IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - x

SAUL MOLINA-MARTINEZ, :

Petitioner : No. 14-8913

v. :

UNITED STATES. :

- - - - - - - - - - - - - - - - - - - x

Washington, D.C.

Tuesday, January 12, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

TIMOTHY CROOKS, ESQ., Assistant Federal Public Defender, Houston, Tex.; on behalf of Petitioner.

SCOTT A.C. MEISLER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 14-8913, Molina-Martinez v. United States.

Mr. Crooks.

ORAL ARGUMENT OF TIMOTHY CROOKS

ON BEHALF OF THE PETITIONER

MR. CROOKS: Mr. Chief Justice, and may it please the Court:

As this Court recognized in Peugh v. United States, the United States Sentencing Guidelines remain uniquely central to Federal sentencing even where the district court ultimately chooses to sentence outside the Guidelines.

Because of the strong anchoring effect of the Guidelines, as also recognized in Peugh, the natural effect of an erroneously high Guideline range is to skew a defendant's sentence higher than it would have been under the correct range. Yet when the district court has elected to sentence within what it believes to be the correct range, it is typically very difficult to determine what the district court would have done had it been presented with the correct lower range.

JUSTICE GINSBURG: Mr. Crooks, you didn't

cite 18 U.S.C. 3742(f), and I wondered why, because it reads: "If the court of appeals determines that the sentence was imposed as a result of an incorrect application of the Sentencing Guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate."

So this seems to say that, if the incorrect -- there was an incorrect application of the Guidelines, then a remand is mandatory.

MR. CROOKS: It -- it does appear to say that, Justice Ginsburg; however, I believe in this Court's decision in Williams v. United States, the Court said that Guideline errors are nonetheless subject to the normal doctrines of harmless and plain-error review and not subject to automatic reversal.

JUSTICE KENNEDY: And -- and so it's not clear that there was a Guidelines violation here. The Guidelines were incorrectly calculated, but it's not clear that at the end of the day there was a violation.

I mean, is that really your response to Justice Ginsburg, or am I oversimplifying?

MR. CROOKS: There was a misapplication of the Guidelines, but harmless and plain-error doctrines apply to determine the remedy for that violation or

misapplication.

JUSTICE KENNEDY: Well, there was a miscalculation. I'm not sure if there was a misapplication. That's -- I -- I suppose that's the issue in the case. Or -- or is this --

MR. CROOKS: We believe --

JUSTICE KENNEDY: -- is this quibble wrong?

MR. CROOKS: We believe that there was a misapplication because the Guidelines were incorrectly calculated with respect to the defendant's criminal history. And that is the type of thing that the statute Justice Ginsburg was referring to says you should remand for, subject, of course, as this Court says in Williams, to the normal doctrines of harmless and plain error.

And we're here today, of course, on a plain-error case because we have a Guideline misapplication that unfortunately was not discovered by anyone below.

JUSTICE ALITO: Well, you say that when there is a -- excuse me -- a miscalculation of the Guidelines range, that should give rise to a rebuttable presumption that the miscalculation affected the sentence that the judge imposed.

MR. CROOKS: That's correct, Justice Alito.

JUSTICE ALITO: And what does that mean?

Does that mean that the -- the burden of persuasion shifts to the prosecution?

MR. CROOKS: We believe that the Court's opinion in Olano actually supports a conceptualization that it simply gives the defendant an alternative way to satisfy his burden of persuasion, which is done in a generalized rather than a case-specific way.

JUSTICE ALITO: Well, suppose there's no evidence, as -- as will -- may very often be the case. Suppose the judge says -- imposes a sentence within what the judge believes to be the Guideline range but says nothing whatsoever beyond that, and it turns out that that is not the correct Guidelines range, so that there's no evidence one way or the other about what the judge would have done had the judge understood the correct Guidelines range.

What outcome in that situation?

MR. CROOKS: In that situation, typically the result would be that the third prong of plain-error review would be satisfied and the defendant would have shown an effect on his substantial right.

JUSTICE ALITO: So that means that the burden of persuasion in that situation is on the prosecution.

MR. CROOKS: Again, we may be quibbling

about terms, but we believe that the defendant satisfies his burden of persuasion with generalized evidence tending to show the -- that the natural effect of a Guideline error is to affect the sentence.

JUSTICE SOTOMAYOR: I -- I don't think I understand the difference between general and specific. Evidence is evidence. And you draw inferences from all sorts of circumstances. So I don't know why you call this general. It's evidence. Okay?

Let's assume the Guideline was 70 to 100. The erroneous Guideline was 80 to 100, and the right Guideline was 70 to 100.

Would we -- you draw a general inference that the corrected Guideline would have made any difference on that sentence?

MR. CROOKS: We would, Your Honor. Our position is that anytime the range is not the correct range, there should be a presumption that it affected --

JUSTICE SOTOMAYOR: So what changed the judge's mind in terms of the facts? He gave you the max when it was 80 to 100. What's going to change his mind about 70 to 100?

MR. CROOKS: Because the fact that the Sentencing Commission gave a different range in its expert advice and its expertise is something that this

Court has recognized factors heavily into district courts' decisions.

JUSTICE SOTOMAYOR: Let's assume I don't believe there's a presumption, okay? It's very hard for me to understand what difference between 70 and 100 and 80 and 100 could make. In this case, I have a difficulty understanding what difference the -- the Criminal History Category would make.

But I'll give you another example of overlapping Guidelines: a defendant who's never committed a crime and a defendant who has committed a crime. I would be more inclined to say that an inference from the facts is that a defendant who's never been committed of a crime, that the judge might take that into consideration, even in an overlapping Guideline case, and send it back. Because we don't know how much mercy that judge might have shown. But if a defendant like yours has many criminal convictions, I'd be pretty close to saying I don't think he's going to make much of a different choice.

MR. CROOKS: But on the other hand, Your Honor, in this case, despite Mr. Molina-Martinez's criminal history, the district judge imposed the bottom of what he believed the Guidelines to be, despite the government's request for a sentence at the top end of

the Guideline range. And our position is that the natural pull of the Guidelines is so strong, so influential, that it is going to pull the judge toward the erroneous range, and therefore --

JUSTICE SCALIA: Mr. Crooks, let -- let me ask you this: You fail to object to the erroneous use of the -- of the Guidelines. If you had objected, what would the situation be? You would have to establish that the error was not harmless, or the -- the government would have to establish that it was harmless, right? Would there be a presumption of nonharmlessness?

MR. CROOKS: I believe under Rule 52(a) there is in effect a presumption of nonharmlessness that the government must rebut. The government must show that the error was harmless.

JUSTICE SCALIA: To show that the error was harmless is the same as saying there is a presumption that it wasn't harmless.

MR. CROOKS: I believe --

JUSTICE SCALIA: That's -- that's not the --

MR. CROOKS: -- the facts --

JUSTICE SCALIA: -- not the way I normally talk. I would normally say the burden -- the burden of establishing it is on the government, but I wouldn't say there's a presumption.

MR. CROOKS: But --

JUSTICE SCALIA: The government is wrong.

MR. CROOKS: But if the government makes no effort to do anything with respect to harmlessness, then the case will be reversed, or there will be --

JUSTICE GINSBURG: The -- the government -- the government says that you are, in effect, making this standard harmless. That you -- you admit that this is a plain-error case, and yet, your presumption, effectively the burden is on the government, is making this into a harmless-error situation.

MR. CROOKS: It is, but -- in a way, but only for the limited class of errors that are Guideline range errors. Under Rule 52(a), the government must show harmlessness for every type of error.

CHIEF JUSTICE ROBERTS: I --

JUSTICE KENNEDY: Under Justice Alito's questioning, he asked if -- isn't it true that you have the burden of persuasion at the outset to show that there was a miscalculation? Once you meet that, his question was does the government then -- I believe his question was -- does the government then have the burden of persuasion to show no error. He was careful not to use the word "presumption," or at least he did not use the word "presumption."

Is that the proper way to think of this case in your view? Another way of asking the question is -- continues with what Justice Alito was inquiring: Do we need to use the word "presumption" here?

MR. CROOKS: I don't think the word "presumption" is absolutely necessary. It is the word that the Court used in Olano, but I think it -- it's really viewed more as who bears the risk of nonpersuasion. And what we're asking is that in the very limited context of a Guideline-range error, the defendant should be deemed to have carried his burden by the generalized evidence that this Court recognized in Peugh v. United States, that the Guidelines do affect sentences and that Guideline ranges do affect what the district court does.

JUSTICE SCALIA: Where have we done that before? I mean, we had dictum in United States v. Olano, which said that there may be a special category. There may be a special category of forfeited errors that can be corrected, regardless of their effect on the outcome. But this issue need not be -- be addressed. And you're saying -- and we have not found any such category in the past. You're saying you -- we have finally -- finally discovered one category that meets that dictum in Olano.

MR. CROOKS: Well, the lower courts -- this Court has not found a presumption since Olano, but the Court did give careful consideration to whether a presumption should apply to the particular type of error at issue in Olano.

But more importantly, the lower courts have looked to what this Court said in Olano, and in a tiny handful of -- of errors, they have adopted just such a rebuttal.

JUSTICE SCALIA: That's more important? That the lower courts have established the law for us?

MR. CROOKS: It's not --

JUSTICE SCALIA: It seems to me we establish the law, and we have never found anything to come within that language in Olano. And it's dictum, and maybe it's wrong.

MR. CROOKS: We believe that it's not wrong, and that the lower courts' decisions, of course, do not bind the Court, but they are expressive of the experience of the lower courts.

JUSTICE KAGAN: But, Mr. Crooks, if I could take you back to your answer to Justice Kennedy. I take it that you don't need to use the word "presumption," right? You're -- you're -- the burden that you have to carry in -- in a -- in plain-error review is you have to

show a reasonable probability. And your argument would work just fine if you dropped the word "presumption"; isn't that right? And you just said that the anchoring effect of the Guidelines creates a reasonable probability that the outcome would be different in a case in which the Court initially thought that the range was different from what it turned out to be. Sort of the end. Who needs the word "presumption"?

MR. CROOKS: We agree, Justice Kagan. Unfortunately, the Fifth Circuit did not, so.

But we do believe that -- that however you conceptualize it, the draw, the pull of the Guidelines is because of the unique centrality of the Guidelines sufficient to establish the reasonable probability of a different result.

JUSTICE SCALIA: What good does it do to say that the Guidelines are advisory, which is what we have held, if, when you mistake them or when you don't apply them properly, you automatically get a reversal, which is what you're arguing here? Does that sound like an advisory Guideline?

MR. CROOKS: Well, Justice Scalia, we disagree. It's an automatic reversal. Besides the third prong of plain-error review, there are two other very stringent prongs, the second and the fourth that

must be met before there can be a reversal on plain error. But with respect to the question of whether it makes the Guidelines any less advisory, we don't believe that it does. It simply recognizes the fact that even though they're now advisory, district court judges still find them influential and persuasive as this Court indicated they should do in Rita.

JUSTICE GINSBURG: How did this -- how did this error come to light? Everybody missed it in the district court. It started with the probation officer, the judge, and the defendant. How did -- how was it found out?

MR. CROOKS: Well, actually, it was missed initially, even on appeal, because I wrote an Anders brief, and the defendant wrote a response and pointed out that one of my factual premises was incorrect.

JUSTICE GINSBURG: So the defendant -- the defendant brought -- detected the error.

MR. CROOKS: Correct. And when I saw it, I realized immediately I had made a mistake, and I filed a merits brief with the Fifth Circuit instead of an Anders brief. And it proceeded to oral argument in the Fifth Circuit. The government conceded that there was an error that was plain, but they disputed that it affected substantial rights because of the overlap of

the Guidelines.

JUSTICE ALITO: Your argument has some appeal on the facts of this case because the judge sentenced the defendant to a sentence at the bottom of what the judge understood to be the Guideline range. But would your argument apply to any sentence that was within both the original and the correct Guideline range?

Suppose the judge here had sentenced your client to 87 months, which I -- I think is the top of the correct Guideline range. Would the same -- would you -- can you infer from that that the judge would not have imposed that sentence had the judge understood that -- the judge thought that the top was 96, judge chose 87, that happens to fall within the correct Guideline range. On those facts, would you infer that the judge would have imposed a lesser sentence?

MR. CROOKS: Our answer is that whenever the range changes in the absence of any other indication, you should infer that the sentence -- there was at least a reasonable probability that the sentence would change.

There may be other contextual factors besides the high end of the Guidelines that would allow the government to show that in fact it wouldn't have made a difference. But if I understand Your Honor's

question correctly, with only the difference in the range, we believe that that is a situation where you should assume there's a reasonable probability.

JUSTICE ALITO: Why would you --

CHIEF JUSTICE ROBERTS: I was -- I was just going to say under that -- I suppose the defendant really wouldn't insist on a resentencing if that were the -- those were the facts, would he?

In other words, it was incorrectly a maximum of 87 and he got the maximum, you say, oh, well the correct one could give you up to 96. If I understand it, the defendant is not going to raise that objection, is he?

MR. CROOKS: If he believes that he could get more -- but if -- for example, in this case the incorrect range was 77 to 96. If he got 96, he might well insist upon appealing because he might think the judge would give me the high end of the correct range.

JUSTICE ALITO: How about -- I mean, the question is, if the judge -- the judge thinks it's 77 to 96 and chooses 87, which is within that range, and it turns out the correct range is 70 to 87, so the 87 is within the correct range as well -- it's the top of the correct range -- what -- what reason would there be to infer -- why would there be a natural probability that

the judge would have given a lesser sentence if the judge thought that the top was 87 as opposed to 96? The judge obviously thought in that situation the correct sentence is -- is 87.

MR. CROOKS: With respect, I have to disagree with your premise because I don't believe judges just pick numbers. I believe they look at the Guideline range and typically determine whether the defendant should be low, middle, or high. So the Guideline range does make a difference. And it --

JUSTICE BREYER: Here's an example: Suppose a person -- everybody -- presentence report, government, defense lawyer, prosecutor, everybody -- thought he's in column 2. Okay? He's not a first-timer. And now it turns out they made a mistake. He is a first-timer. And so being a recidivist, the presentence report says put him at the top of the range. Now it's a lower range, but they know he's not a recidivist.

Depending on the circumstance they might say, Hey, no, put him in the middle of the first-timers. I don't know. You don't know. They don't know. Nobody knows. And so the question is, we don't know, really, what the judge will do upon remand. Common sense suggests ask him. That's what it suggests. And so you're worried about whether you can work the language

around to let you do that, what is common sense.

I'll have some questions for the other side, which I suspect you can, but nonetheless, isn't that the issue?

MR. CROOKS: That -- that is the issue. And we --

JUSTICE SCALIA: Let's factor in the fact that you did not object. Surely -- surely there ought to be a penalty for that. We don't treat cases where there has been an objection the same as we treat cases where -- where there has not been. Sending it back makes total sense when there is an objection that's -- that's wrongfully denied.

JUSTICE BREYER: Yes.

JUSTICE SCALIA: But -- but where you or defense counsel has, in effect, assisted the Court's error, it seems to me we demand more.

MR. CROOKS: And the Court does demand more. It is much more difficult to secure relief on plain-error review because of the other prongs of the rule.

JUSTICE BREYER: But anyway, we've got progress, because it does make sense. And if we've got progress, it is not a punishment to the lawyer for not having raised it. It is a set of circumstances where

the result will make sense without unnecessary administrative problems.

JUSTICE SCALIA: It's not a matter of punishing the lawyer, is it? It's a matter of establishing a system --

JUSTICE BREYER: Yes, that's right.

JUSTICE SCALIA: -- that induces lawyers to make objections when objections are proper and -- and not to mousetrap the -- the Court into -- into error by -- by not -- by not objecting.

MR. CROOKS: But we have --

JUSTICE SCALIA: What are the other two elements that you think serve that purpose?

MR. CROOKS: Well, first, the second and the fourth prong is the answer to your question. But first I have to say --

JUSTICE SCALIA: But what are the second and fourth prongs?

MR. CROOKS: The second prong is that the error must be plain, which means it's not subject to reasonable dispute.

JUSTICE SCALIA: Well, that's no big deal. It -- that doesn't satisfy my problem.

MR. CROOKS: Well, many Guideline errors are not. We have had plain-error relief denied repeatedly

on the second prong.

The fourth prong, that it must seriously affect the fairness, integrity, and public reputation of judicial proceedings, is another hurdle that the defendant must meet on plain-error review.

A person is not in a better position by not objecting. A person would be foolish not to make an objection that would lower the range because it's always better in a sentencing proceeding to start out with a lower range, even if you're going to ask for something below the Guidelines.

JUSTICE GINSBURG: It's not disputed here. Everybody missed it. You missed it, and you -- you were candid in saying even on appeal you were ready to file an Anders brief until the defendant himself.

MR. CROOKS: Yes, Your Honor. In fact I did file an Anders brief.

JUSTICE SCALIA: It's -- it's not enough that the lawyer did not intentionally do it. We -- we demand of lawyers that they do it. They're supposed to assist the Court. And where the objection has not been made, it's -- it's an entirely different case when it comes up here.

MR. CROOKS: But I would suggest, Justice Scalia, that it is still far more difficult to

secure relief on plain-error review, even with the tweak to the third prong that we're suggesting, than it is to just make the objection in the first place.

JUSTICE ALITO: Well, can you give us an example of a Guidelines error that would qualify for -- qualify as a plain-error except for its failure to satisfy the fourth prong of Olano?

MR. CROOKS: Yes. In our reply brief on page 22, we cited the Fifth Circuit's decision in United States v. Duque-Hernandez. And in that case, the Fifth Circuit actually pretermitted the first three prongs of plain-error review and said even if you meet these, you lose on the fourth prong for three different reasons.

First, the Court said that the defendant had in fact admitted the criminal conduct that underlay the controverted Sentencing Guideline enhancement.

Second, there was an issue of quasi dirty hands because the defense attorney had failed to make an objection that the same defense attorney had made in a previous illegal reentry case.

And third, the defendant had an extraordinarily serious criminal history involving drugs and guns. And that is an example, one example -- there are others -- where the Fifth Circuit has applied the

fourth prong very stringently.

JUSTICE GINSBURG: Who would apply --

JUSTICE KENNEDY: Well, in that case would you still send it back to the district judge to ask him in the case you just put?

MR. CROOKS: The --

JUSTICE KENNEDY: We're trying to -- let's assume that we're going to give you some relief -- that was far from clear, but let's assume that. We're trying to find out what the rule ought to be, what the standard ought to be. In the case you just explained to us, in your view, should that case go back to the district court?

MR. CROOKS: The case that I just described?

JUSTICE KENNEDY: Yes.

MR. CROOKS: I -- I don't know whether I necessarily agree with that application of the fourth prong of plain-error --

JUSTICE GINSBURG: Who applies the first prong in the first instance? Is it --

MR. CROOKS: The court of appeals.

JUSTICE GINSBURG: So you're saying that even if the court of appeals gets through the first three, it doesn't remand for the district court to -- to apply the fourth test. It -- the court of appeals does

that itself?

MR. CROOKS: Correct. And if the defendant cannot satisfy the fourth prong of plain-error review, there is no reversal and no resentencing.

JUSTICE KAGAN: So I would think that the answer to Justice Kennedy's question is if the court of appeals really thinks it's not going to give relief because of the fourth prong, why would you bother remanding it?

MR. CROOKS: Why -- why would the court --

JUSTICE KAGAN: Why would -- why would the court of appeals bother remanding it? They could legitimately say it doesn't matter. We're not going to remand it because whatever happens on remand, we're not going to give relief based on the fourth prong. And if that's the case, why would the court of appeals remand it at all?

MR. CROOKS: The court of -- if the defendant does not -- if the court of appeals is not satisfied that the defendant has met his burden on the fourth prong, it will not be remanded; the judgment will be affirmed.

And I would like to save the remainder of my time for rebuttal.

JUSTICE GINSBURG: And may I just ask you to

answer the government's position that if there's no presumption, it's not in your question presented so -- so that you will lock into the way you phrased the -- the question, that "should an appellate court presume"?

MR. CROOKS: Just very briefly, our answer is that the Court in the cases we cited in the reply brief has gone on to consider the merits of a case after deciding a legal question presented by the Petitioner. And certainly, the Court always has the power and the discretion to address a question, even that was not in the question presented or addressed in the court below.

And here, the court below undisputably addressed it, and even if the Court does not endorse the presumption we ask for, it would be useful guidance to the lower courts on the application of the third prong.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Meisler.

ORAL ARGUMENT OF SCOTT A.C. MEISLER

ON BEHALF OF THE RESPONDENT

MR. MEISLER: Mr. Chief Justice, and may it please the Court:

This Court should not adopt the presumption that all misapplications of the Sentencing Guidelines are presumptively prejudicial, for three main reasons:

First, a presumption is not supported by

this Court's plain-error precedence or general principles of appellate review for harmlessness.

Second, presumption is unnecessary, because courts of appeal are capable of discerning prejudice on a case-specific basis.

And third, a presumption ill-serves the policies -- policies that underlie Rule 52(b); in particular, they need to induce timely objections in the district court.

CHIEF JUSTICE ROBERTS: I -- I am concerned about getting hung up on the labels. Okay? If you -- so don't say it's a presumption. We still have, don't we, the question of what happens if nobody -- and who loses if there's no evidence to move one way or another in a tie?

It doesn't matter if you call it a "presumption" or not. Who bears the burden of at least moving forward, and certainly the burden of proof, if one of these errors is on the record?

MR. MEISLER: I think, Your Honor, this Court's decisions in Olano and United States v. Vaughn resolve that question, and makes it clear the burden is on the defendant under plain-error review. That is what the Court has said is the main difference on prong three on the substantial-rights prong between plain-error and

harmless-error review.

JUSTICE KAGAN: But let's say that's right: Yes, the burden is on the defendant. But does the defendant meet that burden by saying, look, there was a mistake in the Guidelines; we know that there's an anchoring effect. That's what the Court said in Peugh. That anchoring effect creates a reasonable probability that the Court would have done something differently.

MR. MEISLER: And so our -- our answer, Your Honor, is that the -- there's no -- I guess what Mr. Crooks calls a "generalized showing." I think it has to be done on a fact-specific basis.

JUSTICE BREYER: That is fact-specific. I mean, I have exactly the same question as Justice Kagan had. Forget all the jargon. You're a -- a lawyer. You want to prove that it rained at noon on the 5th of February.

Your witness says, I heard pitter-patter on the roof. I looked outside. Water was going by the window.

Anything else?

No.

Well, it might have been the window washer, but there is no jury that couldn't find that it was raining.

Same thing here. Case after case, this Court has said: We assume, we presume -- or they don't even use those words -- the Guidelines influence the sentence. That's what they meant by the word "anchor."

If you look at the reality, whether they depart or don't -- whatever you call it now. There's some special word -- you can find evidence after -- of course, the Guidelines affect the sentence. Maybe there's an unusual case, and they don't.

The reason the judge doesn't say anything is because in Rita we said that if you say nothing, Judge, then the appellate courts are to assume it was reasonable. And therefore, the judge now says nothing. He just applies the Guideline.

So we'd have to overcome about five cases in terms of what we said if we are going to rebut the common sense notion that of course using the wrong Guideline had an effect on the sentence. If it's an unusual case, i.e. if it's the window washer, let the government show it was the window washer. But the normal case, pitter-patter means rain, and the normal case is that the judge, when he uses the Guidelines, or even when he uses them as a basis and says I'm departing, that that made a difference.

MR. MEISLER: Well, I think -- I think, Your

Honor, there's a -- there's a number of points in there, and to my mind that's a question of how much weight to give the bare facts of the error.

Of course the error in this case is you used the wrong range. And so I think you're -- I -- from what I understand Your Honor's position to be is that the bare fact of the error, the difference in the range, itself establishes an effect and substantial rights.

That's not usually how we do it. We say you have to look at the particular facts and circumstances in the case. And I think Your Honor --

JUSTICE GINSBURG: Can you -- can you give a concrete example of what you mean? I mean, in my -- my intuition is the same as Justice Breyer and Justice Kagan, that if you -- if you apply the wrong Guidelines, then there's a reasonable probability that he would have received a lower sentence.

But you say he has to show -- what would he have to show, concretely? Give me an example of what is a reasonable probability that he would have received a lower sentence.

MR. MEISLER: Right. Well, I think there's just two points to that, Justice Ginsburg.

One is what the -- what the appellate court is going to have before them in every Guidelines-error

case, which is the nature and the magnitude of the error. The courts then know is this a career-offender bump that changes the defendant's offense level and criminal history and could double his range? Or is it, as in this case, a one-level movement on -- because of a criminal history scoring error that the Sentencing Guidelines, themselves, say you can offset with a departure because it leads to under representation of -- of the defendant's recidivist potential.

So the court's going to know nature and magnitude. And by "magnitude" I mean, are we talking one level? Are we talking 16? Are we talking nine?

So there are going to be many cases. I don't dispute that.

JUSTICE BREYER: There will be many. And there are many cases involving rain. Many. I mean, I don't know how many thousands, but there are many common facts in thousands of cases where the government itself uses very similar kinds of evidence in order to show that it was really raining.

And here, what we're doing is we're using very similar kinds of evidence, namely, that he used the wrong Guideline in order to show that, in fact, better -- more probable than not, or pretty probable, or whatever reasonable probability, that it made a

difference.

MR. MEISLER: Well --

JUSTICE BREYER: Say -- I mean, it's -- I -- I don't see this as special.

MR. MEISLER: Well -- well, I think it is -- it was -- it is special, because, of course, it would be the first-ever presumption of prejudice that this Court recognizes in --

JUSTICE KENNEDY: Well, that's because you're using --

JUSTICE BREYER: The range --

JUSTICE KENNEDY: -- that's because you're using the term "presumption." You don't have to use the term "presumption." You can say that this defendant has met his burden of persuasion.

We make the assumption here, we -- a few of us have practiced under the Guidelines -- maybe none of us -- that the Guidelines are the beginning point in almost every sentence. That's the beginning point, not the ending point, but the beginning point.

And the question is: Once this is shown, like, at a minimum, can't you just ask the district judge? Now, if you want to say that there is sentencing miscalculations in 20 percent of the cases, that they happen all the time, that this is going to burden the

courts, I suppose you can make that argument.

But many circuits, or some circuits at least, have the rule; they just remand it, ask the district judge.

MR. MEISLER: I'm not sure that's how plain-error review has ever been conceived of, Justice Kennedy. I -- I mean, Your Honor asked before, what's our rule? You know, what is the rule the Court had announced in this case without calling it presumption? And if the Court wants to opine in this case about what the standard should be, we think the Court could say something such as that a difference in the range, the use of the wrong range, creates some likelihood in every case that the sentence will be different. But whether that likelihood arises to the required level of a reasonable probability is going to depend on the factors and circumstances.

JUSTICE KAGAN: Well, haven't we already answered that question in Peugh? In Peugh, the question was whether the likelihood was going to rise to the level of a significant risk. And we said yes. If you're using the wrong range, there is a significant risk that you would have made a different decision.

So significant risk actually seems higher to me than reasonable probability. At least it's not

demonstrably lower.

So I would think that we've already said, if you're using the wrong range because of the anchoring effect of the range -- an anchoring effect that is kind of mandatory. It's -- you know, we say that these Guidelines are advisory, but we insist that a judge begin with them.

So if you're using the wrong range, there is a significant risk. I would think so too, a reasonable -- of reasonable probability.

Why -- why -- why is there a difference?

MR. MEISLER: I -- this -- I think there's two points on Peugh, Your Honor.

The first one is that Peugh itself, in footnote 8, says that this is a -- this is an ex post facto error that implicates constitutional concerns. And the Court said, in their regular Chapman v. California harmless-error analysis, Petitioner concedes that when it's a nonconstitutional Guidelines error, under Williams v. The United States in Rule 52(a), you do the regular harmless-error standard.

We think it follows from that, that when the error has been forfeited, not preserved, and there's no constitutional concerns, do the regular plain-error analysis.

And I think it --

JUSTICE KENNEDY: In regard to -- are you telling us that even if there's a significant risk that this sentence was too high, in this case there can be no relief?

MR. MEISLER: Not at all, Your Honor.

JUSTICE KENNEDY: Is that the government's position?

MR. MEISLER: Not at all, Your Honor.

If -- if the defendant makes a case-specific showing of a significant risk or a reasonable probability, then the defendant would clear prong three of the --

JUSTICE SCALIA: What the -- you think the two are equivalent? A risk and a probability are -- are interchangeable?

We're -- we're -- we're going to change our -- our law now, so that plain error is overcome by just a significant risk?

MR. MEISLER: I -- I don't -- I don't think so, Your Honor.

And if I could just --

JUSTICE SCALIA: No, but -- but -- but you've accepted it.

MR. MEISLER: Well --

JUSTICE SCALIA: You seem to say that significant risk and reasonable probability are one and the same. I don't think they're one and the same at all.

MR. MEISLER: This was going to be the second part of my answer to Justice Kagan, which I actually think that the -- framing it in terms of risk, looking at how Peugh analyzed the issue actually lines up almost exactly with how this Court handled the error at issue in Marcus, Marcus in 2010. Marcus was about whether a defendant had been improperly convicted in violation of the due process clause based on pre-enactment conduct.

And this Court said the risk that's going to happen can be ameliorated by certain things that a judge does, but that risk is going to vary by case. And the Court said in that situation where there's a risk and it varies, we're going to hold -- require a regular -- the regular individual showing of prejudice. Now --

CHIEF JUSTICE ROBERTS: Now, does that individual showing, can it be made on the basis purely of the mistake in the Guidelines, there is no extraneous evidence? If you have a case where the erroneous range is 20 to 40 and the judge gives 20, and the correct range is zero to 20, is that a case in which the

defendant has established plain error?

MR. MEISLER: With the caveat that we'd want to know a little bit more about the -- the facts and circumstances.

CHIEF JUSTICE ROBERTS: I don't want to know anything more about it because if the judge is within the Guidelines, he doesn't have to say anything more about it.

MR. MEISLER: I think, Your Honor, if that's all you knew, if it was truly -- it's all you knew, I would say that the defendant probably has -- has met his burden in that case.

CHIEF JUSTICE ROBERTS: Okay. So now let's say -- I mean, this is why the problem is -- is -- whether you want to call it a presumption or whatever, is so difficult. What if the Guideline was 20 to -- to 40 and the judge said 30, and the correct Guideline was zero to 30? In other words, he's half in the middle of the wrong one. Do you say, well, maybe it's an error, maybe it's not? What -- what in that case?

MR. MEISLER: I think I can give you a concrete answer without knowing more about the facts and circumstances. And that's not -- that's not --

CHIEF JUSTICE ROBERTS: That's -- that's why I don't understand why it's one answer, zero to 20 and

20 to 40, and another answer when it's zero to 30 and 20 to -- when it's halfway as opposed to just at the bottom.

MR. MEISLER: Right. Well, I think, Your Honor, the Court was faced with a similar situation in the Davila case from a couple terms ago, where the Respondent in that case had argued that -- and that was -- that involved judicial participation and plea discussions. And the respondent in that case argued, well, the courts of appeals are just finding all these prejudicial and reversing them anyway. Don't bother doing cases if they're prejudiced. Let's come up with an automatic reversal rule.

And this Court said no. It said serious errors are going to be corrected on plain- and harmless-error review, but do a full record assessment in each case. And that's really all we're asking the Court to -- to say here is full-record assessment like in Davila --

JUSTICE GINSBURG: But in -- in most Sentencing Guidelines cases, certainly in this case, the judge says nothing. He's told the probation office said these are the Guidelines, and the judge says, okay. I sentence him at the bottom, period. Doesn't explain why. And there's got to be many, many Guidelines cases

where that's exactly what happens. The judge doesn't explain it. We have told the judge he doesn't need to explain it if he sentences within the Guidelines.

So what do you do with what I think must be the bulk of the cases where the judge just sentences within the Guidelines and says nothing one way or another to explain it?

MR. MEISLER: Well, I'm not sure, Your Honor, that's the bulk of the cases. If --

JUSTICE GINSBURG: But you would agree that at least there are many cases where the judge just sentences within the Guidelines.

MR. MEISLER: There are many cases, but I think you run into the same problem as in Davila. You'd run into a problem of categorization. Are we going to -- are we going to change the entire framework, change the rules that we use in plain- and harmless-error cases --

JUSTICE BREYER: We're not changing -- well, you've heard the argument. But I suspect -- and you -- you may know this empirical point better -- I think there probably are a lot of cases where the issue is the sentence. And the appeal will be -- include something like this. In some subset, there will be a plain-error question. And all you'll really have is what the judge

did.

Now, of course, if the government has more, all you would be saying is that this, in and of itself, shows a risk in this circumstance, the reasonable probability, whatever standard you're using. Of course the government's free to show that there is something different about this. It wasn't harmful. It might have been the window washer, you know? And the government is free to show that.

MR. MEISLER: But --

JUSTICE BREYER: So why is this so difficult?

MR. MEISLER: It's important, Justice Breyer, to recognize -- as I understand your -- your -- what you've posited, that is a shift in the risk, whether you call it the risk of nonpersuasion.

JUSTICE BREYER: Well, you know, you --

MR. MEISLER: Absent the government coming forward with something else, the defendant wins. That's the exact opposite of what usually happens in the prong --

JUSTICE BREYER: Well, you're saying it's a shift in the risk. The government has the burden of proving that it was raining. It's not a shift in the risk to say that the evidence that I've mentioned proves

rain, and it's not a shift in the risk to say that the defendant can come in and show it was the window washer. The question is whether the burden, which lies with the defendant, is satisfied if all there is is that the judge applied the wrong Guideline.

And given the continuous statement in case after case in this Court, that, of course, judges, whether they apply the Guideline or depart, the Guidelines play a significant part in the -- in the sentence that occurs. If all you have is that, you've satisfied the substantial -- whatever it is, you know. What is it called? The substantial --

MR. MEISLER: I think it does matter what it is, Justice Breyer.

JUSTICE BREYER: Of course it matters what it is.

MR. MEISLER: It matters what it is. It's reasonable probability -- it's reasonable probability of a lower sentence.

JUSTICE BREYER: Well, it doesn't say that in Olano. It says -- it says in Olano --

MR. MEISLER: But --

JUSTICE BREYER: -- in Rule 52(b) --

MR. MEISLER: Yeah, substantial -- that the substantial --

JUSTICE BREYER: It says "a plain error that affects substantial rights." And if it is the case, factually, as this Court has said it is, that applying the Guideline that you apply makes a difference to the sentence, that does affect substantial rights. He's just borne the burden of proof by showing that. That -- I don't see why that's different than any other problem of proof.

MR. MEISLER: I think it's quite different, Your Honor. And if I could use the example of this Court's decision in Puckett v. United States, this Court has already spoken to how plain error works in one very serious sentencing error, the government's breach of a Guidelines-related plea promise at sentencing in Puckett. And the Court said, not just, you do plain error; it works in the usual way. Because procedural errors at sentencing -- and the Court cited as an example, a misapplication of the career offender Guideline -- because procedural error at sentencing is amenable to harmlessness-error review. And so we're going to hold the defendant to his usual burden because it's Rule 52(b), not 52(a).

CHIEF JUSTICE ROBERTS: Don't you usually -- don't you usually have a plea colloquy or something in the record in those types of cases?

MR. MEISLER: You do. It's just that you have a sentencing --

CHIEF JUSTICE ROBERTS: Well, no. If it's -- the sentence is within the Guidelines, the judge doesn't have to say anything at all. So it's very difficult for the defendant to go back and say, here's what the error was even though there's also a clear error, a plain error in what the original calculation was.

MR. MEISLER: I do want to dispute one other -- I think the key factual premise there. It's not that the judge said nothing at all. Depending on the spread of the range, by statute, the judge is required, this Court's decision in Rita requires that if the defendant makes a nonfrivolous request for a variance and the judge is choosing the Guidelines range, agreeing with the Commission's recommendation, instead of giving that non-Guideline sentence, the judge has to explain that as well.

JUSTICE ALITO: If we -- if we accept the -- the proposition that in every case in which there is an incorrect identification of the Guidelines at the time of sentencing there has to be a remand, unless the government can prove with some sort of evidence that it was harmless, would there be any difference between the

standard in a case where there was an objection and a case where there was no objection?

MR. MEISLER: Not on prong three, Your Honor, as far as I can tell. The Petitioner's briefs have been a little bit less than clear on what exactly he thinks the government's burden is, but I heard him say today and I believe the citations at page 47 of his brief also indicate that the standard would be the Williams v. United States harmless-error standard. The government would have to show no effect on the sentence. It has to persuade the court of appeals the sentence would have been the same absent the error.

JUSTICE SOTOMAYOR: But these --

CHIEF JUSTICE ROBERTS: Well, but there are the other factors under the Olano test.

MR. MEISLER: There are, Your Honor. I -- I would agree that -- that prong two does some work in these cases, not as much in other settings because courts of appeals look at the plain language of the Guidelines and the application notes and believe that this follows from those -- that language.

And more importantly on prong four, which Mr. Crooks mentioned earlier, he -- he would not embrace the Fifth Circuit's application of kind of a fact-intensive, case-specific prong four analysis. And

the two courts of appeals that have adopted presumptions of prejudice on the Guidelines issue have both either -- well, the Tenth Circuit explicitly, it says, we presume at prong four as well. So I think it's very unclear whether prong four will do any work in these cases.

One other thing I want to mention about these court --

JUSTICE KENNEDY: To the extent that our decision is influenced by our considerations of what kind of a burden, say the Petitioner's proposed rule would put on the resources of the Court, is there anything we can look to or can you or your co-counsel or your colleague for the Petitioner tell us how often Sentencing Guidelines occur in 20 percent of the cases, 5 percent of the cases? And when they do, is it that disruptive to ask the district court, what would you do? Remand.

MR. MEISLER: A couple points. On the statistics, I believe they're collected in footnote 14 of Petitioner's brief, and there are something like 4,500 procedural sentencing appeals; about 2,400 of those are Sentencing Guidelines appeals, and about 20 percent of those, or about 480, are reversed.

We haven't been able to ascertain how many of those are plain-error cases versus harmless-error

cases, but it's a substantial number across the judicial districts every year.

In terms of the cost, Petitioner's position is that it's less costly than remand for a retrial. We don't dispute that, but we do think it's not costless. The en banc Third Circuit, in a recent procedural sentencing error case, it reached -- explained it's not costless at all. You have to reconvene the parties, the judge, and a very busy -- especially in -- in Texas, a very busy district court calendar has to find a spot, reconvene the parties, transport a defendant from a distant location.

And then, of course, we've collected in the appendix to our brief, situations where the remand for resentencing generates another round of appeals.

JUSTICE BREYER: What you have not put in your brief, I don't think, is that they have, in several circuits, created a system where there is a limited remand for purposes of finding out just what the judge thought about it. That's not perfect, but it seems to be workable and not quite as expensive.

But I think the real difference between us, in -- and you can -- I'm raising this because I haven't seen a reason you shouldn't address it squarely -- is I don't think this is a Rule 52(b) case. You see?

It's not about how to interpret Rule 52(b), or 52(a), or Olano. It's a case about Guidelines. It is a case about what the Guidelines are and how they affect a sentence. And once we work that out, the answer will be obvious, because I'm not going to disagree with your interpretation of Olano or 52. But I am going to disagree about what you think the effect of failing to apply the right Guideline is in the mine run of cases.

And once -- if you agreed with me about that, this case would be over; or if I agreed with you. Between us, we'd end it. But that -- that's -- so that's -- that -- that's where the -- I mean, the -- the others might have some views, too.

(Laughter).

But -- but do you see -- do -- do you see -- do you see why I'm -- do you see why I keep pushing you in that direction?

MR. MEISLER: I -- I do, Your Honor. And I -- and I understand the point. I guess the -- the way I'd try to breech the gap between, perhaps, our positions is -- is to recognize and to argue Rule 52(b) is a capacious entire record, full-record inquiry. And I think it leaves room; it accommodates judges' intuitions about how likely given errors are to have an

effect in certain cases.

And so our -- our basic position here, most fundamental position is don't blow up the Rule 52(b) framework. Don't blow up the Rule 52 framework this Court has applied in a number of cases and create, I think, two major problems.

One is the anomaly I mentioned with Puckett, earlier. You're going to have courts saying, Well, the Supreme Court in Puckett said one kind of sentencing error doesn't get a presumption to the usual one, but it's a different kind of sentencing error in Molina-Martinez, gets a different kind of treatment. That's a problem.

JUSTICE SOTOMAYOR: I see -- I see --

JUSTICE GINSBURG: Does it matter -- does it matter that this kind of error is never strategic? This is not an objection that a lawyer would deliberately hold back. This is a -- a lawyer making a mistake by relying on what the probation officer said. I mean, there is practically heavy reliance on that presentence report.

MR. MEISLER: I think the issue, Justice Ginsburg, is really incentives at the margins, right, that in these kind of cases it's one -- and that's what both Dominguez Benitez and Puckett say. We

want to incentivize lawyers to make these.

And if, indeed, the prong three inquiry ends up being no different, the defendant's burden ends up being no different in this cost of cases under plain error than harmless error, it is marginally reducing the incentives --

JUSTICE SOTOMAYOR: You know, so much of this is the use of that word "assumptions," "presumptions"; but both sides are doing it. This case came up because the Third Circuit has a presumption that if a corrected -- it -- it says it: We assume that if Guidelines overlap, the wrong Guideline and the right Guideline overlap, that there is no way -- we assume there's no way you can prove error, or that it affected substantial rights. And there are a number of circuits who have said that. Overlapping Guidelines, you can never prove.

That -- that seems that that's an assumption that's wrong, under your articulation of plain-error review.

MR. MEISLER: If that's what the Fifth Circuit were doing, I -- I would agree with Your Honor. We don't think there should be a presumption either way.

I think the Fifth Circuit has -- as other have -- circuits have -- have treated overlapping-range

cases a bit differently and have suggested that in those cases, because the judge's sentence still aligns with the Commission's recommendation, we're just going to require a bit more. I think what the Fifth Circuit has looked for is something more concrete that moves the dial from --

JUSTICE SOTOMAYOR: So let's go to Justice Alito's point. The more concrete here is that the parties were fighting about extremes. Sentence him, the government said, to the high end. The defendant was arguing he's entitled to the low end. There is some additional proof there. The judge picks the low end.

If the Guideline is an anchor, which I think is almost undisputed, isn't that enough to say it affected substantial rights?

MR. MEISLER: We don't think so in this case. I -- I would make two points: One is we're not abandoning our position that this fact-specific issue is not properly before the Court. We would urge the Court to take a close look at Fry v. Pliler, which involved very similar circumstances.

But on the merits, I think there are really -- both sides can point to kind of two factors in their favor on the -- on the plain-error issue. The defendant can point to the factors that Your Honor mentioned. I

think on our side is the overlap in the range and the nature of the error here.

This is an error that can seem kind of abstruse. It's the -- it's because of the happenstance of when arrests and sentencing were sequenced. The defendant has two criminal -- two recent felony convictions that aren't counted at all, just drop out of the calculation. And the Commission realized that could happen in these cases, and so put in, not just a general departure note, but a -- a specific application note recommending a departure in this kind of a case when this kind of underrepresentation --

JUSTICE SOTOMAYOR: Except the judge --

MR. MEISLER: -- happens.

JUSTICE SOTOMAYOR: -- knew that he could have departed upwards under the old Guideline, because this criminal history was pretty serious. You argued he was entitled to the -- to the -- and should sentence at the upper end, and yet the judge sentenced him at the low end. So the -- the criminal history has less effect on the judge than it has on you, or perhaps on me.

MR. MEISLER: Right. Well, I think that maybe that's true, Your Honor. I -- I guess I would just say that I think these are all factors. And that if we're looking at case-specific determination here, I

think the court of appeals could reasonably conclude, kind of balancing those four facts I mentioned, that the defendant had shown a possibility, no doubt, of a low sentence. I think it's a close case, but not a reasonable probability.

The last point I wanted to make, Your Honor, was just that we mentioned the courts' of appeals experience in this point. And I think it's useful to look at what happened in the Third Circuit in terms of whether this kind of presumption could be confined to the Sentencing Guidelines.

In 2001, the Third Circuit, a decision called Adams, first announced it was going to presume prejudice for the denial of allocution, denial of a defendant's right to allocute at sentencing. A few months later, it adopted -- relied on Adams to find a presumption of prejudice for Sentencing Guidelines errors. The next year it applied those precedents to find a presumption of prejudice for constructive amendments to indictments. And in 2005, when Booker came down from this Court, it then applied those precedents to find a presumption of prejudice for Booker error for sentencing under mandatory Sentencing Guidelines.

I think it's going to be very difficult to

confine this. Mr. Crooks makes the point in his reply brief that the courts of appeals have been relatively restrained in finding errors. One can debate that, but I think the point is that this Court endorses the presumption of prejudice for the first time. I think it's highly unlikely it's going to stay just in the Guidelines context, just because of the anchoring effect that the Court recognized in Peugh.

And if there are no questions, we'd ask that the judgment be affirmed.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Crooks, you have four minutes remaining.

REBUTTAL ARGUMENT OF TIMOTHY CROOKS

ON BEHALF OF THE PETITIONER

MR. CROOKS: With respect to Justice Kennedy's question about the burden on the district courts of resentencings, we would point out that several lower courts in opinions we cited in the brief have pointed out that a resentencing is not all that burdensome, especially in light of the benefits of assuring that defendants are not serving more prison time than the district court wanted them to do.

I did also want to address the government's point about -- the government touched on the issue of overlapping ranges versus ranges that don't overlap.

And we just wanted to point out that the effect of the Guidelines is the same, regardless of whether the correct and incorrect ranges overlap or not. It's simply that the degree of the error, the amount of excess imprisonment that is produced, will be different. It will be lower in the case of an overlapping range. But as this Court said in Glover v. United States, any extra amount of imprisonment affects substantial rights.

Finally, I just wanted to say that the courts of appeals have overwhelmingly recognized, whether you call it a presumption or not, that it is warranted to find that a change in the Guideline range affected a defendant's substantial rights because of the extreme likelihood that a Guideline-range error will skew the sentence.

And the lower courts have found, in their experience, that it's necessary to make that inference because of the great difficulty in the typical case of showing a case-specific effect of the type that the government is arguing for here.

And these two factors mean that this inference or presumption, whatever it's termed, is necessary to avoid, in many cases, the injustice of excess imprisonment.

And it will not blow up Rule 52(b), as the

government warns. It's a modest tweak to one prong of the rule that will help the rule serve its basic purpose of fairness.

And for these reasons, we ask that the Court reverse the judgment below and remand for further proceeding.

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

(Whereupon, at 11:04 a.m., the case in the above-entitled matter was submitted.)