Federal Rules of Criminal Procedure — Plain Error Review — Henderson v. United States

Among the mechanisms meant to correct errors in the U.S. criminal justice system is Rule 52(b) of the Federal Rules of Criminal Procedure, which states that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[1] Over the years, the Supreme Court has attempted to clarify the scope of this exception to the general rule that a defendant must bring an error to the trial court's attention in order for a court of appeals to correct it. In *United States v. Olano*,[2] the Court disaggregated the individual components of Rule 52(b) and added another factor, establishing a four-part test. A federal appeals court can choose to correct a forfeited error if (1) there is in fact an error; (2) the error is plain; (3) the error affects substantial rights; and (4) the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[3] Later, in *Johnson v. United States*,[4] the Court held that even if a trial court's decision was clearly correct at the time it was made, there can be plain error if a change in the law has made the decision clearly incorrect by the time of appeal.[5] Still, at least one question of timing remained unanswered: whether an error could be plain if circuit law was unsettled at the time of trial. Last Term, in *Henderson v. United States*,[6] the Supreme Court held that for the purposes of Rule 52(b), an error need only be plain by the time of appellate review.[7] The case is a paradigmatic example of an important interpretive divide within the Court, yet the obvious dispute between the majority and dissent masks the fact that they both engage in efforts to restrict the use of Rule 52(b).

In 2010, Armarcion Henderson pleaded guilty in federal district court to "being a felon in possession of a firearm."[8] Both the probation office and Henderson emphasized his serious drug problem and lack of treatment.[9] Accordingly, though the recommended Sentencing Guidelines range for his offense was thirty-three to forty-one months, the court sentenced him to sixty months — the minimum sentence qualifying him for the Federal Bureau of Prisons rehabilitation program.[10]

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[1] FED. R. CRIM. P. 52(b).

[2] 507 U.S. 725 (1993).

[3] *Id.* at 732 (alteration in original) (quoting United States v. Young, 470 U.S. 1, 15 (1985)) (internal quotation marks omitted).

[4] 520 U.S. 461 (1997).

[5] *See id.* at 468.

[6] 133 S. Ct. 1121 (2013).

[7] *Id.* at 1124–25.

[8] *Id.* at 1125.

[9] *See* Brief for the United States at 3–4, *Henderson*, 133 S. Ct. 1121 (No. 11-9307).

[10] *See* United States v. Henderson, 646 F.3d 223, 224 (5th Cir. 2011).

The judge imposed the above-Guidelines sentence in order to allow Henderson to get treatment, saying: "I've got to give him that length of time to do the programming and the treatment and the counselling . . . that this defendant needs right now. And that is the reason for that sentence under 3553(a)(2)(D)."[11] Henderson's counsel did not object to the sentence at the time; when the judge asked if there was "any reason why that sentence as stated should not be imposed," counsel responded: "[P]rocedurally, no, Your Honor."[12]

Eight days later, Henderson filed a motion in the U.S. District Court for the Western District of Louisiana under Federal Rule of Criminal Procedure 35(a),[13] claiming that his sentence should have been corrected because it violated 18 U.S.C. § 3582(a), which warns that "imprisonment is not an appropriate means of promoting . . . rehabilitation."[14] The court denied the motion, saying that Rule 35(a) is not intended to allow a court "to reconsider the application . . . of the sentencing guidelines or for the [district] court to simply change its mind about the appropriateness of the sentence."[15]

Before the Fifth Circuit heard Henderson's appeal, the Supreme Court decided *Tapia v. United States*,[16] holding that "a court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation."[17] *Tapia* made Henderson's sentence unlawful "and the District Court's decision to impose [it] . . . erroneous."[18] It also resolved a circuit split on the legality of lengthening sentences for rehabilitative purposes.[19] The Fifth Circuit, though, had not ruled on that issue before *Tapia*, so relevant circuit law was unsettled at the time of Henderson's sentencing.

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[11] *Id.* (quoting Transcript of Sentencing at 29, United States v. Henderson, Criminal Action No. 09-111 (W.D. La. June 2, 2010)). Under 18 U.S.C. § 3553(a)(2)(D), a court is instructed to consider "the need for the sentence imposed . . . to provide the defendant with needed . . . medical care, or other correctional treatment in the most effective manner."

[12] *Henderson*, 646 F.3d at 224 (quoting Transcript of Sentencing, *supra* note 11, at 30) (internal quotation marks omitted).

[13] Rule 35(a) allows a court, "[w]ithin 14 days after sentencing," to "correct a sentence that resulted from arithmetical, technical, or other clear error." FED. R. CRIM. P. 35(a).

[14] 18 U.S.C. § 3582(a) (2012).

[15] United States v. Henderson, Criminal Action No. 09-111, 2010 WL 3037119, at *1 (W.D. La. July 30, 2010) (alteration in original) (quoting United States v. Bridges, 116 F.3d 1110, 1112 n.3 (5th Cir. 1997)) (internal quotation marks omitted).

[16] 131 S. Ct. 2382 (2011).

[17] *Id.* at 2393 (emphasis omitted).

[18] *Henderson*, 133 S. Ct. at 1125.

[19] Three circuit courts had held that courts could lengthen prison terms on the basis of rehabilitation. *See* United States v. Jimenez, 605 F.3d 415, 424–25 (6th Cir. 2010); United States v. Hawk Wing, 433 F.3d 622, 630 (8th Cir. 2006); United States v. Duran, 37 F.3d 557, 561 (9th Cir. 1994). Two circuit courts had held that rehabilitation was not a legitimate basis for lengthening terms of confinement. *See In re* Sealed Case, 573 F.3d 844, 849 (D.C. Cir. 2009); United States v. Manzella, 475 F.3d 152, 158 (3d Cir. 2007).

On appeal, the Fifth Circuit affirmed the district court's decision. Writing for a unanimous panel, Judge Smith[20] held that although the lengthened sentence was erroneous under *Tapia*, Henderson did not preserve his claim of error through his Rule 35(a) motion.[21] As the district court noted,[22] Rule 35(a) applies only to "arithmetical, technical, or other clear error[s]."[23] According to circuit law, clear errors are those "which would almost certainly result in a remand of the case to the trial court for further action."[24] In this case, Judge Smith said, because there was "no binding precedent on a question on which there [was] a circuit split" and the Fifth Circuit "might have gone either way" had it faced that question,[25] "the error would not 'almost certainly result in a remand of the case.'"[26] Thus, the error was neither clear nor plain, and could not be corrected by Rule 35(a) or Rule 52(b). Accordingly, the circuit court upheld Henderson's sentence.[27]

The Supreme Court reversed. Writing for the Court, Justice Breyer[28] held that errors can be plain for the purposes of Rule 52(b) so long as they are plain at the time of appellate review.[29] Justice Breyer began by noting the inherent conflict in the question presented: In both criminal and civil cases, individuals can forfeit their rights by failing to assert them in a timely manner,[30] suggesting that plainness should be "limited to the time the error was committed."[31] But generally, "an appellate court must apply the law in effect at the time it renders its decision,"[32] suggesting that plainness should extend to the time of review. After acknowledging that neither principle is absolute, Justice Breyer argued that the text of Rule 52(b) does not resolve the conflict because it contains no temporal language regarding plainness.[33]

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[20] Judge Smith was joined by Judges Southwick and Graves.

[21] United States v. Henderson, 646 F.3d 223, 225 (5th Cir. 2011).

[22] United States v. Henderson, Criminal Action No. 09-111, 2010 WL 3037119, at *1 (W.D. La. July 30, 2010).

[23] FED. R. CRIM. P. 35(a).

[24] *Henderson*, 646 F.3d at 225 (quoting United States v. Ross, 557 F.3d 237, 239 (5th Cir. 2009)) (internal quotation mark omitted).

[25] *Id.*

[26] *Id.* (quoting *Ross*, 557 F.3d at 239).

[27] By a 10–7 vote, the Fifth Circuit also denied rehearing en banc. United States v. Henderson, 665 F.3d 160, 160 (5th Cir. 2011). Judge Haynes, in an opinion joined by Judge Dennis, dissented. She argued that the issues of error preservation under Rule 35(a) and the timing of plainness under Rule 52(b) both merited the full court's consideration. *Id.* at 160 (Haynes, J., dissenting).

[28] Justice Breyer was joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Sotomayor, and Kagan.

[29] *Henderson*, 133 S. Ct. at 1130–31.

[30] *See, e.g.*, United States v. Olano, 507 U.S. 725, 731 (1993).

[31] *Henderson*, 133 S. Ct. at 1126.

[32] *Id.* (quoting Thorpe v. Hous. Auth. of Durham, 393 U.S. 268, 281 (1969)) (internal quotation mark omitted).

[33] *See id.*

Accordingly, Justice Breyer turned to Supreme Court precedent, concluding that while it did not clearly demand a particular result, it suggested that "a 'time of error' interpretation would prove highly, and unfairly, anomalous."[34] Rule 52(b) unquestionably covers a trial court decision that was plainly incorrect when it was made,[35] and *Johnson* made clear that the rule also applies when a trial court's decision was plainly correct at the time it was made but a change in the law later made the decision incorrect.[36] Therefore, Justice Breyer argued, to hold that the rule does not cover intermediate cases — where the trial court's decision was, because of unsettled law, neither plainly correct nor plainly incorrect when it was made — would cause "unjustifiably different treatment of similarly situated individuals."[37] Furthermore, a time-of-error interpretation would force courts "to play a kind of temporal ping-pong," which "would make the appellate process yet more complex and time consuming."[38]

Finally, Justice Breyer rejected the government's concerns that a time-of-review interpretation would create improper incentives for attorneys and open the floodgates to claims of plain error. Though he acknowledged that a time-of-error rule would give attorneys further incentive to make timely objections, Justice Breyer dismissed the idea that lawyers might intentionally forgo objecting in hopes that the law might later change and allow them to argue plain error.[39] Also, responding to the government's argument that "plain error" becomes mere "error" under a time-of-review interpretation, Justice Breyer reasoned that not all changes in the law make trial courts' contrary deci-

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[34] *Id.* at 1127.

[35] *See Olano*, 507 U.S. at 734.

[36] *See* Johnson v. United States, 520 U.S. 461, 468 (1997).

[37] *Henderson*, 133 S. Ct. at 1127. Justice Breyer illustrated his point with a hypothetical:

> Imagine three virtually identical defendants, each from a different circuit, each sentenced in January to identical long prison terms, and each given those long sentences for the same reason, namely to obtain rehabilitative treatment. Imagine that none of them raises an objection. In June, the Supreme Court holds this form of sentencing unlawful. And, in December, each of the three different circuits considers the claim that the trial judge's January-imposed prison term constituted a legal error. Imagine further that in the first circuit the law in January made the trial court's decision clearly lawful as of the time when the judge made it; in the second circuit, the law in January made the trial court's decision clearly unlawful as of the time when the judge made it; and in the third circuit, the law in January was unsettled.
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> . . . What reason is there to give two of these three defendants the benefits of a new rule of law, but not the third?

Id. at 1127–28.

[38] *Id.* at 1128. A court of appeals, Justice Breyer explained, would have to "look[] at *the law that now is* to decide whether 'error' exists, look[] at *the law that then was* to decide whether the error was 'plain,' and look[] at *the circumstances that now are* to decide whether the defendant has satisfied *Olano*'s third and fourth criteria." *Id.*

[39] *Id.* at 1128–29. Justice Breyer compared such an attorney to a unicorn, who "finds his home in the imagination, not the courtroom." *Id.* at 1129.

sions *plainly* wrong. If a lower court's decision is merely questionable at the time of appeal — as is the case after many new rules of law that "concern matters of degree, not kind" — it cannot be corrected under Rule 52(b).[40] And the rule is also limited to errors that would "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings," further restricting the floodgates that might otherwise open.[41]

Justice Scalia dissented.[42] To start, he took issue with Justice Breyer's conception of the question presented. Rather than to resolve a conflict between two legal principles, Justice Scalia argued, the Court's role was to determine whether "the failure of timely objection" is "an exception to the rule that an appellate court applies the law in effect at the time of its judgment" — a question Justice Scalia would have answered in the affirmative.[43] In his view, the purpose of Rule 52(b) derives from Rule 51(b), which allows a defendant to preserve his claim of error by objecting at the time "when the court ruling or order is made or sought."[44] Rule 52(b), then, is a plain error exception to the implicit forfeiture rule of Rule 51(b), and Justice Scalia would not have extended the exception to errors that are plain only at the time of appeal.[45] Limiting Rule 52(b) to errors that are plain at trial would best preserve incentives for defense counsel to make timely objections, which Justice Scalia believes to be the central purpose of Rule 51(b).[46]

Further emphasizing his concerns about inducing timely objections, Justice Scalia argued that *Johnson* does not require a time-of-appeal interpretation for cases in which the law is unsettled at the time of trial.[47] Applying a time-of-appeal method to *Johnson* cases, in which the trial court's decision was correct when it was made, does not chill objections, since a *Johnson* defendant has no reason to object.[48] For that reason, Justice Scalia contended, Justice Breyer's "similarly situated" defendants were not in fact similarly situated for the purposes of Rules 51(b) and 52(b) and should not receive the same treatment.[49] He

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[40] *Id.* at 1130.

[41] *Id.* Notably, the Court observed, the jurisdictions that had already adopted the *Henderson* rule had encountered no observable plain error floodgates problem. *See id.*

[42] Justices Thomas and Alito joined his dissent.

[43] *Henderson*, 133 S. Ct. at 1131 (Scalia, J., dissenting).

[44] FED. R. CRIM. P. 51(b).

[45] *Henderson*, 133 S. Ct. at 1131–32 (Scalia, J., dissenting).

[46] *See id.*

[47] *See id.* at 1133. In fact, Justice Scalia noted, the *Johnson* Court "took pains to exclude [Henderson's situation] from the time-of-appeal method it articulated," *id.*, by specifically limiting its holding to cases in which "the law at the time of trial was settled and clearly contrary to the law at the time of appeal," *id.* (quoting Johnson v. United States, 520 U.S. 461, 468 (1997)).

[48] *See id.*

[49] That is, the defendant in the circuit where the lengthy sentence was clearly lawful did not object because he had no reason to do so, while the other two defendants *did* have reason to object and should have done so. *See id.* at 1134.

warned that the Court's decision to the contrary might cause counsel to remain silent about possible errors, or even worse, to be less diligent in "efforts to identify uncertain points of law and bring them . . . to the court's attention, *so that error will never occur*."[50] Ultimately, Justice Scalia argued, the Court's decision transforms Rule 52(b) "into an end-run around the consequences of claim forfeiture."[51] He also dismissed the majority's concerns that a time-of-error interpretation would be too difficult for courts, noting that appellate courts conduct similar inquiries in other areas of law — including federal habeas corpus review and immunity law — and that the majority's interpretation would not actually avoid the practical difficulties it identified.[52]

While *Henderson*'s particular extension of the Court's plain error jurisprudence is unlikely to apply to many defendants, the case is notable for the sharp disagreement between the majority and dissenting opinions,[53] as *Henderson* is a particularly clear example of the vast interpretive divide between Justice Breyer and Justice Scalia. Yet when their opinions are considered among alternative interpretations of the plain error rule, the Justices disagree about less than is first apparent: both fundamentally engage in restricting courts' use of the permissive plain error rule.

In his opinion for the Court, Justice Breyer firmly situated himself and the Court's Rule 52(b) jurisprudence in the subjective realm of "fairness." His conclusion that "the basic purpose of Rule 52(b)" is "the creation of a *fairness-based* exception to the general requirement that an objection be made at trial"[54] suggests a preference for standards instead of rules; his ease in referencing *Olano*'s subjective fourth factor — which he quoted in full no fewer than five times[55] — confirms it. Justice Breyer consistently framed and evaluated the results under both the time-of-error and time-of-review interpretations in terms of equity and practical consequences. For example, he reasoned that a time-of-error interpretation "would bring about unjustifiably different treatment of similarly situated individuals,"[56] while a time-of-review interpretation "would treat [those] defendants alike."[57] His use of

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[50] *Id.*

[51] *Id.* at 1135.

[52] *See id.*

[53] *See* Rory Little, *Train Wreck Avoided: Plain Errors May Be Corrected Even when "Plain" Only on Appeal*, SCOTUSBLOG (Feb. 25, 2013, 11:36 AM), http://www.scotusblog.com/2013/02/train-wreck-avoided-plain-errors-may-be-corrected-even-when-plain-only-on-appeal (noting the peculiarity of the attention the Justices devoted to this particular case).

[54] *Henderson*, 133 S. Ct. at 1129 (emphasis added).

[55] *Id.* at 1126, 1127, 1128, 1129, 1130.

[56] *Id.* at 1127.

[57] *Id.* at 1128; *see also id.* at 1129 ("[T]he competing 'time of error' rule . . . creates unfair and anomalous results . . . .").

precedent followed this pragmatic path as well: Justice Breyer suggested that *Johnson* leads to a time-of-review interpretation because of that case's common-sense implications, not because *Johnson*'s reasoning itself demands it.[58]

In contrast to Justice Breyer's extension of *Olano*'s subjective language, Justice Scalia argued for a bright-line rule that could be predictably applied by courts and critiqued the majority for instead believing that its task in *Henderson* was "the exalted philosophical one of deciding where justice lies."[59] To him, Rule 51(b) is actually at the heart of this case,[60] as it sets up the general principle that Rule 52(b) merely modifies: "a party does *not* preserve a claim of error . . . unless he informs the court or objects to the court's action when the ruling or order is made or sought."[61] Where Justice Breyer relied on loftier principles of equality in the absence of an answer in the text,[62] Justice Scalia simply expanded the text. With Rule 51(b) as the focus of his analysis, Rule 52(b)'s role as an *exception* was naturally emphasized.[63] As a result, Justice Scalia seemed merely to tolerate plain error review, at least when it does not "thwart the objective of causing objections to be made when they can do some good."[64] Throughout his dissent, Justice Scalia repeatedly returned to the issue of proper objections to trial errors.[65] To Justice Scalia, a plain error test can be correct only if it preserves the best system for inducing timely objections, as his priority remains "the orderly administration of justice that underlies the contemporaneous objection rule."[66]

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[58] *See id.* at 1127.

[59] *Id.* at 1131 (Scalia, J., dissenting).

[60] Notably, though Justice Breyer's majority opinion noted that Rule 52(b) is an exception to the general rule, it did not cite Rule 51(b).

[61] *Henderson*, 133 S. Ct. at 1131 (Scalia, J., dissenting).

[62] To be sure, Justice Breyer might well have made this choice even if Rule 52(b) had provided more fodder for a textual interpretation.

[63] In fact, though the dissent is several pages shorter than the majority opinion, Justice Scalia used the word "exception" six times to Justice Breyer's two. Despite his emphasis on Rule 52(b)'s role as an exception, Justice Scalia did not articulate a clear reason for why it exists in the first place. He called it "a limitation designed to induce trial objections that will assist the court," *Henderson*, 133 S. Ct. at 1136 (Scalia, J., dissenting), but it is Rule 51(b) that provides the incentive to object at trial. As an *exception* to Rule 51(b), Rule 52(b) does not itself induce objections. While it may be a limitation of some kind, Rule 52(b) in fact allows defendants to get away with *not* objecting.

[64] *Id.* at 1131–32.

[65] *See, e.g.*, *id.* at 1132 ("[A] plain-error doctrine of this sort cannot possibly induce counsel to make contemporaneous objection . . . ."); *id.* at 1133 ("When the law is settled against a defendant at trial he is not remiss for failing to bring his claim of error to the court's attention. It would be futile. An objection would therefore disserve efficiency . . . .").

[66] *Id.* at 1133 (quoting United States v. David, 83 F.3d 638, 644 (4th Cir. 1996)) (internal quotation mark omitted).

The majority and dissenting opinions in *Henderson* thus represent a paradigmatic example of the diametrically opposed jurisprudential philosophies of these two Justices — a dynamic also reflected in other cases. Justice Breyer believes that judges "should consider the purposes of the legal provision in question and the practical consequences of various possible interpretations."[67] He disfavors "wooden doctrinal formulas and rigid rules," arguing that judges "frequently need to balance a variety of factors, make pragmatic judgments, and see matters of degree as dispositive."[68] Justice Scalia, meanwhile, famously prefers bright-line rules that courts can apply predictably across a multitude of cases.[69] After all, he says, "[p]redictability . . . is a needful characteristic of any law worthy of the name."[70] In fact, he values rules so strongly that he argues that "[t]here are times when even a bad rule is better than no rule at all."[71] These opposing interpretive philosophies predictably result in frequent disagreement: in the Court's 2012 Term, both Justice Scalia and Justice Breyer disagreed with each other more often than with any other Justice.[72]

The persistent difference between Justice Breyer's pragmatic, standards-based approach and Justice Scalia's rules-based approach has been evident in several recent cases — including *Henderson* — in which the Court has effectively bolstered the constitutional guarantee of effective assistance of counsel through standards-based, nonconstitutional means. In 2010's *Holland v. Florida*[73] (also featuring a majority opinion by Justice Breyer), the Court held that an attorney's failure to comport with fundamental standards of professional responsibility might be cause for equitable tolling of the one-year statute of limitations on federal habeas petitions.[74] Justice Scalia dissented, objecting to a "transparent attempt to smuggle *Strickland* [*v.*

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[67] Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675, 1688 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY (2005)).

[68] *Id.* Critics, of course, warn that Justice Breyer's purposive approach can create "judicial subjectivity and legal indeterminacy." *Id.* at 1689; *see, e.g.*, Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE L.J. 1719, 1735 (2006) (reviewing BREYER, *supra* note 67) ("Breyer pays too little attention to the risk that any judgments about reasonableness will be the judges' own . . . .").

[69] *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997); Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). For an example of Justice Scalia replacing a substantive justice framework that required some subjective judgments with a bright-line procedural-consistency rule, see his opinion for the Court in *Crawford v. Washington*, 541 U.S. 36 (2004), which abrogated *Ohio v. Roberts*, 448 U.S. 56 (1980).

[70] Scalia, *supra* note 69, at 1179.

[71] *Id.*

[72] *The Supreme Court, 2012 Term — The Statistics*, 127 HARV. L. REV. 408, 410 tbl.1(B1) (2013).

[73] 130 S. Ct. 2549 (2010).

[74] *See id.* at 2562–65.

Washington] into a realm the Sixth Amendment does not reach."[75] The Court followed *Holland* in 2012's *Maples v. Thomas*,[76] holding that a prisoner whose attorneys had abandoned him without notice could not be bound by their procedural failures.[77] Justice Scalia again dissented, arguing that because defendants do not have the constitutional right to counsel in postconviction proceedings, clients "bear[] the risk of all attorney errors made in the course of the representation, regardless of the egregiousness of the mistake."[78] And in *Henderson*, the Court compensated for the mistake of an attorney who could have and arguably *should* have objected to the trial court's error.[79] In each of these cases, the Court relied on ideas of substantive individual fairness to effectively offer an additional claim to a small subset of prisoners whose attorneys had erred,[80] while Justice Scalia expressed a preference for a rule that could increase the predictability of courts' decisions. But *Henderson* is paradigmatic: with little textual help from Rule 52(b) and few cases of precedential value, the opinions are deeply reflective of the Justices' individual interpretive persuasions.[81] *Henderson* thus sharpens and illuminates the frequent divide between Justice Breyer's pragmatic, purposive consideration of practical consequences and Justice Scalia's emphasis on "the rule of law as a law of rules."[82]

Yet the two *Henderson* opinions also have more in common than is readily apparent: fundamentally, both engage in restricting and defining courts' use of Rule 52(b). Justice Scalia explicitly advocates a rule that would prevent the extension of Rule 52(b) by limiting the tem-

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[75] *Id.* at 2575 (Scalia, J., dissenting). *Strickland v. Washington*, 466 U.S. 668 (1984), provides the test for evaluating claims of ineffective assistance of counsel.

[76] 132 S. Ct. 912 (2012). Justice Breyer joined Justice Ginsburg's majority opinion.

[77] *Id.* at 927.

[78] *Id.* at 930 (Scalia, J., dissenting).

[79] As the trial court's decision was, at best, not clearly correct, Henderson's counsel had the incentive to object that the *Johnson* defense counsel lacked.

[80] The *Strickland* standard, in addition to applying only where defendants have a constitutional right to counsel, is notoriously difficult for many defendants to overcome. *See, e.g.*, Kenneth Williams, *Does* Strickland *Prejudice Defendants on Death Row?*, 43 U. RICH. L. REV. 1459, 1461 (2009) ("The [*Strickland*] prejudice standard has proven to be so onerous that few defendants are able to satisfy it."). *But see, e.g.*, Robert R. Rigg, *The T-Rex Without Teeth: Evolving* Strickland v. Washington *and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77, 97 (2007) (arguing that "the Court has given teeth to the test for ineffective assistance" by beginning to use American Bar Association standards "as a means to measure a lawyer's performance in death penalty cases").

[81] Justice Breyer's plain error framework, based on the subjective language of *Olano*, stands in especially stark contrast to Justice Scalia's belief in the need for consistent rules. After all, the judicial manageability of *Olano*'s "seriously affect[s]" language is certainly doubtful, and *Olano* applies that standard to not one but three vague values in its fourth factor. *See* United States v. Olano, 507 U.S. 725, 732 (1993) (alteration in original) (quoting United States v. Young, 470 U.S. 1, 15 (1985)).

[82] *See generally* Scalia, *supra* note 69.

poral circumstances in which plain error review is available. And although Justice Breyer takes an approach that uses standards instead of rules, he also affirms a doctrine that presumes an inherently limited use of Rule 52(b). *Olano*'s fourth factor — the most subjective, and the only one not found in the text of Rule 52(b) — helps courts to decide when plain error review is appropriate by giving them an *additional* consideration that must be met. And even then, the rule is permissive, not mandatory.[83] By continuing to define the scope of plain error review in the context of the *Olano* factors — even though it appears to expand the doctrine's scope here — Justice Breyer's opinion joins a jurisprudence that in fact deliberately limits the circumstances in which Rule 52(b) applies.

Alternative approaches to Rule 52(b) illuminate this common ground between the *Henderson* majority and dissent. For example, in *United States v. Marcus*,[84] Justice Stevens would have eliminated the Court's plain error formula entirely, allowing the applicability of Rule 52(b) to hinge only on whether the defendant's substantial rights were affected. He argued that "[t]he Federal Rules . . . set forth a unitary standard, which turns on whether the error in question affected substantial rights . . . , and they leave it to judges to figure out how best to apply that standard."[85] Given this alternative interpretation of Rule 52(b)[86] — which would not restrict the rule's application at all beyond the issue of substantial rights — it seems evident that the *Henderson* majority and dissent, though an excellent example of the great divide between Justice Breyer and Justice Scalia, share a piece of the same foundation: both assume that Rule 52(b) should be a restricted exception to the general rule that claims of error must be preserved at trial.

Henderson offers an especially clear example of a dispute between two interpretive philosophies that are often at odds on the Court. Yet the disagreement in the foreground hides a point of agreement in the background — a shared presumption that plain error review should continue to be used in limited circumstances.

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[83] *See Olano*, 507 U.S. at 735. The *Olano* Court did say at one point, though, that an appellate court "should" correct errors that meet all four *Olano* requirements. *Id.* at 736.

[84] 130 S. Ct. 2159 (2010). Notably, Justice Breyer wrote the *Marcus* majority opinion, and Justice Scalia joined it.

[85] *Id.* at 2168–69 (Stevens, J., dissenting). Justice Stevens also lamented that the "Court's ever more intensive efforts to rationalize plain-error review may have been born of a worthy instinct. But they have trapped the appellate courts in an analytic maze that, I have increasingly come to believe, is more liable to frustrate than to facilitate sound decisionmaking." *Id.* at 2169.

[86] While Justice Scalia in *Henderson* expanded his analysis of Rule 52(b)'s text to consider Rule 51(b), Justice Stevens in *Marcus* considered Rule 52(a) instead: "[T]he language of Rule 52(b) is straightforward. It states simply: 'A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.' This is the mirror image of Rule 52(a), which instructs courts to disregard any error 'that does not affect substantial rights.'" *Id.* at 2168 (first quoting FED. R. CRIM. P. 52(b), then quoting FED. R. CRIM. P. 52(a)).