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PLAIN ERROR RULE—CLARIFYING PLAIN ERROR ANALYSIS UNDER RULE 52(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

United States v. Olano, 113 S. Ct. 1770 (1993)

I. INTRODUCTION

In *United States v. Olano*,¹ the United States Supreme Court held that the presence of alternate jurors during jury deliberations was not an error that the court of appeals could correct under Rule 52(b) of the Federal Rules of Criminal Procedure.² The Court articulated a four-step analysis of plain error review under Rule 52(b).³ It decided that under that analysis, the defendants needed to show that the presence of alternates during deliberations prejudiced their defense, either specifically or presumptively, before a reviewing court could correct the error pursuant to the Rule.⁴ After rejecting the court of appeals' determination that the error was "inherently prejudicial," the Court found that the defendants did not meet their burden of showing prejudice and that the appellate court therefore had no authority to reverse the defendants' convictions.⁵

After reviewing the history of plain error review as it has evolved from the common law to Rule 52(b), this Note argues that *Olano* was a poor case to use to clarify plain error review. This Note then examines the purpose of the plain error rule and argues that *Olano*, by rejecting the miscarriage of justice standard for applying Rule 52(b), disserves this purpose. Finally, this Note evaluates the Court's application of Rule 52(b) to the Respondents' case, arguing that the Court's ad hoc approach is consistent with the history and

¹ 113 S. Ct. 1770 (1993).

² *Id.* at 1781.

³ *Id.* at 1777-79.

⁴ *Id.* at 1780.

⁵ *Id.* at 1781.

purpose of the Rule but inconsistent with the Court's more ambitious goal of drawing an analytical blueprint of plain error review.

II. BACKGROUND

Rule 52(b) of the Federal Rules of Criminal Procedure was drafted as a restatement of the common law.⁶ The United States Supreme Court recognized the "plain error doctrine," the common law predecessor of Rule 52(b), at least as far back as 1896. In *Wiborg v. United States*,⁷ Chief Justice Fuller stated that "if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it" even though the defendants in the case had not "duly excepted" to the error at trial.⁸ The Court reaffirmed this formulation of the doctrine in *Clyatt v. United States*,⁹ stating that although defendant's counsel did not make a motion for the jury to find the defendant not guilty, *Wiborg* allowed the Court to determine whether a plain error had been committed "in a matter so vital to the defendant."¹⁰

Forty years after *Wiborg*, the Court offered a different articulation of the plain error doctrine. In *United States v. Atkinson*,¹¹ the Court explained that "[i]n exceptional circumstances, especially in criminal cases, appellate courts . . . may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."¹² The *Atkinson* Court did not cite or discuss *Wiborg*, but the *Atkinson* standard seemed to shift the focus of plain error inquiry from the impact of the error on the defendant to the impact of the error on the judicial process.¹³

Rule 52(b) codified the plain error rule in still different terms, providing that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of

⁶ See FED. R. CRIM. P. 52(b) advisory committee's note ("This rule is a restatement of existing law . . .").

⁷ 163 U.S. 632 (1896).

⁸ *Id.* at 658-59. The Court reviewed the record of the case and decided that the two defendants should have been acquitted of the charges against them: "We are of the opinion that adequate proof . . . is not shown by the record, and that as the case stood the jury should have been instructed to acquit them." *Id.* at 659. See *infra* text accompanying notes 128-31.

⁹ 197 U.S. 207 (1905).

¹⁰ *Id.* at 221-22 (citing *Wiborg*, 163 U.S. at 658). As in *Wiborg*, the *Clyatt* Court reviewed the record and decided that the evidence did not support the verdict. *Id.* at 222.

¹¹ 297 U.S. 157 (1936).

¹² *Id.* at 160.

¹³ See *infra* part V.B.

the court.”¹⁴ The Rule did not explain or define the concepts of “plain error” or “affecting substantial rights,” although the advisory committee’s notes indicated that the Rule was meant to codify the doctrine articulated in *Wiborg*.¹⁵

In *United States v. Frady*,¹⁶ the Supreme Court addressed the plain error rule as codified in Rule 52(b).¹⁷ *Frady* involved a motion filed under 28 U.S.C. § 2255¹⁸ seeking to vacate Joseph Frady’s first degree murder conviction on the grounds that the trial court’s jury instructions erroneously required the jury to presume malice, thereby eliminating any chance Frady had of securing a manslaughter conviction.¹⁹ The Court held that Rule 52(b) did not apply to prisoners bringing collateral attacks against criminal convictions.²⁰ Although the Court did not apply Rule 52(b) in *Frady*, the majority did note in dicta that the Rule “grants the courts of appeals the latitude to correct particularly egregious errors on appeal regardless of a defendant’s trial default.”²¹ The Court explained that “Rule 52(b) was intended to afford a means for the prompt redress of miscarriages of justice”²² and noted approvingly that the courts of appeals have “recognized that the power granted to them by Rule 52(b) is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.”²³

In *United States v. Young*,²⁴ the Court reiterated *Frady*’s “miscarriage of justice” standard for applying Rule 52(b) and added that “[a]ny unwarranted extension of this exacting definition of plain er-

¹⁴ FED. R. CRIM. P. 52(b). Rule 52 provides:

(a) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

¹⁵ FED. R. CRIM. P. 52(b) advisory committee’s note. The note specifically cites *Wiborg* after explaining that the Rule is a restatement of existing law.

¹⁶ 456 U.S. 152 (1982).

¹⁷ *Id.* at 163.

¹⁸ Section 2255 provides in relevant part:

[A] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.

²⁸ U.S.C. § 2255 (1988).

¹⁹ *Frady*, 456 U.S. at 158.

²⁰ *Id.* at 166.

²¹ *Id.* at 163.

²² *Id.* (footnote omitted). In the omitted footnote, the Court also cited the *Atkinson* formulation of the plain error doctrine. *Id.* at 163 n.13.

²³ *Id.* at n.14 (citing *United States v. Gerald*, 624 F.2d 1291, 1299 (5th Cir. 1980) and *United States v. DiBenedetto*, 542 F.2d 490, 494 (8th Cir. 1976)).

²⁴ 470 U.S. 1 (1985).

ror would skew the Rule's 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.'"²⁵ The respondent in *Young* had appealed his convictions of mail fraud and making false statements to a government agency on the ground that the prosecutor's closing statement unfairly prejudiced him.²⁶ Since *Young* had not objected to the remarks at trial, the Court determined that the principal issue in the case was whether the prosecutor's comments constituted "plain error" that a reviewing court could correct absent timely objection.²⁷ The majority in *Young* quoted both the *Atkinson* and the miscarriage of justice standards in describing plain error review under Rule 52(b), indicating that the Court considered the two standards to be synonymous.²⁸ The *Young* Court emphasized that "a reviewing court cannot properly evaluate a case [for plain error under Rule 52(b)] except by viewing such a claim against the entire record."²⁹ Explaining that "each case necessarily turns on its own facts,"³⁰ the Court decided that in light of the facts presented in *Young*, the prosecutor's remarks did not "rise to the level of plain error."³¹

The *Young* Court also maintained that the federal appellate courts had "consistently interpreted" the plain error doctrine to require a two-part inquiry.³² According to the Court, the appellate courts' interpretation of Rule 52(b) required them to determine first whether the error seriously affected substantial rights and then whether the error had an unfair prejudicial impact on the jury's deliberations.³³ Only after such an analysis, the Court maintained,

²⁵ *Id.* at 15 (quoting *Frady*, 456 U.S. at 163).

²⁶ *Id.* at 6.

²⁷ *Id.*

²⁸ *Id.* at 15 (citing *United States v. Atkinson*, 297 U.S. 157, 160 (1936) and *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)).

²⁹ *Id.* at 16.

³⁰ *Id.* (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 240 (1940)).

³¹ *Id.*

³² *Id.* at 16 n.14.

³³ *Id.* *Young's* suggestion that appellate courts have "consistently interpreted" the plain error rule is misleading. As Professor Charles Alan Wright has noted in his discussion of appellate court treatment of Rule 52(b), there are "no 'hard and fast classifications in either the application of the principle or the use of a descriptive title.'" 3A CHARLES A. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 856 (2d ed. 1982) (quoting *Dupont v. United States*, 388 F.2d 39, 45 (5th Cir. 1968)). For examples of appellate court cases that do not apply the two-step plain error analysis outlined in *Young*, see *United States v. Stout*, 667 F.2d 1347, 1354 (11th Cir. 1982); *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018 (1982); *Eaton v. United States*, 398 F.2d 485, 486 (5th Cir.), *cert. denied*, 393 U.S. 937 (1968); *Page v. United States*, 282 F.2d 807, 810 (8th Cir. 1960). See also 3 WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 26.5 (1984) ("Opinions frequently stress that 'no talismanic method

could appellate courts "conclude that the error undermined the fairness of the trial and contributed to a miscarriage of justice."³⁴ Although the Court characterized this two-part analysis favorably, it did not mandate that reviewing courts follow such an approach when applying the Rule.³⁵

In *United States v. Olano*, the Court for the first time set forth a framework for plain error review under Rule 52(b) and addressed the differences between the *Atkinson* and the miscarriage of justice standards for correcting errors under the Rule.

III. FACTUAL AND PROCEDURAL HISTORY

In 1986, Guy W. Olano, Jr. and Raymond M. Gray were indicted on numerous federal charges for participating in an intricate scheme to defraud several savings and loan institutions.³⁶ Olano was the chairman of Alliance Federal Savings and Loan Association in Kenner, Louisiana, and Gray was the chairman of Home Savings and Loan Association in Seattle, Washington.³⁷ The jury trial of Olano, Gray, and five co-defendants began in the Western District of Washington on March 2, 1987.³⁸ During pretrial proceedings, the parties agreed that fourteen jurors—twelve regular jurors and two alternates—would hear the case.³⁹ The prosecution and the defense each reserved one peremptory challenge to be used at the end of the trial.⁴⁰ The two jurors challenged at the end of the trial were to be the alternates.⁴¹

On May 26, near the end of the three-month trial, District Court Judge Barbara J. Rothstein suggested to the defendants that the two alternate jurors be allowed to remain with the regular jurors during deliberations:

My last question, and I'd just like you to think about it, you have a day, let me know, it's just a suggestion and you can—if there is even one person who doesn't like it we won't do it, but it is a suggestion that other courts have followed in long cases where jurors have sat through a lot of testimony, and that is to let the alternates go in but not partici-

exists for determining plain error,' and each case must be examined on its own facts.") (footnote and citations omitted).

³⁴ *Young*, 470 U.S. at 16 n.14.

³⁵ *Id.*

³⁶ *United States v. Olano*, 113 S. Ct. 1770, 1774 (1993).

³⁷ *United States v. Olano*, 934 F.2d 1425, 1428 (9th Cir. 1991).

³⁸ Brief for Respondent Guy W. Olano, Jr. at 2, *United States v. Olano*, 113 S. Ct. 1770 (1993) (No. 91-1306) [hereinafter Brief for Olano].

³⁹ *Olano*, 113 S. Ct. at 1774.

⁴⁰ Brief for Olano at 2, *Olano* (No. 91-1306).

⁴¹ *Id.*

pate, but just to sit in on deliberations.⁴²

The next day, the court raised the issue again, and the following cryptic colloquy took place:

THE COURT: [H]ave you given any more thought as to whether you want the alternates to go in and not participate, or do you want them out?

MR. ROBISON [counsel for Gray]: We would ask they not.

THE COURT: Not.⁴³

One day later, on the last day of the trial, the court again asked whether the defendants agreed to the court's proposal to allow the alternate jurors to sit in on deliberations:

THE COURT: Well, counsel, I received your alternates. Do I understand that the defendants now—it's hard to keep up with you, Counsel. It's sort of a day by day—but that's all right. You do all agree that all fourteen deliberate?

[No record of response.]

Okay. Do you want me to instruct the two alternates not to participate in deliberation?

MR. KELLOGG [counsel for co-defendant Hilling]: That's what I was on my feet to say. It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations.⁴⁴

All three discussions concerning the alternate jurors took place outside the presence of the jury but in the presence of both Gray's counsel and Olano's counsel.⁴⁵ Gray was present at all three discussions, but Olano, who attended the first two, may not have attended the third.⁴⁶ At the end of the final day of the trial the court told the jury: "[W]hat we would like to do in this case is have all of you go back so that even the alternates can be there for the deliberations, but according to the law, the alternates must not participate in the deliberations."⁴⁷ The court then announced the identity of the alternate jurors, and the jury retired to deliberate.⁴⁸ The next day the court excused one of the alternate jurors at the juror's request, but the other alternate remained with the jury throughout the deliberations.⁴⁹

On June 3, 1987, the jury returned a verdict convicting Olano on eight of the nine counts with which he was charged and Gray on

⁴² *Id.*

⁴³ *Olano*, 113 S. Ct. at 1774.

⁴⁴ *Id.* at 1774-75.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

all eight of the counts with which he was charged.⁵⁰ Gray and Olano appealed to the United States Court of Appeals for the Ninth Circuit.⁵¹ The court of appeals reversed, holding that the evidence was insufficient to convict Olano on two counts and Gray on three counts.⁵² The court vacated the convictions on the remaining counts after determining that the presence of alternate jurors during jury deliberations was reversible error under Rules 24(c) and 52(b) of the Federal Rules of Criminal Procedure.⁵³ Because the defendants did not object to the alternates' presence, the court of appeals applied a "plain error analysis" under Rule 52.⁵⁴ The court decided that Rule 24(c) prohibits alternate jurors from attending deliberations unless the defendants personally consent on the record to a waiver of their right to exclude alternate jurors from jury deliberations.⁵⁵ Since the district court did not obtain "individual waivers" from each defendant agreeing to the presence of alternate jurors during deliberations, the court of appeals held that the district court violated Rule 24(c).⁵⁶ The court then went on to hold that such a violation was "inherently prejudicial," stating that "facial expressions, gestures or the like" may affect the decision of one or more jurors and that "[t]he presence of alternate jurors, even if they are instructed not to participate, infringes upon the jury's privacy and the secrecy of the jury process."⁵⁷ The court of appeals concluded that the violation of Rule 24(c) "require[d] a reversal of the verdict" under the plain error doctrine of Rule 52(b).⁵⁸

The United States Supreme Court granted certiorari⁵⁹ on May 18, 1992 to "clarify the standard for 'plain error' review by the Courts of Appeals under Rule 52(b)."⁶⁰

⁵⁰ Brief for Olano at 4, *Olano* (No. 91-1306).

⁵¹ *United States v. Olano*, 934 F.2d 1425, 1427 (9th Cir. 1991).

⁵² *Id.* at 1428.

⁵³ *Id.* Rule 24(c) provides in part that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." FED. R. CRIM. P. 24(c).

⁵⁴ *Olano*, 934 F.2d at 1436.

⁵⁵ *Id.* at 1436-37.

⁵⁶ *Id.* at 1438.

⁵⁷ *Id.* (citing *United States v. Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964)).

⁵⁸ *Id.* at 1439.

⁵⁹ *United States v. Olano*, 112 S. Ct. 1935 (1992).

⁶⁰ *United States v. Olano*, 113 S. Ct. 1770, 1776 (1993).

IV. THE SUPREME COURT OPINIONS

A. THE MAJORITY OPINION

After reviewing the facts of the case, Justice O'Connor, writing for the majority,⁶¹ explained that Rule 52(b) "provides the Courts of Appeals with a limited power to correct errors that were forfeited because not timely raised in the District Court."⁶² Justice O'Connor then examined the basic principles of such "plain error review" with a four-step analysis of Rule 52(b).⁶³ According to this analysis, Rule 52(b) requires that there be an "error," that the error be "plain," and that the error " 'affect[] substantial rights' " before courts may correct the error.⁶⁴ The fourth step in the analysis is the application of a "standard" to guide appellate courts' exercise of remedial discretion under the Rule.⁶⁵

In analyzing the first element, Justice O'Connor stated that "[d]eviation from a legal rule is 'error' unless the rule has been waived."⁶⁶ Waiver, Justice O'Connor noted, is not forfeiture.⁶⁷ Forfeiture is "the failure to make the timely assertion of a right," whereas waiver is the " 'intentional relinquishment or abandonment of a known right.' "⁶⁸ Justice O'Connor also noted that forfeiture, unlike waiver, does not extinguish "errors" under the plain error rule.⁶⁹ She concluded that if the district court violated a legal rule during trial proceedings, and if the defendant did not waive the rule, then there is an "error" within the meaning of Rule 52(b).⁷⁰

The Court explained the second element by noting simply that "plain" is synonymous with both "clear" and "obvious," and that the appellate courts cannot correct errors under Rule 52(b) unless those errors are "clear under current law."⁷¹

The Court addressed the third element by stating that an error "affect[ing] substantial rights" means in most cases that the error was prejudicial; that is, that the error "affected the outcome of the District Court proceedings."⁷² The majority held that the defend-

⁶¹ Justice O'Connor delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Scalia, Kennedy, Souter, and Thomas joined.

⁶² *Olano*, 113 S. Ct. at 1776.

⁶³ *Id.* at 1776-79.

⁶⁴ *Id.* at 1777-78.

⁶⁵ *Id.* at 1778-79.

⁶⁶ *Id.* at 1777.

⁶⁷ *Id.*

⁶⁸ *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 1777-78.

ant rather than the government bears the burden of showing prejudice.⁷³ While acknowledging that "[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome" of a case, Justice O'Connor declined to discuss this special category of errors.⁷⁴ The Court also declined to decide whether the defendant is always required to make a specific showing of prejudice to satisfy the "substantial rights" prong of Rule 52(b), indicating that the prejudice requirement applied in this case.⁷⁵

The majority then considered when a reviewing court should correct errors pursuant to Rule 52(b).⁷⁶ Justice O'Connor noted that Rule 52(b) is permissive rather than mandatory.⁷⁷ According to Justice O'Connor, Rule 52(b) gives courts of appeals the authority to order the correction of plain errors affecting substantial rights, but they are not required to do so.⁷⁸ She maintained that the Court had articulated the standard that should guide appellate courts in their "exercise of remedial discretion under Rule 52(b)" in *United States v. Atkinson*.⁷⁹ Quoting *Atkinson*, Justice O'Connor stated that courts of appeals "should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"⁸⁰ The Court maintained that an error may seriously affect the fairness, integrity or public reputation of a judicial proceeding independent of a defendant's innocence. Justice O'Connor noted that in *Frady* and *Young* the Court had specified that reviewing courts should correct plain errors under Rule 52(b) "in those circumstances in which a miscarriage of justice would otherwise result."⁸¹ Explaining that the phrase "miscarriage of justice" means that the defendant is "actually innocent," the majority rejected the notion that a Rule 52(b) remedy is warranted only to avoid miscarriages of justice.⁸²

Having articulated a four-part outline of plain error review under Rule 52(b), the Court applied the principles of that analysis to the case of Olano and Gray.⁸³ Justice O'Connor noted that allowing alternate jurors to sit in on jury deliberations was "no doubt a devia-

⁷³ *Id.* at 1778.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 1779 (citing *United States v. Atkinson*, 297 U.S. 157 (1936)).

⁸⁰ *Id.* (quoting *Atkinson*, 297 U.S. at 160).

⁸¹ *Id.* (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)).

⁸² *Id.* See *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982).

⁸³ *Id.*

tion from Rule 24(c)" since the Rule explicitly provides that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." ⁸⁴ The Court declined to decide, however, whether such a deviation was a "plain error," noting that the United States had conceded that the deviation was both "plain" and an "error."⁸⁵ The Court therefore focused exclusively on the "substantial rights" prong of Rule 52(b).⁸⁶

In analyzing the substantial rights issue, Justice O'Connor determined that "[t]he presence of alternate jurors during jury deliberations is not the kind of error that 'affect[s] substantial rights' independent of its prejudicial impact."⁸⁷ According to Justice O'Connor, the presence of alternate jurors during the jury deliberations does violate the "cardinal principle that the deliberations of the jury shall remain private and secret," but such a violation does not by itself warrant correction since the primary purpose of jury privacy is to protect the deliberations from improper influence.⁸⁸

The important question, Justice O'Connor decided, is whether the violation of Rule 24(c) "prejudiced respondents, either specifically or presumptively."⁸⁹ She noted that allowing alternate jurors to sit in on deliberations might prejudice a defendant in two different ways: the alternates might actually have participated in the deliberations; or the alternates' presence might have exerted a "chilling" effect on the regular jurors.⁹⁰ The Court held that Olano and Gray did not show that the presence of the alternate jurors prejudiced them in either of these ways.⁹¹ The majority also refused to presume prejudice, deciding that the court of appeals was incorrect in finding that the presence of alternates during jury deliberations was "inherently prejudicial."⁹² Justice O'Connor pointed out that the two alternate jurors were "indistinguishable" from the regular jurors until the end of the trial and that the district court specifically instructed the alternate jurors not to participate in the deliberations.⁹³ Quoting language from *Francis v. Franklin*,⁹⁴ Justice O'Connor stated that reviewing courts should presume that jurors

⁸⁴ *Id.* (quoting FED. R. CRIM. P. 24(c)).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1779-80 (quoting FED. R. CRIM. P. 23(b) advisory committee's note).

⁸⁹ *Id.* at 1780.

⁹⁰ *Id.*

⁹¹ *Id.* at 1781.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ 471 U.S. 307 (1985).

strive to understand and follow the instructions given to them.⁹⁵ The court of appeals in this case, therefore, should not have presumed that the district court's instructions were contravened.⁹⁶

Finally, the majority decided that the presence of alternate jurors did not entail a "sufficient risk of 'chill'" to warrant a presumption of prejudice.⁹⁷ Having concluded that the respondents failed to meet their burden of showing prejudice under Rule 52(b), the Court reversed the judgment of the Ninth Circuit without deciding whether the district court's violation of Rule 24(c) would have warranted correction under the *Atkinson* standard.⁹⁸

B. JUSTICE KENNEDY'S CONCURRENCE

In a brief and enigmatic concurrence, Justice Kennedy joined the majority opinion and added a statement expressing his "own understanding" of the majority's holding.⁹⁹ Justice Kennedy first noted that the majority's opinion is carefully phrased to emphasize that "burden of proof concepts are the normal or usual mode of analysis of error under Rule 52."¹⁰⁰ Presumably Justice Kennedy was referring to the Court's discussion of the differences between harmless error review under Rule 52(a) and plain error review under Rule 52(b). The majority had explained that under Rule 52(a) the government has the burden of persuading the reviewing court that the error was not prejudicial whereas under Rule 52(b) the defendant carries that burden.¹⁰¹ Justice Kennedy argued that "other rules may apply where the aggrieved party has not raised the issue," but he did not explain which rules may apply to such cases, noting only that in most cases the aggrieved party will raise the alleged error on appeal.¹⁰² Justice Kennedy maintained that in "that context" the majority's analysis was helpful because it gave "operative effect" to the differences in Rule 52 analysis between cases where a party preserves an objection and cases where a party does not.¹⁰³

Justice Kennedy also observed that the majority did not question the assumption that permitting alternates in the jury room dur-

⁹⁵ *Olano*, 113 S. Ct. at 1781 (quoting *Franklin*, 471 U.S. at 324 n.9).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* (Kennedy, J., concurring).

¹⁰⁰ *Id.* at 1782 (Kennedy, J., concurring).

¹⁰¹ *Id.* at 1778.

¹⁰² *Id.* at 1782 (Kennedy, J., concurring).

¹⁰³ *Id.* (Kennedy, J., concurring).

ing deliberations was "error."¹⁰⁴ According to Justice Kennedy, there are "good reasons" to suppose that Rule 24(c) is the result of "a judgment that our jury system should be given a stable and constant structure, one that cannot be varied by a court with or without the consent of the parties."¹⁰⁵ Nevertheless, he agreed with the Court that Rule 52(b) does not allow a party to withhold an objection to alternate jurors during jury deliberations and then "demand automatic reversal" of the verdict.¹⁰⁶

C. THE DISSENTING OPINION

Writing for the dissent, Justice Stevens¹⁰⁷ argued that the district court had a "clear and unqualified duty" to dismiss the two alternate jurors at the end of the trial under Rule 24(c).¹⁰⁸ Justice Stevens disagreed with the majority's determination that Rule 24(c) errors "affect substantial rights" only when the errors prejudice a particular defendant.¹⁰⁹ According to the dissent, some errors concerning the jury's "deliberative function" warrant reversal regardless of whether the defendant can show prejudice because it is difficult to measure the effects of such errors on a jury's decision and because the errors "'undermin[e] the structural integrity of the criminal tribunal itself.'"¹¹⁰ Justice Stevens maintained that such errors may therefore "'seriously affect the fairness, integrity, or public reputation of judicial proceedings.'"¹¹¹

The dissent also noted that the phrase "substantial rights" appears in both Rule 52(a) and Rule 52(b).¹¹² On the assumption that the phrase has "the same meaning" in both parts of Rule 52, Justice Stevens argued that under the majority's understanding of "substantial rights," even a timely objection to the alternates' presence during jury deliberations would not have mandated reversal.¹¹³ Justice Stevens argued that the Rule 24(c) violation, according to the majority's view, would have warranted only harmless-error review since the majority believed that the error did not affect "substantial

¹⁰⁴ *Id.* (Kennedy, J., concurring).

¹⁰⁵ *Id.* (Kennedy, J., concurring).

¹⁰⁶ *Id.* (Kennedy, J., concurring).

¹⁰⁷ Justices White and Blackmun joined Justice Stevens in dissent.

¹⁰⁸ *Olano*, 113 S. Ct. at 1782 (Stevens, J., dissenting).

¹⁰⁹ *Id.* (Stevens, J., dissenting).

¹¹⁰ *Id.* at 1782-83 (Stevens, J., dissenting) (quoting *Vasquez v. Hillary*, 474 U.S. 254, 263-64 (1986) (prohibiting racial discrimination in the selection of grand jury members)).

¹¹¹ *Id.* at 1783 (Stevens, J., dissenting) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

¹¹² *Id.* (Stevens, J., dissenting).

¹¹³ *Id.* (Stevens, J., dissenting).

rights.”¹¹⁴ Justice Stevens believed that had the defendants objected to the alternates’ presence, and had the district court nevertheless allowed the jurors to be present in the jury room, reversal of the judgment “would have been the proper response, with or without a showing of prejudice.”¹¹⁵ Since in this case the defendants did not object to the alternates’ presence during the trial, and since Justice Stevens considered the violation of Rule 24(c) an error that “affected substantial rights,” Justice Stevens argued that Rule 52(b) required an inquiry into the appellate court’s exercise of remedial discretion.¹¹⁶ Noting that the courts of appeals are “allowed a wide measure of discretion in the supervision of litigation” in their circuits, Justice Stevens stated that he was “not persuaded that the Court of Appeals here abused its broad discretion” in reversing the judgment of the district court for violating Rule 24(c).¹¹⁷

V. ANALYSIS

This Note evaluates the Court’s attempt to clarify plain error review under Rule 52(b). This Note first argues that *Olano* was an ill-suited case for developing a four-part framework for Rule 52(b) analysis. Since the Court decided the case by focusing on one narrow issue, most of the elements of plain error review set out in *Olano* were unapplied and unnecessary to the resolution of the case. This Note then examines the purpose of plain error review and argues that Rule 52(b) is meant to allow appellate courts to correct miscarriages of justice. By abandoning the “miscarriage of justice” standard in favor of the *Atkinson* standard, the Court disserves the underlying purpose of the Rule. Finally, this Note argues that the Court’s circumscribed treatment of the “affecting substantial rights” element properly resolved the issue in *Olano* but failed to further the Court’s more ambitious goal of clarifying plain error review.

A. *OLANO* WAS AN INAPPROPRIATE CASE FOR SETTING OUT A COMPREHENSIVE OUTLINE OF RULE 52(b) ANALYSIS

The Supreme Court granted certiorari in *Olano* to “clarify the standard for ‘plain error’ review” under Rule 52(b).¹¹⁸ It is unclear whether by “standard” the Court meant the general analytical framework for applying Rule 52(b) or the principle that should

¹¹⁴ *Id.* (Stevens, J., dissenting).

¹¹⁵ *Id.* (Stevens, J., dissenting).

¹¹⁶ *Id.* (Stevens, J., dissenting).

¹¹⁷ *Id.* at 1783-84 (Stevens, J., dissenting) (citing *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199, 1209 n.24 (1993)).

¹¹⁸ *Id.* at 1776.

guide courts in their "exercise of remedial discretion" under the Rule.¹¹⁹ Under either interpretation, however, *Olano* was a poor case to use for clarifying plain error review.

The central problem with using *Olano* as an instrument for clarifying Rule 52(b) is that, under Justice O'Connor's analysis, *Olano* involved only one element of plain error review. According to Justice O'Connor, appellate courts applying Rule 52(b) needed to determine whether there was an "error," whether the error was "plain," whether the error "affected substantial rights," and whether the error "seriously affected the fairness, integrity or public reputation of judicial proceedings."¹²⁰ In *Olano* itself, however, the Court focused only on the substantial rights question.¹²¹ Since the Court was able to resolve *Olano* without applying the three other elements of plain error review, the Court's decision to discuss only the substantial rights issue was simply an exercise of judicial restraint. The unfortunate result is that the Court's articulation of the three other elements of plain error review is dicta that provides appellate courts with little guidance on how to apply *Olano*'s new framework for plain error review. Given the difficulty that appellate courts have had in developing a cogent and consistent understanding of "plain error," the Court's failure to apply the "plain" and "error" prongs of its new test is especially troubling.¹²² A case that required an inquiry into the definitions of "plain" and "error" as well as into the question of whether the error "seriously affected the fairness, integrity or public reputation of judicial proceedings" would have been much more appropriate for clarifying the Court's interpretation of the plain error rule.

B. *OLANO* MISCONSTRUES THE PURPOSE OF RULE 52(b)

The second significant problem with *Olano* is that the Court misconstrues the purpose of Rule 52(b) and thereby adopts the

¹¹⁹ *Id.* at 1777-79. Since, in the remainder of the opinion, the Court consistently uses "standard" to mean the principle that should guide an appellate court's exercise of remedial discretion (the "*Atkinson* standard," for example), that interpretation seems more probable. See *id.* at 1779, 1781.

¹²⁰ *Id.* at 1777-78.

¹²¹ *Id.* at 1778. The Court noted that the United States had conceded that the violation of Rule 24(c) was an "error" and had "essentially concede[d]" that the error was "plain." *Id.* at 1777. Because the Court decided that the error did not affect substantial rights, the Court did not consider whether the error would have warranted correction under the *Atkinson* standard. *Id.* at 1781.

¹²² Professor Wright has noted that appellate court cases "give the distinct impression that 'plain error' is a concept appellate courts find impossible to define, save that they know it when they see it." 3A WRIGHT, *supra* note 33 § 856.

wrong standard¹²³ for correcting errors under the Rule. Rule 52(b), as the *Olano* majority correctly noted,¹²⁴ was intended as a restatement of the existing law of plain error review.¹²⁵ As the Court itself explained in *Young*, the Advisory Committee's Notes on the Federal Rules indicate that Rule 52(b) restated existing law as set forth in *Wiborg v. United States*.¹²⁶ A close examination of the plain error doctrine in *Wiborg* reveals that the *Olano* Court should have adopted the miscarriage of justice standard rather than the standard laid down in *Atkinson*, which authorized the correction of errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings."¹²⁷

In *Wiborg*, the defendants failed to make a "motion or request" that the jury be instructed to acquit them.¹²⁸ Although the defendants did not properly raise the issue during the trial, the Supreme Court reversed the convictions of two of the three defendants on appeal, explaining that "if a plain error was committed in a matter *so absolutely vital to the defendants*, we feel ourselves at liberty to correct it."¹²⁹ The *Wiborg* Court made it clear that there was insufficient proof on the record to convict the two defendants and that the trial court should have instructed the jury to acquit them.¹³⁰ The plain error doctrine in *Wiborg*, therefore, allowed the Court to correct an error that was "so absolutely vital" to the defendants that the defendants were convicted on legally insufficient evidence.¹³¹ In the eyes of the law, the defendants in *Wiborg* were innocent.

The *Wiborg* articulation of the plain error doctrine has manifested itself in the "miscarriage of justice" standard that many appellate courts invoked when applying Rule 52(b).¹³² In plain error

¹²³ This Note uses "standard" to mean the principle "that should guide the exercise of remedial discretion under Rule 52(b)." *Olano*, 113 S. Ct. at 1779. This standard for applying Rule 52(b) is the fourth part of *Olano's* four-part analysis. *Id.* See *supra* note 119 and accompanying text.

¹²⁴ *Olano*, 113 S. Ct. at 1776.

¹²⁵ See *supra* note 6 and accompanying text.

¹²⁶ *United States v. Young*, 470 U.S. 1, 15 n.12 (1985) (citing FED. R. CRIM. P. 52(b) advisory committee's note; *Wiborg v. United States*, 163 U.S. 632 (1896)).

¹²⁷ *United States v. Atkinson*, 297 U.S. 157, 160 (1936).

¹²⁸ *Wiborg*, 163 U.S. at 658.

¹²⁹ *Id.* (emphasis added). In *Young*, the Court misquotes "matter" as "manner." *Young*, 470 U.S. at 15 n.12.

¹³⁰ *Wiborg*, 163 U.S. at 659.

¹³¹ *Id.* *Accord* *Clyatt v. United States*, 197 U.S. 207 (1905).

¹³² See, e.g., *United States v. Newman*, 965 F.2d 206, 213 (7th Cir.) (for courts to correct a plain error under Rule 52(b), the error must have been "likely to have made a difference in the judgment, so that failure to correct it could result in a miscarriage of justice, that is, in the conviction of an innocent person or the imposition of an erroneous sentence"), *cert. denied*, 113 S. Ct. 470 (1992); *United States v. Frazier*, 936 F.2d 262, 266

analysis the phrase "miscarriage of justice" means "the conviction of one who but for the error probably would have been acquitted."¹³³ Since the *Wiborg* Court reversed the convictions of two defendants "who but for the error probably would have been acquitted," the appellate courts that have invoked Rule 52(b) to prevent a "miscarriage of justice" have simply applied the traditional plain error doctrine as set forth in *Wiborg*.

An important policy consideration underlies the "miscarriage of justice" standard. As the Court of Appeals for the Seventh Circuit has explained, "[r]eversing a conviction on the basis of an error that the defendant's lawyer failed to bring to the judge's attention is inconsistent with the premises of an adversary system."¹³⁴ Put another way, the adversarial system depends upon each party's counsel to insure that his or her client receives a fair trial. The Supreme Court itself recognized this concern in *Young*.¹³⁵ After explicitly stating that the plain error rule should be used "sparingly, *solely* in those circumstances in which a miscarriage of justice would otherwise result,"¹³⁶ the Court maintained that "[a]ny unwarranted extension of this exacting definition of plain error would skew the Rule's 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.'" ¹³⁷ The "miscarriage of justice" standard for applying Rule 52(b) recognizes the premises of the adversarial system and is firmly grounded in the purpose underlying plain error review.

Despite the apparent appropriateness of the "miscarriage of justice" standard, the *Olano* Court rejected it in favor of the standard laid down in *Atkinson*.¹³⁸ The *Atkinson* standard authorizes appellate courts to correct errors that "seriously affect the fairness, integrity

(6th Cir. 1991) (describing plain error as "an egregious error, one that leads directly to a miscarriage of justice"); *United States v. Gollot*, 939 F.2d 255, 259 (5th Cir. 1991) (defining "plain error" to be "mistakes so fundamental as to constitute a miscarriage of justice"); *United States v. Neumann*, 887 F.2d 880, 882 (8th Cir. 1989) (plain error rule should be applied only when necessary to prevent a miscarriage of justice), *cert. denied*, 495 U.S. 949 (1990).

¹³³ *United States v. Silverstein*, 732 F.2d 1338, 1349 (7th Cir. 1984), *cert. denied*, 469 U.S. 1111 (1985).

¹³⁴ *Id.*

¹³⁵ *United States v. Young*, 470 U.S. 1, 15 (1985).

¹³⁶ *Id.* (emphasis added) (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)).

¹³⁷ *Id.* (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)).

¹³⁸ *United States v. Olano*, 113 S. Ct. 1770, 1779 (1993). See *supra* text accompanying notes 79-81.

or public reputation of judicial proceedings.”¹³⁹ Like many standards, the *Atkinson* standard and the miscarriage of justice standard are nebulous at the boundaries, and it is difficult to articulate the exact difference between the two. Nevertheless, as the *Olano* Court noted for the first time, the two are not the same.¹⁴⁰ Under the *Atkinson* standard, unlike under the miscarriage of justice standard, the plain errors that appellate courts can correct need not be so absolutely vital to the defendant that the defendant was wrongly convicted; that is, convicted of a crime that, at least in the eyes of the law, he did not commit.¹⁴¹ Under the *Atkinson* formulation, courts rather than counsel are entrusted with insuring the fairness, integrity, and public reputation of the judicial process. Under the miscarriage of justice standard, counsel shoulders most of that responsibility, with the reviewing court stepping in only to avoid the gross injustice of allowing the conviction of an innocent person to stand.¹⁴² Although the two standards involve fundamentally different conceptions of the importance of the adversarial system,¹⁴³ *Olano* failed to address this issue.¹⁴⁴

The *Olano* Court gave two reasons for adopting the *Atkinson* standard. The Court maintained that the *Atkinson* standard was “codified in Federal Rule of Criminal Procedure 52(b)”¹⁴⁵ and that “we repeatedly have quoted the *Atkinson* language in describing plain-error review.”¹⁴⁶ Neither of these arguments is convincing enough to warrant the abandonment of the miscarriage of justice standard. The Court’s claim that Rule 52(b) codified the *Atkinson* standard is controverted by the Advisory Committee’s Notes¹⁴⁷ and the Court’s own statements in *Young*.¹⁴⁸ The argument that the

¹³⁹ *United States v. Atkinson*, 297 U.S. 157, 160 (1936).

¹⁴⁰ *Olano*, 113 S. Ct. at 1779.

¹⁴¹ *Id.* (“An error may ‘seriously affect the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.”) (quoting *Atkinson*, 297 U.S. at 160).

¹⁴² Judge Posner of the United States Court of Appeals for the Seventh Circuit has, in characteristic form, explained the rationale behind the miscarriage of justice standard in economic terms: “The benefit of departing from the ordinary processes of adversary justice is maximized when the departure is necessary to save an innocent person.” *United States v. Caputo*, 978 F.2d 972, 974 (7th Cir. 1992).

¹⁴³ See *United States v. Silverstein*, 732 F.2d 1338, 1349 (7th Cir. 1984), *cert. denied*, 469 U.S. 1111 (1985). See *supra* text accompanying notes 134-37.

¹⁴⁴ *Olano*, 113 S. Ct. at 1779.

¹⁴⁵ *Id.* (citing *United States v. Young*, 470 U.S. 1, 7 (1985)).

¹⁴⁶ *Id.* (citations omitted).

¹⁴⁷ FED. R. CRIM. P. 52(b) advisory committee’s note. The advisory committee’s note cites *Wiborg*, not *Atkinson*. See *supra* notes 6-10 and accompanying text.

¹⁴⁸ *Young*, 470 U.S. at 15 n.12. In *Young*, the Court noted that the Committee sought to allow the courts of appeals to review plain errors so that “‘any miscarriage of justice may

Court has "frequently quoted the *Atkinson* language" in describing Rule 52(b) analysis implies that the Court has preferred the *Atkinson* standard over the "miscarriage of justice" standard. Before *Olano*, however, the Court had never recognized the conceptual differences between the two standards. In *Frady*, the Court did not apply Rule 52(b) to the facts of the case and so never reached the question of whether the *Atkinson* standard or the miscarriage of justice standard was a more appropriate guide for determining when to reverse errors under the Rule.¹⁴⁹ In *Young*, the Court quoted both standards in its description of plain error review and decided that the error at issue in the case did not warrant correction under Rule 52(b) because it did not "undermine the fundamental fairness of the trial and contribute to a miscarriage of justice."¹⁵⁰ In neither case did the Court acknowledge that the two standards are similar but conceptually distinct,¹⁵¹ and in neither case did the Court express a preference for the *Atkinson* standard over the miscarriage of justice standard.¹⁵² In light of the policy and history supporting the miscarriage of justice standard, the Court, in a case where the standard for correcting plain errors was actually at issue, should have decided that appellate courts should correct errors under Rule 52(b) "solely in those circumstances in which a miscarriage of justice would otherwise result."¹⁵³

C. THE *OLANO* COURT'S AD HOC APPLICATION OF RULE 52(b)

As indicated above, the *Olano* Court addressed only the "affecting substantial rights" issue when it applied the basic principles of plain error review to the defendants' case.¹⁵⁴ The Court began its inquiry into whether the presumed error of allowing alternate jurors to remain in the jury room during deliberations "affected substantial rights" by asking whether the presumed error was the kind that "'affect[s] substantial rights' independent of its prejudicial impact."¹⁵⁵ In other words, the Court was simply asking whether the error at issue in *Olano* could somehow affect substantial rights without necessarily being prejudicial. The majority needed to ask this

be thwarted.'" *Id.* (emphasis added) (quoting FED. R. CRIM. P. (Preliminary Draft 1943)).

¹⁴⁹ *United States v. Frady*, 456 U.S. 152, 164 (1982). See *supra* note 20 and accompanying text.

¹⁵⁰ *Young*, 470 U.S. at 16.

¹⁵¹ See *supra* notes 140-42 and accompanying text.

¹⁵² See *Frady*, 456 U.S. at 163; *Young*, 470 U.S. at 15-16.

¹⁵³ *Frady*, 456 U.S. at 163 n.14.

¹⁵⁴ See *supra* part V.A.

¹⁵⁵ *United States v. Olano*, 113 S. Ct. 1770, 1779 (1993).

question because it declined to decide whether the phrase "affecting substantial rights" is always synonymous with "prejudicial."¹⁵⁶ Like the decision not to determine whether the presence of alternate jurors during jury deliberations was a "plain error" under Rule 52(b), the decision not to determine whether "affecting substantial rights" means "prejudicial" was an exercise of judicial restraint. That decision, however, leaves the appellate courts to determine for themselves on a case-by-case basis whether the prejudice inquiry is the proper means of deciding if an error affected substantial rights within the meaning of the Rule.

The *Olano* Court resolved the issue by noting that it had usually "analyzed outside intrusions on the jury for prejudicial impact"¹⁵⁷ and then by deciding that it saw no reason to depart from this normal prejudice inquiry.¹⁵⁸ The Court gave no indication, however, whether appellate courts were supposed to engage in a similar analysis each time they reached the substantial rights issue. It simply answered the specific issue and then moved on to the prejudice inquiry.

The Court's ad hoc approach to the substantial rights element is consistent with the case-by-case inquiry that has characterized plain error review since its common law inception.¹⁵⁹ The case-by-case analysis is also consistent with the vagueness of the phrase "affecting substantial rights" and with the notion that Rule 52(b) is an "exceptional" remedy requiring a careful review of the particular facts of the case.¹⁶⁰ It is not clear, however, whether the case-by-case approach is consistent with the *Olano* Court's broader goal of clarifying plain error review for the appellate courts. The Court did not explain whether it was attempting to "formulate a test for plain error that articulates the prejudice standard to be applied" or simply "reasserting the plain-error doctrine's lack of rigid definition."¹⁶¹ The Court's narrow ruling certainly provides little guidance to the appellate court judges who must determine whether errors not involving "jury intrusions" require an inquiry into "prejudicial impact" to satisfy the substantial rights language of Rule 52(b).

¹⁵⁶ *Id.* at 1778.

¹⁵⁷ *Id.* at 1780.

¹⁵⁸ *Id.*

¹⁵⁹ See 3A WRIGHT, *supra* note 33 § 856.

¹⁶⁰ See *United States v. Young*, 470 U.S. 1, 16 (1984) ("Especially when addressing plain error, a reviewing court cannot properly evaluate a case except by viewing such a claim against the entire record.").

¹⁶¹ *United States v. Robinson*, 485 U.S. 25, 36-37 (1988) (Blackmun, J., concurring in part and dissenting in part).

The Court's discussion of whether the presence of alternate jurors during jury deliberations is prejudicial is so bound to the facts in *Olano* that it, too, is unlikely to be an appropriate model for analyzing other cases.¹⁶² The Court decided that the presence of alternate jurors during deliberations could have prejudiced the defendants in two ways: either because the alternate jurors actually participated in the deliberations with the regular jurors; or because the alternates had a "chilling" influence on the regular jurors.¹⁶³ Such a narrowly tailored inquiry was not only appropriate but necessary for resolving the prejudice issue in *Olano*, but that analysis is not easily analogized to other cases. Both the nature of the presumed error and the record of the case are crucial to the Court's conclusion that the defendants did not meet their burden of proving prejudice.¹⁶⁴ Thus, the result, if not the intent, of *Olano* is the reinforcement of the case-by-case nature of plain error review. *Olano* gives reviewing courts a four-part framework for analyzing Rule 52(b), but the application of at least one key element of that framework is inextricably linked to the peculiar nature of "jury intrusions" and to the court's own judgment of those issues.

VI. CONCLUSION

In *Olano*, the Court correctly decided that the presence of alternate jurors during jury deliberations was not an error that warranted reversal of a verdict under Rule 52(b) of the Federal Rules of Criminal Procedure. The Court reached that conclusion, however, by articulating a new, four-part framework for plain error analysis in a case requiring the resolution of only a narrow issue. By focusing on only one prong of the four-pronged test, the Court left appellate courts with the task of determining how to apply most of the elements of its new framework. The Court's new framework also explicitly rejects the miscarriage of justice standard for applying Rule 52(b) in favor of the *Atkinson* standard. That decision disserves the purpose of the plain error rule and forces appellate courts to decide how to apply a standard that the Court did not clarify or apply in *Olano* itself. In light of the uncertainties surrounding the Court's new analysis and given the Court's own ad hoc application of the substantial rights element of its new framework, it seems likely that appellate courts will continue to decide plain error cases on a case-

¹⁶² See *Olano*, 113 S. Ct. at 1780-81.

¹⁶³ *Id.* at 1780.

¹⁶⁴ *Id.* at 1781.

by-case basis despite *Olano*'s attempt to articulate a formula for plain error review under Rule 52(b).

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