICE GINSBURG: Mr. Wall, your time is
16 up, but we have a rule -- the Supreme Court has a
17 rule -- and I would like to know how the government
18 reads it. It's our Rule 24, that says we, this Court,
19 may consider plain error not covered in the questions
20 presented, but evident from the record.

21 Is our rule -- in your view, must the error
22 be plain at the trial court stage, or is it enough that
23 the error was plain at the court of appeals stage for us
24 to apply our rule?

25 MR. WALL: I don't think there's anything

1 about the text or history or the way that rule has been
2 used that suggests it should be interpreted differently
3 from Rule 52.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 The case is submitted.

6 (Whereupon, at 11:03 a.m., the case in the
7 above-entitled matter was submitted.)

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