

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - x

UNITED STATES, :

Petitioner : No. 12-167

v. :

ANTHONY DAVILA :

- - - - - x

Washington, D.C.

Monday, April 15, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:12 a.m.

APPEARANCES:

ERIC J. FEIGIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner.

ROBERT M. YABLON, ESQ., Washington, D.C.; on behalf of Respondent.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	ERIC J. FEIGIN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	ROBERT M. YABLON, ESQ.	
7	On behalf of the Respondent	19
8	REBUTTAL ARGUMENT OF	
9	ERIC J. FEIGIN, ESQ.	
10	On behalf of the Petitioner	45
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(11:12 a.m.)

CHIEF JUSTICE ROBERTS: We will hear
argument next in Case 12-167, United States v. Davila.

Mr. Feigin? It is Feigin, right?

ORAL ARGUMENT OF ERIC J. FEIGIN

ON BEHALF OF THE PETITIONER

MR. FEIGIN: Yes, Your Honor, thank you.

CHIEF JUSTICE ROBERTS: Thank you.

MR. FEIGIN: Thank you, Mr. Chief Justice,
and may it please the Court:

The court of appeals' practice of
automatically granting appellate relief for every
violation of Rule 11(c)(1), irrespective whether it
prejudiced the defendant, is flawed. As this Court
recognized in United States v. Vaughn, Rule 11(h) was
adopted for the precise purpose of ending the
then-common practice of automatically reversing even for
non-prejudicial Rule 11 errors.

It would be especially inappropriate to
apply an automatic reversal rule in a case like this one
that comes to the appellate courts in a plain error
posture.

Erroneous judicial participation --

JUSTICE GINSBURG: May -- may I ask you a

1 question about that? It's plain error because the
2 defendant didn't make an objection in the lower court.
3 But the defendant doesn't know about Rule 11 and doesn't
4 know about 11(c) that says a judge is not supposed to
5 participate in plea bargaining, and his lawyer doesn't
6 tell him the judge is doing something wrong because his
7 lawyer wants him to plea. So he lacks the information
8 necessary to make a prompt objection.

9 So it seems a bit unfair to say that he's
10 subjected to plain error when he hasn't got a clue that
11 the judge, magistrate wasn't supposed to do what he did.

12 MR. FEIGIN: Well, first of all, Your Honor,
13 I'd respectfully disagree with the notion that just
14 because Respondent's counsel was advising him to plead
15 guilty, that Respondent's counsel had so advocated -- so
16 abdicated his representation that he couldn't be
17 expected to object to an error that the judge made.

18 I'd also point out that if the Court were to
19 create an exception to the plain error doctrine, this
20 would be a particularly inappropriate case in which to
21 do it because not only was there not a contemporaneous
22 objection, there wasn't an objection before the district
23 judge in the months and proceedings that followed.

24 They didn't raise any claim of error on
25 appeal until the court of appeals raised it. And in

1 fact, in this case, Respondent did file a motion in the
2 district court to withdraw his plea. And he didn't
3 mention the magistrate's comments or any pressure he
4 felt from those comments at all.

5 JUSTICE KENNEDY: Well, suppose you just
6 stick with Justice Ginsburg's hypothetical, or perhaps
7 not even a hypothetical, what happened in this case.
8 Just assume that the defense attorney likes this
9 judicial intervention and he -- he wants this to take
10 place. It -- it seems quite unfair to talk about the
11 plain error, because he doesn't tell -- as Justice
12 Ginsburg says, what does the defendant know about Rule
13 11(c)? He doesn't know about it.

14 MR. FEIGIN: Well, Your Honor, if Respondent
15 wants to make an ineffective assistance of counsel claim
16 on collateral review, he can make that. But I'm not
17 aware of any court of appeals that has abandoned the
18 plain error doctrine in this kind of case and I don't
19 think there should be any sort of special exception that
20 says when -- that we assume when counsel is advising his
21 client to plead guilty, that we can't expect counsel to
22 make objections to errors that occur based on the
23 judge's comments.

24 JUSTICE SOTOMAYOR: It doesn't really
25 matter --

1 JUSTICE GINSBURG: But this is a lawyer that
2 had filed an Anders brief. So he didn't -- even at that
3 stage, the lawyer, the -- I don't want to absorb your
4 time beyond this, but I think the plain error is
5 questionable when it seems that the judge, the lawyer,
6 they arranged against the -- the defendant, and the
7 defendant doesn't know that he has this route.

8 MR. FEIGIN: Well, Your Honor, let me just
9 say one other word about that. I don't think it's going
10 to be easy for courts of appeals to tell exactly why the
11 lawyer may not have made an objection, and I just don't
12 think it's fair to assume that in every Rule 11(c)(1)
13 case that the lawyer is effectively acting at contrary
14 purposes to his client.

15 I mean, lawyers advise clients to plead
16 guilty all the time and that doesn't mean that they've
17 abandoned the representation to the point where you
18 can't assume they're acting on the client's behalf and
19 will raise objections. But our basic point in this --

20 JUSTICE SOTOMAYOR: Excuse me. Does this
21 issue go -- it doesn't go to whether you should apply
22 the prejudice prong, because either under normal
23 harmless error or plain error you have to get to whether
24 it prejudices someone.

25 MR. FEIGIN: That's exactly right, Justice

1 Sotomayor. That was exactly the next sentence that was
2 going to come out of my mouth is that our basic point in
3 this case is that you have to apply prejudice analysis
4 in some form, and whether it's harmless error or plain
5 error, the court of appeals refuses to do it. And we
6 think --

7 JUSTICE SOTOMAYOR: One of the most powerful
8 arguments of your adversary is that in the most common
9 of situations -- and it's how I read the advisory
10 notes -- it's going to be awfully difficult to say that
11 a judge's intervention hasn't influenced a defendant.
12 This is the unusual case where you might actually have a
13 no prejudice argument because of the unique facts.

14 But there is a purpose for keeping judges
15 out of this, and that's because the subtle influence
16 that judges exert is not so subtle. It's very palpable
17 and does influence most decision making, both by lawyers
18 and defendants.

19 So if that's the standard, why isn't it a
20 rebuttable presumption that prejudice exists?

21 MR. FEIGIN: Well --

22 JUSTICE SOTOMAYOR: It has to be an awfully
23 high presumption, otherwise, you make mockery of the
24 rule, in my mind.

25 MR. FEIGIN: Well, first of all, Your Honor,

1 I want to take issue with the notion that all Rule
2 11(c)(1) errors are alike. There's actually a variety
3 of different kinds of Rule 11(c)(1) errors.

4 Rule 11(c)(1) has been held to cover, for
5 example, a judge pressuring the government outside the
6 defendant's presence to offer a plea, a judge
7 discouraging a plea, a judge commenting in a
8 well-intentioned manner about the obvious difference in
9 potential sentencing consequences between a potential
10 plea agreement and a trial, or a judge, having rejected
11 one plea agreement that the parties reached, indicating
12 a bit too strongly what kind of plea agreement the judge
13 might accept.

14 I think adopting some sort of "one size fits
15 all" rule would -- would be inappropriate, and the
16 rebuttable presumption I think would also be
17 inappropriate, for a few reasons.

18 First of all, I don't think courts should
19 have to distinguish between different types of errors to
20 see whether a rebuttable presumption should apply.

21 Second of all --

22 JUSTICE SOTOMAYOR: Well, I don't disagree
23 that one doesn't have to use the word "rebuttable
24 presumption," but there has to be a strong prejudice
25 factor --

1 MR. FEIGIN: Well, Your Honor --

2 JUSTICE SOTOMAYOR: -- whether rebuttable or
3 not, assumed in a judge's intervention.

4 MR. FEIGIN: -- I think that's already built
5 into Rule 52 in a couple of different ways.

6 First of all, Rule 52 places a presumption
7 based on whether or not the defendant objected. If the
8 defendant objected, the burden's on the government. If
9 the defendant didn't object, the burden is on the
10 defendant.

11 But also, I don't -- I want to be clear on
12 this: The type of error -- if there is a very serious
13 error, the nature of the error and the error's
14 seriousness would of course be a factor, and a very
15 important factor, in the prejudice analysis.

16 But, as Your Honor has recognized with this
17 case, there may be other circumstances that indicate
18 that the error did not in this case have a reasonable
19 probability of affecting the decision of the plea.

20 JUSTICE BREYER: But that's the problem. Is
21 there a way of doing this, which I -- I don't see at the
22 moment? But the judge intervenes in a serious way and
23 says, you go listen to your lawyer and this is a very
24 harsh penalty and, boy, you are into -- okay? A serious
25 problem.

1 And now to track down whether that affected
2 substantial rights, you have to try to track down the
3 state of mind of the defendant and would he have pled
4 guilty anyway. And that's sometimes quite difficult to
5 do, very hard.

6 But if you don't insist on doing it, and you
7 have an absolute rule of structural error or something,
8 then you suddenly discover these minor things. The
9 judge says, go to lunch, or -- or, you know, some really
10 trivial intervention, and you are going to say that --
11 the guilty plea, he can just void his guilty plea.

12 So there should be a way of distinguishing
13 the trivial from the -- from the really important in
14 terms of how serious the intervention was, but I don't
15 see any way to do that. Have -- have you thought about
16 that at all? Do we have to go all the one way or all
17 the other way?

18 MR. FEIGIN: I have thought about that a
19 little bit, Your Honor, and I'd say that trying to break
20 Rule 11(c)(1) into different pieces and adopt different
21 rules based on different kinds of error would be
22 inappropriate, for three main reasons.

23 The first one is I think it would be
24 inconsistent with this Court's position in *Neder v. the*
25 *United States*, which makes clear that in deciding

1 whether an error is structural you have to look at the
2 entire class of errors.

3 And Rule 11(c)(1) defines the class of
4 errors as cases in which a judge participates in plea
5 negotiations in some way, and it doesn't define
6 subcategories.

7 Second, I think breaking this up into pieces
8 would essentially be an incomplete and unsatisfactory
9 form of prejudice analysis. That is, reviewing courts
10 would still be looking at errors and differentiating
11 between them in order to decide whether relief is
12 warranted, but they would be narrowly focused only on
13 the binary inquiry of how to categorize the error,
14 they'd be disregarding how serious that particular error
15 was versus other errors in that category, and they would
16 be disregarding all the other facts and circumstances
17 the courts always look at and are well familiar with how
18 to look at in a normal prejudice analysis, to determine
19 whether the error affected the outcome.

20 Third, particularly because the
21 subcategories don't exist in the rule and would be
22 something of judicial invention, I think that approach
23 would be inherently inadministrable and manipulatable
24 and lead to inconsistent results.

25 It could be very difficult to tell whether a

1 particular type of error should fall into one category
2 or another, and under the approach you're suggesting,
3 which I think is the approach Respondent is
4 advocating -- I don't think Respondent is actually
5 advocating the per se rule that the Eleventh Circuit
6 adopted here -- I think under that approach, you know,
7 everything turns on a narrow question of categorization.

8 I think the much better approach, and the
9 approach that Rule 52 adopts, is to look at all the
10 facts and circumstances to attempt to determine the
11 effect on the outcome.

12 JUSTICE GINSBURG: Mr. Feigin, is there any
13 situation in which a -- a judge participating in a plea
14 bargaining, any situation that would be prejudicial,
15 that you recognize would be prejudicial, and if there is
16 can you describe what that would be?

17 MR. FEIGIN: Certainly, Your Honor.

18 We -- the government loses many of these
19 cases even in circuits that have prejudice analysis. In
20 fact, one example the Court might want to look to, there
21 was a certiorari petition I think filed at the end of
22 last term, a case, 11-8966, Rebollo-Andino, which was a
23 case of Rule 11(c)(1) error. The government conceded
24 that even on a plain error analysis that that was
25 prejudicial.

1 I can describe --

2 JUSTICE GINSBURG: What -- what makes it
3 prejudicial and this not?

4 MR. FEIGIN: Well, let me take -- let me
5 take a different example.

6 The Fourth Circuit's decision in United
7 States v. Bradley, the judge essentially told the
8 defendants that he -- it boggled his mind that they were
9 going to trial and kept essentially harassing them about
10 why they were going to trial. And, eventually, they
11 said, all right, Your Honor, we are going to -- we're
12 going to plead guilty. I mean, that kind of thing
13 obviously is going to be prejudicial.

14 But the advantage of a prejudice approach is
15 it allows you to separate that kind of case from kinds
16 of cases when there are less serious errors, or even a
17 case where there is a fairly serious error -- and this
18 case may fall within that category -- but there are
19 facts and circumstances that indicate that the error
20 didn't have a reasonable probability of affecting the
21 defendant's decision to plead.

22 And while we're not asking the Court to
23 resolve the prejudice analysis here in the first
24 instance, we -- we're just asking the Court to remand
25 the case to the court of appeals to do that, I think

1 it's just worth noting that -- a couple of the factors.
2 One is that -- there was a 3-month break between the
3 magistrate judge's comments and the entry of the plea,
4 and a month into that a speedy trial motion was filed,
5 which indicated at least some intent at that point to go
6 to trial.

7 The plea and the sentencing occurred in
8 front of the district judge, not the magistrate judge
9 who made the comments.

10 JUSTICE GINSBURG: On that point, do we
11 know -- do we know if the district judge who did preside
12 at the plea hearing knew about the episode with the
13 magistrate 3 months earlier?

14 MR. FEIGIN: I don't -- I'm not aware of
15 anything in the record that reflects whether he did or
16 did not. There's never been an allegation that -- that
17 he said something about them, or that he was aware of
18 them or --

19 JUSTICE GINSBURG: The same for the
20 prosecutor?

21 MR. FEIGIN: Your Honor, my understanding is
22 the government was not aware of this because it occurred
23 in an ex parte hearing in which the government wasn't in
24 attendance. The government wasn't aware of it until the
25 Eleventh Circuit conducted its own review of the record

1 and asked for further briefing on the issue.

2 JUSTICE ALITO: Suppose there's a case where
3 the -- the defendant would not have pled guilty without
4 the court saying something inappropriate about it's a
5 case where the defendant would be crazy to go to trial
6 because the trial would lead to a much more severe
7 sentence. Would there be prejudice there?

8 MR. FEIGIN: Yes, Your Honor. He has a
9 right to go to trial if he wants to go to trial, even if
10 it would be crazy. So under that circumstance, if he
11 wouldn't have, you know, pleaded guilty without the
12 erroneous comments from the judge, there would be
13 prejudice.

14 JUSTICE KENNEDY: That's -- what happens
15 under -- under the rule if the magistrate asked that the
16 defendant be excused -- I don't know quite how you do
17 that; the defendant has to be present. But can the --
18 can the judge just have the attorneys before him and
19 say, now, I want you to be very, very clear that this is
20 a mandatory minimum, that we should try to avoid if at
21 all possible.

22 Can he do that?

23 MR. FEIGIN: Well, Your Honor, I think
24 that's --

25 JUSTICE KENNEDY: It's awfully hard to have

1 a hypothetical where you exclude the defendant.

2 MR. FEIGIN: Well, Your Honor, this actually
3 happened in a non-hypothetical fashion in a case we cite
4 in our reply brief, called *In re United States*, in which
5 the judge was apparently unhappy with the Government's
6 conduct in that case and had the prosecutor and defense
7 counsel in chambers, or at least in court, without the
8 defendant's presence, and was urging the parties to
9 reach a plea agreement.

10 I think if something like that happens, Your
11 Honor, there'd be some question whether the defendant
12 was made aware of it, and whether it actually influenced
13 the defendant's decision to plead. I don't think there
14 can be a presumption that just because counsel heard it,
15 that necessarily --

16 JUSTICE ALITO: What -- what if the judge
17 sees what the judge thinks is ineffective assistance of
18 counsel under our decision in *Lafler* taking place? Is
19 there anything that can be done?

20 MR. FEIGIN: So -- Your Honor, I think one
21 of our main concerns in bringing this case before the
22 Court is the interaction of this Court's decisions in
23 *Lafler* and *Frye* with Rule 11(c)(1), and *Frye* suggests
24 that one way a judge can try to guard against a later
25 claim of ineffective assistance of counsel is to conduct

1 a colloquy with the defendant -- not a colloquy, but a
2 discussion with the defendant -- during the initial
3 proceedings to try to establish that he understands the
4 consequences of his plea and that he's receiving
5 effective assistance of counsel.

6 I think that could be done very carefully by
7 asking very general questions, but I think it's very
8 easy to see how a judge might slip up and say, oh,
9 that's an interesting offer. Did you discuss that with
10 your counsel? That seems like something you ought to
11 discuss with your counsel.

12 And I think what the automatic reversal rule
13 the court of appeals has adopted is it really puts
14 judges, and, frankly, the government, in kind of a box.
15 On the one hand, judges have to guard against these
16 later ineffective assistance of counsel claims by
17 discussing plea discussions, and on the other hand, any
18 slipup in that discussion is going to lead to automatic
19 reversal on appeal.

20 Now, I -- I just want to add one -- one more
21 thing, which is, I think, the best evidence that we have
22 that this -- the magistrate judge's comments here did
23 not create a reasonable probability of effecting the
24 defendant's decision to plead is, again, defendant
25 himself moved pro se to withdraw his plea in the

1 district court, and his reasons for withdrawing his
2 plea, which start on page 58 of the Joint Appendix,
3 never mention the magistrate's comments. Instead, in
4 his own words, what he says is, "Your Honor, my decision
5 to enter the plea was a strategic decision.

6 The reason being is that I knew that the
7 prosecutor had a duty with the courts to disclose the
8 information relevant for this court's determination of
9 the acceptance or rejection of the plea."

10 And what he means by that is that he took
11 issue with some aspects of the allegations in the
12 indictment, although he's quite clear, both in that
13 proceeding and at his guilty plea proceeding, that he
14 did commit the conspiracy offense, and he just believed
15 that those allegations in the record would be cleaned up
16 or have to be withdrawn by the prosecutor if he pleaded
17 guilty.

18 Now, he was wrong about that. But what we
19 have in this case is a clear unvarnished explanation by
20 the defendant in his own words about why he pleaded that
21 doesn't mention the magistrate's comments.

22 The Court of Appeals erred in disregarding
23 that.

24 And if the Court has no more questions, I'll
25 reserve the balance of my time.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Yablon?

3 ORAL ARGUMENT OF ROBERT M. YABLON

4 ON BEHALF OF THE RESPONDENT

5 MR. YABLON: Mr. Chief Justice, and may it
6 please the Court:

7 By imploring Anthony Davila to forego his
8 trial rights, confess his alleged crimes, and accept a
9 plea deal, the magistrate judge abandoned his role as
10 neutral arbiter and fundamentally distorted the pretrial
11 process.

12 JUSTICE KENNEDY: I -- I don't want to
13 interrupt your opening because I think -- I just didn't
14 hear your first -- "by foregoing"?

15 MR. YABLON: By foregoing --

16 JUSTICE KENNEDY: By foregoing.

17 MR. YABLON: -- his trial rights.

18 This -- the right at issue in this case is
19 not one that should be subject to post hoc speculation.
20 Judges, when an error of this kind occurs --

21 JUSTICE SOTOMAYOR: You're creating a sui
22 generis structural error analysis. You're basically --
23 because even with respect to constitutional violations
24 that we have found structural error in, we've created
25 the plain error rule that still requires a proof of

1 prejudice. So you're asking us to create something
2 that's really sui generis in saying it's always a
3 structural error.

4 MR. YABLON: That's -- that's not correct,
5 Your Honor. First, let's put to one side the fact that
6 we do argue that we should not be in a plain error
7 framework at all in this case because of the
8 circumstances in which the judge's improper intervention
9 occurred.

10 JUSTICE SOTOMAYOR: Assume I accept that
11 argument.

12 MR. YABLON: So this Court has --

13 JUSTICE SOTOMAYOR: You're -- you're saying
14 this is a structural error always.

15 MR. YABLON: And this Court has, at the very
16 least, strongly suggested that substantial rights when
17 you're dealing with a structural error are affected, per
18 se, where they've left the door open to some additional
19 analysis is the fourth prong of the plain error standard
20 where the Court is called upon to consider whether the
21 error affects the fairness, integrity, or public
22 reputation of the proceedings.

23 And the government has never, in this case,
24 invoked that fourth prong. They've never claimed that
25 the error here is one that -- that does not affect the

1 the fairness, integrity, or public reputation.

2 So when you're only dealing with the third
3 prong of the plain error standard, does the error affect
4 substantial rights, that language is the same in Rule
5 52(b), the plain error standard, as it is in Rule 52(a),
6 affects substantial rights, and if it means in Rule
7 52(a) that this is the sort of error for which an
8 individualized prejudice inquiry is not appropriate,
9 then the same analysis necessarily carries over to Rule
10 52(b).

11 So I would not say that this is at all the
12 kind of sui generis example that -- that you're
13 indicating.

14 And I do want to -- to -- and try to show
15 that this error is quite similar, both to constitutional
16 and nonconstitutional violations in with -- which this
17 Court has said that an error should be said to affect
18 substantial rights without the sort of specific showing
19 of prejudice that the government is demanding.

20 When you have a judge that, as in this case,
21 is stepping out of his proper role, is acting contrary
22 to his duties to guard against ill-considered and
23 involuntary waivers of the defendant's basic trial
24 rights, is actually ratcheting up the already tremendous
25 pressure on the defendant to plead guilty, that is a

1 systematic distortion of the process. That is not
2 unlike the kind of error that occurs when a defendant is
3 denied an impartial adjudicator. It is not unlike the
4 kind of error that occurs when a defendant is denied
5 counsel or is forced to --

6 CHIEF JUSTICE ROBERTS: What -- what if you
7 have the situation where the judge is conveying purely
8 factual information? There's a -- a plea bargain on the
9 table for one year and the judge says, you should know
10 that I -- I have these cases a lot. The last ten cases
11 that went to trial where the defendant was found guilty,
12 I sentenced them to a minimum of 12 years. Pure facts.

13 The facts might have the effect of pushing
14 the defendant one way or another, but it's also factual
15 information of which he ought to be aware.

16 MR. YABLON: That's right, Your Honor, and
17 this raises a question about what the scope of the
18 participation prohibition actually is.

19 And we're in a strange posture in this case
20 because the government has conceded that we're dealing
21 with a conceded plain violation of the rule, and yet
22 their analysis, instead of proceeding from that
23 violation, it goes out to the periphery and tries to
24 figure out where are the boundaries of Rule 11.

25 Now -- and they cite some appellate cases

1 that arguably have applied too broad a construction of
2 the rule and have reversed where maybe there was just a
3 one-off comment or a purely informational comment, but
4 it's not clear that that is actually what the text of
5 Rule 11 forbids, particularly when you consider the
6 context of the rule and its underlying purposes. So --

7 CHIEF JUSTICE ROBERTS: Well, we do need to
8 have a good sense of how far your -- your per se
9 structural argument is going to reach before we
10 decide -- in deciding whether it's appropriate or not.

11 MR. YABLON: That's right, Your Honor, and
12 there are -- there are two ways to break it down. One
13 is we do argue that the remedy that we seek should apply
14 for all cases of judicial participation. And the
15 question then is: Are judicial participation violations
16 as expansive a category as the government suggests that
17 they are?

18 Our second argument is that --

19 JUSTICE KAGAN: Well, on that, what's the
20 most minor thing that the government could do that would
21 still count as a Rule 11(c)(1) violation?

22 MR. YABLON: The most minor thing that the
23 government could do or a judge could do?

24 JUSTICE KAGAN: That the judge could do.
25 I'm sorry.

1 MR. YABLON: Well, the most minor -- we
2 think that Rule 11 is concerned with judicial pressure
3 to plead guilty. And so the most -- I mean, a judge
4 might make a comment that, viewed from the transcript,
5 would suggest that the evidence against the defendant is
6 overwhelming or that the defendant is likely to get a
7 much lower sentence if he pleads guilty than if he goes
8 to trial. Those we think are --

9 CHIEF JUSTICE ROBERTS: What -- what about
10 the hypothetical that I posed?

11 MR. YABLON: So that hypothetical, if -- if
12 we were talking about a purely informational statement
13 like that, then, actually, we don't think that that is
14 likely to be a violation of Rule 11(c)(1). And the
15 reason is, if you look at 11(b), the rule expects that
16 judges are, in fact, going to be offering a lot of
17 advice to defendants before the defendant pleads guilty.

18 And so if a judge is making the kinds of
19 comments that Rule 11(b) is contemplating, informing the
20 defendant about the nature of the charges against him,
21 attempting to make sure that the defendant understands
22 that his trial right is a real one, telling the
23 defendant a little bit about what, in fact, the -- the
24 sentencing exposure might be if he is convicted, those
25 purely informational statements we don't think is what

1 is meant to be prohibited by the rule.

2 CHIEF JUSTICE ROBERTS: So if he -- if it's
3 my example and he says, this is what I've done the past
4 ten times, so you ought to think long and hard about
5 whether a bargain for one year is a good deal.

6 MR. YABLON: So -- and -- and this is
7 getting -- and then the judge may well be crossing the
8 line. And what the judge --

9 CHIEF JUSTICE ROBERTS: It's kind of a fine
10 line to -- to draw, isn't it?

11 MR. YABLON: There's no question that there
12 will be close cases. I would say that if you look to
13 the majority of cases that are actually out there, most
14 judges, of course, are very scrupulous about following
15 the rule. And when a judge is not, the judge is not
16 usually being circumspect about it, the judge is trying
17 to get a message across to the defendant.

18 And so there may be difficult line-drawing
19 cases, and that's true whether you're looking at the
20 remedial approach that we're asking for or the remedial
21 approach that the Government's asking for.

22 JUSTICE GINSBURG: Mr. Yablon, the -- the
23 case that you're presenting would be quite strong if the
24 same judge -- if the magistrate judge also presided at
25 the plea hearing, but here we have two factors that are

1 special in this case. One is it's a different judge,
2 and two is we have the interval of some three months in
3 between. And then we have a plea hearing that looks to
4 me like it's exemplary. The district judge did go
5 through everything that Rule 11 calls for.

6 So it is a different case, isn't it, when we
7 have a plea hearing with a judge who is exerting no
8 pressure at all, has nothing to do with encouraging the
9 defendant to plead, but there was an earlier episode
10 where a magistrate judge did overbear?

11 MR. YABLON: And at no point during the plea
12 colloquy hearing is the district judge in any way
13 acknowledging or disavowing the magistrate judge's
14 comments, which, we submit, there is at least a very
15 strong probability that those comments affected the
16 defendant's thinking and the reason that the defendant
17 is at the Rule 11 hearing in the first place.

18 JUSTICE GINSBURG: But -- but the -- but the
19 judge did ask, do you recognize that your -- your
20 conduct satisfied the elements of the conspiracy? And
21 the defendant answered yes. And the -- the judge asked,
22 has anyone pressured you to plead guilty? And he
23 answers no. So --

24 MR. YABLON: And, of course, in that
25 situation, the defendant is likely not thinking about

1 pressure that may come from the judiciary itself. And
2 also, not to nitpick but when he's asking that pressure
3 question he's asking whether anyone pressured him to
4 plead guilty today, which may not cause the defendant to
5 think back on why he started down the negotiation road.

6 I think an important --

7 JUSTICE SOTOMAYOR: Mr. Yablon, I agree with
8 you totally. I'm not as much convinced in the delay in
9 pleading because defendants often think about it and I
10 can imagine a hypothetical where the lawyer comes in and
11 says: I told him to plead guilty and he said to me: I
12 don't want to, but the judge told me to.

13 So I don't think the time limit -- we don't
14 know if that happened. But what did happen is that the
15 defendant made a motion to withdraw his plea and he
16 directly said: "I entered the plea because I
17 strategically decided that the government would
18 eventually have to come forward and vacate the charges
19 against me." He said it himself with no pressure by a
20 lawyer, because he was making the motion. How do you
21 get past that statement?

22 MR. YABLON: That statement reveals just how
23 little confidence we actually should have in the plea
24 decision that he made. Here is a defendant who for the
25 better part of a year was adamant about his desire to go

1 to trial and exercise his rights. It's the reason that
2 the in camera hearing happened in the first place,
3 because he was unhappy that the lawyer just wanted him
4 to plead guilty. After that hearing, suddenly there are
5 plea negotiations and a plea deal, which it's clear that
6 he is never happy about from the start.

7 Even at the plea hearing, he is attempting
8 to tell the judge: Look, I don't think that my conduct
9 actually is consistent with the conspiracy charge as
10 alleged. And he says later at the sentencing hearing
11 when they are discussing the withdrawal motion that
12 basically he went forward because his lawyer was
13 instructing him that it was the right thing to do. And
14 if you look at that sentencing --

15 JUSTICE SOTOMAYOR: But that is the whole
16 point, which is this may be IAC, but I don't know how --
17 how you prove that what the magistrate judge said to him
18 led to his decision.

19 MR. YABLON: And we don't need to prove
20 that.

21 JUSTICE SOTOMAYOR: That's only if we don't
22 accept that prejudice is a consideration here.

23 MR. YABLON: Either way, if you were looking
24 at whether this conduct should be viewed as inherently
25 prejudicial the reason that you might do that is because

1 you might think that at least in all of these cases
2 there might at least be a reasonable probability that it
3 would affect where the defendant is. And here you have
4 a defendant who has been adamant that he's not going to
5 plead, and when you have the judge making these comments
6 in front of the defendant, having him lose confidence in
7 his right to go to trial, then it's likely that that is
8 shifting the defendant's mind set in a way that gets him
9 to the negotiating table. And it also reaffirms the
10 defense lawyer's position in this case.

11 And so you have a defense lawyer who may
12 then go back to the prosecutor and say: We're just
13 going to get this deal done, and it may not be the deal
14 that the defendant would otherwise have wanted reached.

15 JUSTICE BREYER: You want us to basically
16 not apply the 11(h), the harmless error business, and
17 you basically want to prevent bizarre results by making
18 a tough definition of the word "participate." That's
19 how I understand you. And maybe you are right, but it
20 sounds to me as you say it in reading the briefs that
21 this is really a job for the rules committee.

22 This is a rule. We don't normally have
23 structural errors with respect to rules. We have rules
24 committees there to listen to this kind of complaint, to
25 weigh it in the system as a whole and to come up with

1 better rules.

2 MR. YABLON: Let me address that in two
3 ways, because we have two separate arguments and I want
4 to try to keep them distinct. One is that if you look
5 at the text and the history of Rule 11, there is strong
6 evidence that Congress actually made an affirmative
7 judgment not to sweep in Rule 11 violations within the
8 scope of Rule 11(h).

9 Our second argument is even if Rule 11(h)
10 applies to all Rule 11 errors, that all Rule 11(h) does
11 is apply the same substantial rights language that you
12 see in Rule 52(a) and (b). And this Court has
13 recognized that, while that substantial rights language
14 is often synonymous with a case of specific prejudice
15 inquiry, that's not always true. And there are a number
16 of examples. The Court is familiar with the
17 constitutional cases in which the Court has said that an
18 error is structural without trying to determine, make a
19 case-specific determination of prejudice.

20 But there are a number of nonconstitutional
21 cases as well in which the Court has said an
22 individualized prejudice inquiry is simply
23 inappropriate, that the error affects substantial rights
24 by its nature. So one example that I think is fairly
25 close to the one we have here is Gomez v. United States,

1 where you have the Court addressing a statutory
2 provision that prevents magistrate judges from
3 conducting the jury voir dire and that proviso is
4 violated and the Court is asked to conduct a prejudice
5 analysis: Did it matter that the magistrate judge
6 conducted voir dire?

7 And the Court said: We are not going to go
8 there; this is in effect a structural defect in the
9 proceedings.

10 JUSTICE KAGAN: Well, Mr. Yablon, have we
11 ever said that about the violation of a rule of criminal
12 procedure, that it's structural error no matter what the
13 circumstances?

14 MR. YABLON: First, Justice Sotomayor, this
15 Court has said that rules of criminal -- I'm so,
16 sorry --

17 JUSTICE SOTOMAYOR: That's not the first
18 time that has happened.

19 MR. YABLON: And I should be --

20 JUSTICE KAGAN: You worked for her, too, I
21 think.

22 MR. YABLON: That makes it that much more
23 embarrassing. She used to sit over there.

24 This Court has said that Federal rules and
25 statutes stand on equal footing, so whether we are

1 talking about applying this with respect to a rule or a
2 statute, it shouldn't make a difference; the analysis
3 should be the same. And in fact there is at least one
4 case where the Court did apply in effect the structural
5 analysis to -- to a rule violation and a second case in
6 which the Court at least left open the possibility.

7 So the case in which the Court did so is the
8 McCarthy case, which is discussed extensively in the
9 briefs. The Court referred to the 1966 version of Rule
10 11 and said that prejudice adheres in a violation of
11 that rule and that it was not going to conduct an
12 individualized analysis. It was simply going to grant
13 relief where there had not been full compliance with
14 that provision.

15 Of course, the rule has been amended since
16 then, but that provides evidence that the Court is not
17 unwilling to adopt this kind of rule in the context of
18 the Federal Rules.

19 JUSTICE KAGAN: I would think, Mr. Yablon,
20 that one of the effects of what you are asking us to do
21 is that the rule would just get narrower and narrower.
22 In other words, if automatic reversal is always the
23 effect of finding a violation -- and I think you
24 acknowledge this in a way -- that people will just find
25 fewer and fewer violations. And I'm wondering why we

1 should do something like that rather than interpret the
2 rule as it was meant to be interpreted, but then say:
3 You know, somebody can look and say it really just
4 didn't matter that it was violated in this case.

5 MR. YABLON: So we think that our approach
6 is consistent with how the rule is in fact meant to be
7 interpreted. The rule really is about this problem of
8 placing judicial pressure on defendants to plead guilty,
9 and those are the cases that ought to be reversed.

10 But the Court has a line-drawing decision to
11 make either way. Either the line that the Court should
12 focus on is the line that separates participation from
13 nonparticipation or, again, a narrower class of
14 participation. And I want to get to this point that --

15 JUSTICE ALITO: But you are arguing for a
16 narrower interpretation of Rule 11(c)(1) than a number
17 of courts of appeals have adopted, isn't that correct?

18 MR. YABLON: I believe there are some
19 decisions out that have adopted probably a broader
20 construction than we think is necessary and appropriate.
21 But what is easier for reviewing courts to monitor? Is
22 it easier for them to monitor the narrowing, the
23 improper narrowing of the rule over time, or is it
24 easier for them to monitor improper applications of the
25 harmless error rule, especially applications of it that

1 are happening in this kind of setting, where it's going
2 to be almost inherently a very speculative analysis, an
3 attempt to read the defendant's mind and ascertain
4 whether the defendant was influenced by what the judge
5 was saying.

6 And it would be much easier for appellate
7 courts to focus on the line-drawing exercise that
8 determines whether or not a violation had occurred or,
9 if you think that the rule is broader, whether the kind
10 of violation that occurred in this case occurred, than
11 it would be to try to make this case-by-case scouring
12 the record, individualized prejudice determinations.

13 JUSTICE ALITO: Could you say something
14 about Mr. Feigin's comments regarding what a judge can
15 and cannot do if the judge thinks that he or she sees a
16 violation of Lafler and Frye taking place?

17 MR. YABLON: So there ought to be things
18 that a judge is able to do in that situation. Suppose,
19 for example, that the judge becomes aware that the
20 defense attorney has given the -- his client false
21 information about the elements of the charge. It would
22 not violate Rule 11(c)(1) for the judge to say: I
23 understand that you were told that the elements of the
24 charge are A, B, and C, but in fact they are X, Y, and
25 Z.

1 So there are -- there are certainly steps
2 that a judge can take to help root out the violation.
3 And I would say that the fact is that generally when it
4 comes to ineffective assistance of counsel claims there
5 is only so much that the trial court can do. So
6 the fact that the trial court may not be able to solve
7 or prevent every ineffective assistance claim in this
8 context is not necessarily an argument against the rule,
9 because the judge often is not aware of the privileged
10 communications.

11 JUSTICE ALITO: What if the judge knows as a
12 result of pretrial motions that the evidence in the case
13 is very, very strong.

14 Let's say there's a -- there's been a motion
15 to suppress extremely incriminating evidence and the
16 motion has been denied, so the judge knows this is going
17 to come in. And the judge thinks if this comes in,
18 there's virtually very little chance that the defendant
19 is going to be acquitted, and yet the defendant -- and
20 the judge knows that a plea bargain -- a plea offer was
21 made and the defendant initially was going to take it,
22 and then before it was accepted, it's rejected.

23 Is there anything a judge can do in that
24 situation? Just sit back and, you know, wait for the
25 case to be -- to be reversed?

1 MR. YABLON: Well, the judge's role in that
2 situation is -- is not to step in as defense counsel or,
3 in effect, as second prosecutor. The judge -- I think
4 that there may be ways in that case for the judge to try
5 to alleviate the error without -- without crossing the
6 line. But when -- but when you start to make exceptions
7 in that -- in that situation, you -- you go down the
8 road of -- of the judge being the one who is evaluating
9 the evidence and who is, in effect, potentially
10 presuming the defendant's guilt. And the judge --

11 JUSTICE ALITO: It just puts -- puts the
12 judge in a very difficult position. It could -- can the
13 judge say, you -- do you realize that I denied your
14 motion to suppress that wiretap? And do you recognize
15 that on that wiretap, you conceded that the loss in this
16 case is \$20 million, and do you know that under the
17 sentencing guidelines, the sentence where the loss is
18 \$20 million is whatever it is, ten years in jail.

19 If the judge says all of that, has the judge
20 violated Rule 11(c)(1)?

21 MR. YABLON: And if this is happening in the
22 context of active discussions of whether the defendant
23 should or should not take a plea, then that -- that may
24 well cross the line.

25 JUSTICE KENNEDY: I don't know when it can

1 happen, because there's no colloquy when there's a
2 guilty plea. The colloquy happens when there's a not
3 guilty plea.

4 MR. YABLON: I think -- isn't it the
5 opposite, Justice Kennedy? The colloquy happens after
6 the defendant --

7 JUSTICE KENNEDY: No, no -- you're correct.
8 You're correct.

9 MR. YABLON: So -- so taking -- so in that
10 instance, again, you have a situation that may not be
11 different from situations that arise in completely
12 different contexts, where the attorney is doing
13 something that's ineffective, for example, and the judge
14 just doesn't know about it. And -- and whether or not
15 that can be cured in this -- in this setting of the --
16 of plea discussions, it's just a little bit tangential,
17 I think, to the key issue.

18 CHIEF JUSTICE ROBERTS: Now -- well, but
19 you've answered a lot of these questions by saying, you
20 know, it's hard to draw the line and, you know, maybe in
21 that case, maybe in this case.

22 Most -- our precedents where we recognize
23 structural error and -- and plain error are ones that
24 are pretty easily categorized. Did a magistrate conduct
25 voir dire or did he not? You know right away one way or

1 the other. Did he participate enough? You know, well,
2 if he told them how many times he sentenced people this
3 way, it's not, but if he said you ought to -- you ought
4 to pay attention to what I'm telling you when you'd
5 consider whether to plea or not, well, then it is.

6 It -- it seems to me in the typical plain
7 error cases, we're very -- the categories are very
8 sharply defined.

9 MR. YABLON: That's actually not accurate.
10 I would say, for example, take the defendant's right to
11 self-representation. And do you -- there may be obvious
12 cases and when the defendant's right to
13 self-representation has been clearly denied. But there
14 are going to be line-drawing problems when you're trying
15 to figure out did standby counsel intervene so much that
16 he denied that right.

17 Or similarly with the public trial,
18 obviously, a court can be totally closed, but then there
19 are going to be difficult cases when you have to decide
20 whether the justifications for closing the courtroom
21 are --

22 CHIEF JUSTICE ROBERTS: I would say in both
23 of those examples, the line -- the gray area, if you
24 were, is really quite narrow than here, where almost
25 every time you've been asked a question about a

1 difficult hypothetical, you say, well, maybe, maybe not.
2 And I think that's quite different than saying is the
3 court closed or not or was the person -- you know, did
4 he represent himself in fact or not. And those just
5 strike me as much easier cases.

6 MR. YABLON: And, of course, I'm being asked
7 all of the difficult hypotheticals.

8 If you look at the cases that actually
9 rise --

10 CHIEF JUSTICE ROBERTS: Yes, but if you were
11 -- if you were arguing whether or not it's -- it's
12 categorical error when the magistrate conducts voir
13 dire, it'd be pretty hard for somebody to come up with a
14 tough hypothetical.

15 MR. YABLON: In that instance, yes. But
16 there certainly are instances in which the structural --
17 in which the Court has found structural error, even when
18 there will be difficult line-drawing problems. And --

19 JUSTICE GINSBURG: Mr. Yablon, one problem
20 with calling this structural error is that it's not so
21 clear that this is a -- a bad thing. That is, some
22 States even today allow a judge to participate in plea
23 bargaining, and the advisors -- the rules advisory
24 committee -- said, when it -- when it framed this
25 rule that some commentators had said it was quite --

1 quite a frequent thing that happened, that judges
2 participated. So it isn't like not having a public
3 trial or not giving a person counsel of choice.

4 It's, this was -- this was something that
5 still some jurisdictions think it's okay.

6 MR. YABLON: Your Honor, no jurisdiction
7 endorses judicial exhortations to plead guilty. And --
8 and so this Court can resolve the case just on that
9 narrower basis, that there is a category of cases that
10 clearly do involve direct judicial pressure. And no
11 State allows it, and those are clear violations of the
12 rules. So without needing to draw these other lines
13 about how broad participation may reach, the Court can
14 do that.

15 But even in those States, it's important to
16 note that -- that the Federal system has made a
17 different structural choice. So whether or not it may
18 violate the Constitution for States to have carefully
19 tailored procedures that allow some type of judicial
20 involvement, that's not the structure that the Federal
21 system has chosen. And when you're dealing with the
22 structural choice that was made in Rule 11, that judges
23 shall not, must not participate in plea discussions,
24 that that is as elemental to the Federal system of plea
25 bargaining that we have as many of the familiar elements

1 of -- of the trial are. And so, the fact that States
2 have made -- made different structural choices does not
3 mean that it's not a structural error here.

4 Now, I do want to get back to this
5 line-drawing issue, because I think that this is not
6 something that should trouble the Court too much, for a
7 couple of reasons: First, in most cases, the line will
8 not be that hard to draw when you consider the purpose
9 of Rule 11(c)(1), which is reducing judicial pressure,
10 and instances in which judges are stepping out of their
11 role as impartial adjudicators, and when reviewing
12 courts take that as the touchstone, there may be
13 difficult cases, but they're going to be able to resolve
14 most of them.

15 Now, if the Court feels like it may be
16 difficult to do line drawing, and it is uncomfortable
17 extending the rule, the remedy that we're seeking that
18 far, it is entirely appropriate for the Court to -- to
19 take out a subcategory of Rule 11(c)(1) violations.

20 JUSTICE KAGAN: But that seems a bit odd,
21 don't you think, Mr. Yablon? You know, you're saying,
22 well, there are core violations as opposed to noncore
23 violations. I mean, presumably, that's part of what the
24 Court would think about when it was doing prejudice
25 analysis.

1 MR. YABLON: It would factor into the
2 prejudice analysis that the Court undertakes, but it
3 also is a reason just to -- to draw the line. I mean,
4 this Court in -- in various instances has
5 indicated that -- I mean, there are some -- some broad
6 rules out there: The right to the assistance of
7 counsel. It comes in different shapes. And the
8 prejudice analysis that applies for a total denial of
9 the right to counsel is different from the one that
10 applies when you're dealing with mere deficiency in
11 counsel's performance.

12 And there is -- and again, this is -- this
13 is a comparative line-drawing problem. Either you draw
14 the line looking at what a violation is or looking at
15 what a judicial exhortation is from the statement that
16 is made, or you engage in this freewheeling speculation
17 that the government wants engaged in, where you were
18 trying to read the defendant's mind. And that is simply
19 not how harmless error analysis normally proceeds, where
20 you have a closed universe of a record, you have
21 specific criteria that are being applied, and you can
22 posit what a reasonable juror is.

23 There is no reasonable defendant that can be
24 posited in the same way, because defendants are
25 idiosyncratic and are entitled to be idiosyncratic.

1 JUSTICE KAGAN: Mr. Yablon, do you know of
2 any case where there is one of these core violations,
3 these exhortation cases, where the Court did not find
4 prejudice?

5 MR. YABLON: The answer is no, and that
6 would be -- and we would urge the Court that if it does
7 not accept our primary submission, that it make clear
8 that judicial exhortations like this are highly unlikely
9 to be harmless.

10 That is what the Fourth Circuit has done,
11 the Fifth Circuit, the Seventh Circuit, the Tenth
12 Circuit, the D.C. Circuit. They are in effect applying
13 a per se analysis, they're just not calling it that.
14 They are reversing in all of these cases.

15 And so, if this Court is uncomfortable
16 calling it a per se rule, at least it should give very
17 strong indications that comments like this cannot be
18 written off, that they are highly likely, given the
19 position of the judge relative to the defendant, to
20 affect the defendant's thinking, to affect the way that
21 the defense counsel approaches the case, and possibly
22 the prosecution as well in those cases in which the
23 prosecution is aware of the error.

24 And we would go further and say that if the
25 Court were to go down this road, it would be useful for

1 the Court to provide the additional guidance of holding
2 that this particular type of error was not harmless.
3 That would send a signal to the lower courts that this
4 conduct is clearly off limits, and it would give them an
5 indication that the court means what it's saying, that
6 these kind of comments, where a judge is exhorting a
7 defendant to come to the cross, that he needs to plead
8 guilty --

9 CHIEF JUSTICE ROBERTS: How do we -- if
10 we're giving this guidance, what do we say about the
11 fact that he had a different judge subsequent to this,
12 that he filed a speedy trial motion after this coercion,
13 to suggest that he wasn't coerced all that much.

14 Are we supposed to take all that into
15 consideration, too?

16 MR. YABLON: You should say that those
17 inferences are not adequate to overcome the inference
18 that you draw from this type of participation,
19 particularly here.

20 I mean, consider the change in judge. The
21 reason this hearing occurred before the magistrate judge
22 is because the defendant sent a letter to the district
23 court asking -- explaining his problems with his
24 counsel. He got a response from the magistrate judge.
25 So in the defendant's mind, the magistrate judge and the

1 district court are effectively one and the same, and you
2 would not want a system where district courts are
3 encouraged to send these issues to magistrate judges, so
4 magistrate judges can engage in these kind of comments,
5 but then the district judge can basically just cleanse
6 it. It is going to affect the way that the process
7 plays out.

8 Now, the speedy trial issue, if I may
9 just -- we can equally draw the inference that that was
10 only done because counsel wanted to put some pressure on
11 the government to actually reach a deal. And it is that
12 kind of speculation that makes this error ill-suited to
13 the kind of remedial analysis the government favors.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Feigin, 13 minutes.

16 REBUTTAL ARGUMENT OF ERIC J. FEIGIN

17 ON BEHALF OF THE PETITIONER

18 MR. FEIGIN: Thank you, Mr. Chief Justice.

19 I just want to make one quick point in
20 response to the notion that we're asking for some form
21 of new prejudice analysis here.

22 This is the exact same prejudice analysis
23 from Dominguez Benitez, that looks whether there is a
24 reasonable probability that the error affected the plea.

25 Unless the Court has any further questions,

1 I will rest --

2 JUSTICE KAGAN: Mr. Feigin, can I ask you
3 the same question that I asked Mr. Yablon: Do you know
4 of any cases where in these -- where there are really
5 core violations, where a judge exhorts the defendant to
6 plea it -- does the Court ever find that
7 non-prejudicial?

8 MR. FEIGIN: I am aware of one or two State
9 cases in which the court has looked at the passage of
10 time as a reason why that kind of error wouldn't have
11 been prejudicial.

12 But otherwise, I agree with Respondent that
13 in the Federal courts of appeals, that does tend to get
14 reversed. And I think that supports the idea that if
15 the Court adopts the normal prejudice approach, and
16 reaffirms that approach in this case, that there's
17 not really that --

18 JUSTICE SOTOMAYOR: Do you disagree with how
19 the Fourth and Seventh Circuits and other circuits apply
20 a prejudice analysis, but one that says that it's highly
21 unlikely that you're not going to find prejudice? Do
22 you disagree with their analysis and approach?

23 MR. FEIGIN: Well, Your Honor, there --
24 my -- I'm not going to go so far as to endorse the
25 results they've reached in every single case --

1 JUSTICE SOTOMAYOR: No.

2 MR. FEIGIN: -- but I think insofar as they
3 approach the matter that -- you know, if there's a
4 fairly serious error and the defendant pleads guilty
5 right after that, that that's very likely absence of
6 extenuating circumstances to be prejudicial; we don't
7 have a problem with that.

8 Unless there are further questions --

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Counsel.

11 The case is submitted.

12 (Whereupon, at 12:01 p.m., the case in the
13 above-entitled matter was submitted.)

14

15

16

17

18

19

20

21

22

23

24

25

A				
abandoned 5:17 6:17 19:9	advantage 13:14	answer 43:5	argue 20:6 23:13	14:17,22,24
abdicated 4:16	adversary 7:8	answered 26:21 37:19	arguing 33:15 39:11	16:12 22:15 34:19 35:9 43:23 46:8
able 34:18 35:6 41:13	advise 6:15	answers 26:23	argument 1:12	awfully 7:10,22 15:25
above-entitled 1:11 47:13	advising 4:14 5:20	Anthony 1:6 19:7	2:2,5,8 3:4,6 7:13 19:3 20:11	a.m 1:13 3:2
absence 47:5	advisors 39:23	anyway 10:4	23:9,18 30:9 35:8 45:16	B
absolute 10:7	advisory 7:9 39:23	apparently 16:5	arguments 7:8 30:3	b 30:12 34:24
absorb 6:3	advocated 4:15	appeal 4:25 17:19	arranged 6:6	back 27:5 29:12 35:24 41:4
accept 8:13 19:8 20:10 28:22 43:7	advocating 12:4 12:5	appeals 3:12 4:25 5:17 6:10 7:5 13:25 17:13 18:22 33:17 46:13	ascertain 34:3	bad 39:21
acceptance 18:9	affect 20:25 21:3 21:17 29:3 43:20,20 45:6	APPEARANC... 1:14	asked 15:1,15 26:21 31:4 38:25 39:6 46:3	balance 18:25
accepted 35:22	affirmative 30:6	appellate 3:13 3:22 22:25 34:6	asking 13:22,24 17:7 20:1 25:20 25:21 27:2,3 32:20 44:23 45:20	bargain 22:8 25:5 35:20
accurate 38:9	agree 27:7 46:12	Appendix 18:2	applications 33:24,25	bargaining 4:5 12:14 39:23 40:25
acknowledge 32:24	agreement 8:10 8:11,12 16:9	apply 3:21 6:21 7:3 8:20 23:13 29:16 30:11 32:4 46:19	aspects 18:11	based 5:22 9:7 10:21
acknowledging 26:13	alike 8:2	applying 32:1 43:12	assistance 5:15 16:17,25 17:5 17:16 35:4,7 42:6	basic 6:19 7:2 21:23
acquitted 35:19	ALITO 15:2 16:16 33:15 34:13 35:11 36:11	approach 11:22 12:2,3,6,8,9 13:14 25:20,21 33:5 46:15,16 46:22 47:3	Assistant 1:15	basically 19:22 28:12 29:15,17 45:5
acting 6:13,18 21:21	allegation 14:16	approaches 43:21	assume 5:8,20 6:12,18 20:10	basis 40:9
active 36:22	allegations 18:11 18:15	appropriate 21:8 23:10 33:20 41:18	assumed 9:3	behalf 1:17,18 2:4,7,10 3:7 6:18 19:4 45:17
adamant 27:25 29:4	alleged 19:8 28:10	April 1:9	attempt 12:10 34:3	believable 19:22 28:12 29:15,17 45:5
add 17:20	alleviate 36:5	arbiter 19:10	attempting 24:21 28:7	basis 40:9
additional 20:18 44:1	allow 39:22 40:19	area 38:23	attendance 14:24	basic 40:9
address 30:2	allows 13:15 40:11	arguably 23:1	attend 14:24	basic 40:9
addressing 31:1	amended 32:15		attention 38:4	basic 40:9
adequate 44:17	analysis 7:3 9:15 11:9,18 12:19 12:24 13:23 19:22 20:19 21:9 22:22 31:5 32:2,5,12 34:2 41:25 42:2,8,19 43:13 45:13,21 45:22 46:20,22		attorney 5:8 34:20 37:12	basic 40:9
adheres 32:10	Anders 6:2		attorneys 15:18	basic 40:9
adjudicator 22:3			automatic 3:21 17:12,18 32:22	basic 40:9
adjudicators 41:11			automatically 3:13,18	basic 40:9
adopt 10:20 32:17			avoid 15:20	basic 40:9
adopted 3:17 12:6 17:13 33:17,19			aware 5:17 14:14	basic 40:9
adopting 8:14				basic 40:9
adopts 12:9 46:15				basic 40:9

box 17:14	37:21 40:8 43:2	choice 40:3,17	coercion 44:12	31:6
boy 9:24	43:21 46:16,25	40:22	collateral 5:16	conducting 31:3
Bradley 13:7	47:11,12	choices 41:2	colloquy 17:1,1	conducts 39:12
break 10:19 14:2	cases 11:4 12:19	chosen 40:21	26:12 37:1,2,5	confess 19:8
23:12	13:16 22:10,10	Circuit 12:5	come 7:2 27:1,18	confidence 27:23
breaking 11:7	22:25 23:14	14:25 43:10,11	29:25 35:17	29:6
BREYER 9:20	25:12,13,19	43:11,12,12	39:13 44:7	Congress 30:6
29:15	29:1 30:17,21	circuits 12:19	comes 3:22	consequences
brief 6:2 16:4	33:9 38:7,12,19	46:19,19	27:10 35:4,17	8:9 17:4
briefing 15:1	39:5,8 40:9	Circuit's 13:6	42:7	consider 20:20
briefs 29:20 32:9	41:7,13 43:3,14	circumspect	comment 23:3,3	23:5 38:5 41:8
bringing 16:21	43:22 46:4,9	25:16	24:4	44:20
broad 23:1 40:13	case-by-case	circumstance	commentators	consideration
42:5	34:11	15:10	39:25	28:22 44:15
broader 33:19	case-specific	circumstances	commenting 8:7	consistent 28:9
34:9	30:19	9:17 11:16	comments 5:3,4	33:6
built 9:4	categorical	12:10 13:19	5:23 14:3,9	conspiracy 18:14
burden 9:9	39:12	20:8 31:13 47:6	15:12 17:22	26:20 28:9
burden's 9:8	categories 38:7	cite 16:3 22:25	18:3,21 24:19	Constitution
business 29:16	categorization	claim 4:24 5:15	26:14,15 29:5	40:18
	12:7	16:25 35:7	34:14 43:17	constitutional
C	categorize 11:13	claimed 20:24	44:6 45:4	19:23 21:15
C 2:1 3:1 34:24	categorized	claims 17:16	commit 18:14	30:17
called 16:4 20:20	37:24	35:4	committee 29:21	construction
calling 39:20	category 11:15	class 11:2,3	39:24	23:1 33:20
43:13,16	12:1 13:18	33:13	committees	contemplating
calls 26:5	23:16 40:9	cleaned 18:15	29:24	24:19
camera 28:2	cause 27:4	cleanse 45:5	common 7:8	contemporane...
carefully 17:6	certainly 12:17	clear 9:11 10:25	communications	4:21
40:18	35:1 39:16	15:19 18:12,19	35:10	context 23:6
carries 21:9	certiorari 12:21	23:4 28:5 39:21	comparative	32:17 35:8
case 3:4,21 4:20	chambers 16:7	40:11 43:7	42:13	36:22
5:1,7,18 6:13	chance 35:18	clearly 38:13	complaint 29:24	contexts 37:12
7:3,12 9:17,18	change 44:20	40:10 44:4	completely 37:11	contrary 6:13
12:22,23 13:15	charge 28:9	client 5:21 6:14	compliance	21:21
13:17,18,25	34:21,24	34:20	32:13	conveying 22:7
15:2,5 16:3,6	charges 24:20	clients 6:15	conceded 12:23	convicted 24:24
16:21 18:19	27:18	client's 6:18	22:20,21 36:15	convinced 27:8
19:18 20:7,23	Chief 3:3,9,10	close 25:12	concerned 24:2	core 41:22 43:2
21:20 22:19	19:1,5 22:6	30:25	concerns 16:21	46:5
25:23 26:1,6	23:7 24:9 25:2	closed 38:18	conduct 16:6,25	correct 20:4
29:10 30:14	25:9 37:18	39:3 42:20	26:20 28:8,24	33:17 37:7,8
32:4,5,7,8 33:4	38:22 39:10	closing 38:20	31:4 32:11	counsel 4:14,15
34:10 35:12,25	44:9 45:14,18	clue 4:10	37:24 44:4	5:15,20,21 16:7
36:4,16 37:21	47:9	coerced 44:13	conducted 14:25	16:14,18,25

<p>17:5,10,11,16 19:1 22:5 35:4 36:2 38:15 40:3 42:7,9 43:21 44:24 45:10,14 47:9,10 counsel's 42:11 count 23:21 couple 9:5 14:1 41:7 course 9:14 25:14 26:24 32:15 39:6 court 1:1,12 3:11 3:12,15 4:2,18 4:25 5:2,17 7:5 12:20 13:22,24 13:25 15:4 16:7 16:22 17:13 18:1,22,24 19:6 20:12,15,20 21:17 30:12,16 30:17,21 31:1,4 31:7,15,24 32:4 32:6,7,9,16 33:10,11 35:5,6 38:18 39:3,17 40:8,13 41:6,15 41:18,24 42:2,4 43:3,6,15,25 44:1,5,23 45:1 45:25 46:6,9,15 courtroom 38:20 courts 3:22 6:10 8:18 11:9,17 18:7 33:17,21 34:7 41:12 44:3 45:2 46:13 court's 10:24 16:22 18:8 cover 8:4 crazy 15:5,10 create 4:19 17:23 20:1 created 19:24</p>	<p>creating 19:21 crimes 19:8 criminal 31:11 31:15 criteria 42:21 cross 36:24 44:7 crossing 25:7 36:5 cured 37:15</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 Davila 1:6 3:4 19:7 deal 19:9 25:5 28:5 29:13,13 45:11 dealing 20:17 21:2 22:20 40:21 42:10 decide 11:11 23:10 38:19 decided 27:17 deciding 10:25 23:10 decision 7:17 9:19 13:6,21 16:13,18 17:24 18:4,5 27:24 28:18 33:10 decisions 16:22 33:19 defect 31:8 defendant 3:15 4:2,3 5:12 6:6,7 7:11 9:7,8,9,10 10:3 15:3,5,16 15:17 16:1,11 17:1,2,24 18:20 21:25 22:2,4,11 22:14 24:5,6,17 24:20,21,23 25:17 26:9,16 26:21,25 27:4 27:15,24 29:3,4</p>	<p>29:6,14 34:4 35:18,19,21 36:22 37:6 42:23 43:19 44:7,22 46:5 47:4 defendants 7:18 13:8 24:17 27:9 33:8 42:24 defendant's 8:6 13:21 16:8,13 17:24 21:23 26:16 29:8 34:3 36:10 38:10,12 42:18 43:20 44:25 defense 5:8 16:6 29:10,11 34:20 36:2 43:21 deficiency 42:10 define 11:5 defined 38:8 defines 11:3 definition 29:18 delay 27:8 demanding 21:19 denial 42:8 denied 22:3,4 35:16 36:13 38:13,16 Department 1:16 describe 12:16 13:1 desire 27:25 determination 18:8 30:19 determinations 34:12 determine 11:18 12:10 30:18 determines 34:8 difference 8:8 32:2 different 8:3,19 9:5 10:20,20,21</p>	<p>13:5 26:1,6 37:11,12 39:2 40:17 41:2 42:7 42:9 44:11 differentiating 11:10 difficult 7:10 10:4 11:25 25:18 36:12 38:19 39:1,7,18 41:13,16 dire 31:3,6 37:25 39:13 direct 40:10 directly 27:16 disagree 4:13 8:22 46:18,22 disavowing 26:13 disclose 18:7 discouraging 8:7 discover 10:8 discuss 17:9,11 discussed 32:8 discussing 17:17 28:11 discussion 17:2 17:18 discussions 17:17 36:22 37:16 40:23 disregarding 11:14,16 18:22 distinct 30:4 distinguish 8:19 distinguishing 10:12 distorted 19:10 distortion 22:1 district 4:22 5:2 14:8,11 18:1 26:4,12 44:22 45:1,2,5 doctrine 4:19 5:18</p>	<p>doing 4:6 9:21 10:6 37:12 41:24 Dominguez 45:23 door 20:18 draw 25:10 37:20 40:12 41:8 42:3 42:13 44:18 45:9 drawing 41:16 duties 21:22 duty 18:7 D.C 1:8,16,18 43:12</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 14:13 26:9 easier 33:21,22 33:24 34:6 39:5 easily 37:24 easy 6:10 17:8 effect 12:11 22:13 31:8 32:4 32:23 36:3,9 43:12 effecting 17:23 effective 17:5 effectively 6:13 45:1 effects 32:20 either 6:22 28:23 33:11,11 42:13 elemental 40:24 elements 26:20 34:21,23 40:25 Eleventh 12:5 14:25 embarrassing 31:23 encouraged 45:3 encouraging 26:8</p>
---	--	--	--	---

<p>endorse 46:24 endorses 40:7 engage 42:16 45:4 engaged 42:17 enter 18:5 entered 27:16 entire 11:2 entirely 41:18 entitled 42:25 entry 14:3 episode 14:12 26:9 equal 31:25 equally 45:9 ERIC 1:15 2:3,9 3:6 45:16 erred 18:22 erroneous 3:24 15:12 error 3:22 4:1,10 4:17,19,24 5:11 5:18 6:4,23,23 7:4,5 9:12,13 9:13,18 10:7,21 11:1,13,14,19 12:1,23,24 13:17,19 19:20 19:22,24,25 20:3,6,14,17 20:19,21,25 21:3,3,5,7,15 21:17 22:2,4 29:16 30:18,23 31:12 33:25 36:5 37:23,23 38:7 39:12,17 39:20 41:3 42:19 43:23 44:2 45:12,24 46:10 47:4 errors 3:19 5:22 8:2,3,19 11:2,4 11:10,15 13:16 29:23 30:10</p>	<p>error's 9:13 especially 3:20 33:25 ESQ 1:15,18 2:3 2:6,9 essentially 11:8 13:7,9 establish 17:3 evaluating 36:8 eventually 13:10 27:18 evidence 17:21 24:5 30:6 32:16 35:12,15 36:9 ex 14:23 exact 45:22 exactly 6:10,25 7:1 example 8:5 12:20 13:5 21:12 25:3 30:24 34:19 37:13 38:10 examples 30:16 38:23 exception 4:19 5:19 exceptions 36:6 exclude 16:1 Excuse 6:20 excused 15:16 exemplary 26:4 exercise 28:1 34:7 exert 7:16 exerting 26:7 exhortation 42:15 43:3 exhortations 40:7 43:8 exhorting 44:6 exhorts 46:5 exist 11:21 exists 7:20 expansive 23:16</p>	<p>expect 5:21 expected 4:17 expects 24:15 explaining 44:23 explanation 18:19 exposure 24:24 extending 41:17 extensively 32:8 extenuating 47:6 extremely 35:15</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fact 5:1 12:20 20:5 24:16,23 32:3 33:6 34:24 35:3,6 39:4 41:1 44:11 factor 8:25 9:14 9:15 42:1 factors 14:1 25:25 facts 7:13 11:16 12:10 13:19 22:12,13 factual 22:8,14 fair 6:12 fairly 13:17 30:24 47:4 fairness 20:21 21:1 fall 12:1 13:18 false 34:20 familiar 11:17 30:16 40:25 far 23:8 41:18 46:24 fashion 16:3 favors 45:13 Federal 31:24 32:18 40:16,20 40:24 46:13 feels 41:15 Feigin 1:15 2:3,9 3:5,5,6,8,10</p>	<p>4:12 5:14 6:8 6:25 7:21,25 9:1,4 10:18 12:12,17 13:4 14:14,21 15:8 15:23 16:2,20 45:15,16,18 46:2,8,23 47:2 Feigin's 34:14 felt 5:4 fewer 32:25,25 Fifth 43:11 figure 22:24 38:15 file 5:1 filed 6:2 12:21 14:4 44:12 find 32:24 43:3 46:6,21 finding 32:23 fine 25:9 first 4:12 7:25 8:18-9:6 10:23 13:23 19:14 20:5 26:17 28:2 31:14,17 41:7 fits 8:14 flawed 3:15 focus 33:12 34:7 focused 11:12 followed 4:23 following 25:14 footing 31:25 forbids 23:5 forced 22:5 forego 19:7 foregoing 19:14 19:15,16 form 7:4 11:9 45:20 forward 27:18 28:12 found 19:24 22:11 39:17 fourth 13:6 20:19</p>	<p>20:24 43:10 46:19 framed 39:24 framework 20:7 frankly 17:14 freewheeling 42:16 frequent 40:1 front 14:8 29:6 Frye 16:23,23 34:16 full 32:13 fundamentally 19:10 further 15:1 43:24 45:25 47:8</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 general 1:16 17:7 generally 35:3 generis 19:22 20:2 21:12 getting 25:7 Ginsburg 3:25 5:12 6:1 12:12 13:2 14:10,19 25:22 26:18 39:19 Ginsburg's 5:6 give 43:16 44:4 given 34:20 43:18 giving 40:3 44:10 go 6:21,21 9:23 10:9,16 14:5 15:5,9,9 26:4 27:25 29:7,12 31:7 36:7 43:24 43:25 46:24 goes 22:23 24:7 going 6:9 7:2,10 10:10 13:9,10</p>
---	---	---	--	--

<p>13:11,12,13 17:18 23:9 24:16 29:4,13 31:7 32:11,12 34:1 35:16,19 35:21 38:14,19 41:13 45:6 46:21,24 Gomez 30:25 good 23:8 25:5 government 8:5 9:8 12:18,23 14:22,23,24 17:14 20:23 21:19 22:20 23:16,20,23 27:17 42:17 45:11,13 Government's 16:5 25:21 grant 32:12 granting 3:13 gray 38:23 guard 16:24 17:15 21:22 guidance 44:1,10 guidelines 36:17 guilt 36:10 guilty 4:15 5:21 6:16 10:4,11,11 13:12 15:3,11 18:13,17 21:25 22:11 24:3,7,17 26:22 27:4,11 28:4 33:8 37:2 37:3 40:7 44:8 47:4</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>hand 17:15,17 happen 27:14 37:1 happened 5:7 16:3 27:14 28:2 31:18 40:1</p>	<p>happening 34:1 36:21 happens 15:14 16:10 37:2,5 happy 28:6 harassing 13:9 hard 10:5 15:25 25:4 37:20 39:13 41:8 harmless 6:23 7:4 29:16 33:25 42:19 43:9 44:2 harsh 9:24 hear 3:3 19:14 heard 16:14 hearing 14:12,23 25:25 26:3,7,12 26:17 28:2,4,7 28:10 44:21 held 8:4 help 35:2 high 7:23 highly 43:8,18 46:20 history 30:5 hoc 19:19 holding 44:1 Honor 3:8 4:12 5:14 6:8 7:25 9:1,16 10:19 12:17 13:11 14:21 15:8,23 16:2,11,20 18:4 20:5 22:16 23:11 40:6 46:23 hypothetical 5:6 5:7 16:1 24:10 24:11 27:10 39:1,14 hypotheticals 39:7</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>IAC 28:16</p>	<p>idea 46:14 idiosyncratic 42:25,25 ill-considered 21:22 ill-suited 45:12 imagine 27:10 impartial 22:3 41:11 imploring 19:7 important 9:15 10:13 27:6 40:15 improper 20:8 33:23,24 inadmirable 11:23 inappropriate 3:20 4:20 8:15 8:17 10:22 15:4 30:23 incomplete 11:8 inconsistent 10:24 11:24 incriminating 35:15 indicate 9:17 13:19 indicated 14:5 42:5 indicating 8:11 21:13 indication 44:5 indications 43:17 indictment 18:12 individualized 21:8 30:22 32:12 34:12 ineffective 5:15 16:17,25 17:16 35:4,7 37:13 inference 44:17 45:9 inferences 44:17 influence 7:15,17</p>	<p>influenced 7:11 16:12 34:4 information 4:7 18:8 22:8,15 34:21 informational 23:3 24:12,25 informing 24:19 inherently 11:23 28:24 34:2 initial 17:2 initially 35:21 inquiry 11:13 21:8 30:15,22 insist 10:6 insofar 47:2 instance 13:24 37:10 39:15 instances 39:16 41:10 42:4 instructing 28:13 integrity 20:21 21:1 intent 14:5 interaction 16:22 interesting 17:9 interpret 33:1 interpretation 33:16 interpreted 33:2 33:7 interrupt 19:13 interval 26:2 intervene 38:15 intervenes 9:22 intervention 5:9 7:11 9:3 10:10 10:14 20:8 invention 11:22 invoked 20:24 involuntary 21:23 involve 40:10 involvement 40:20</p>	<p>irrespective 3:14 issue 6:21 8:1 15:1 18:11 19:18 37:17 41:5 45:8 issues 45:3 it'd 39:13</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>J 1:15 2:3,9 3:6 45:16 jail 36:18 job 29:21 Joint 18:2 judge 4:4,6,11,17 4:23 6:5 8:5,6,7 8:10,12 9:22 10:9 11:4 12:13 13:7 14:8,8,11 15:12,18 16:5 16:16,17,24 17:8 19:9 21:20 22:7,9 23:23,24 24:3,18 25:7,8 25:15,15,16,24 25:24 26:1,4,7 26:10,12,19,21 27:12 28:8,17 29:5 31:5 34:4 34:14,15,18,19 34:22 35:2,9,11 35:16,17,20,23 36:3,4,8,10,12 36:13,19,19 37:13 39:22 43:19 44:6,11 44:20,21,24,25 45:5 46:5 judges 7:14,16 17:14,15 19:20 24:16 25:14 31:2 40:1,22 41:10 45:3,4 judge's 5:23 7:11 9:3 14:3 17:22</p>
--	---	--	---	---

<p>20:8 26:13 36:1 judgment 30:7 judicial 3:24 5:9 11:22 23:14,15 24:2 33:8 40:7 40:10,19 41:9 42:15 43:8 judiciary 27:1 jurisdiction 40:6 jurisdictions 40:5 juror 42:22 jury 31:3 Justice 1:16 3:3 3:9,10,25 5:5,6 5:11,24 6:1,20 6:25 7:7,22 8:22 9:2,20 12:12 13:2 14:10,19 15:2 15:14,25 16:16 19:1,5,12,16 19:21 20:10,13 22:6 23:7,19,24 24:9 25:2,9,22 26:18 27:7 28:15,21 29:15 31:10,14,17,20 32:19 33:15 34:13 35:11 36:11,25 37:5,7 37:18 38:22 39:10,19 41:20 43:1 44:9 45:14 45:18 46:2,18 47:1,9 justifications 38:20</p> <hr/> <p style="text-align: center;">K</p> <p>KAGAN 23:19 23:24 31:10,20 32:19 41:20 43:1 46:2 keep 30:4 keeping 7:14</p>	<p>Kennedy 5:5 15:14,25 19:12 19:16 36:25 37:5,7 kept 13:9 key 37:17 kind 5:18 8:12 13:12,15 17:14 19:20 21:12 22:2,4 25:9 29:24 32:17 34:1,9 44:6 45:4,12,13 46:10 kinds 8:3 10:21 13:15 24:18 knew 14:12 18:6 know 4:3,4 5:12 5:13 6:7 10:9 12:6 14:11,11 15:11,16 22:9 27:14 28:16 33:3 35:24 36:16,25 37:14 37:20,20,25 38:1 39:3 41:21 43:1 46:3 47:3 knows 35:11,16 35:20</p> <hr/> <p style="text-align: center;">L</p> <p>lacks 4:7 Lafler 16:18,23 34:16 language 21:4 30:11,13 lawyer 4:5,7 6:1 6:3,5,11,13 9:23 27:10,20 28:3,12 29:11 lawyers 6:15 7:17 lawyer's 29:10 lead 11:24 15:6 17:18</p>	<p>led 28:18 left 20:18 32:6 letter 44:22 let's 20:5 35:14 likes 5:8 limit 27:13 limits 44:4 line 25:8,10 33:11,12 36:6 36:24 37:20 38:23 41:7,16 42:3,14 lines 40:12 line-drawing 25:18 33:10 34:7 38:14 39:18 41:5 42:13 listen 9:23 29:24 little 10:19 24:23 27:23 35:18 37:16 long 25:4 look 11:1,17,18 12:9,20 24:15 25:12 28:8,14 30:4 33:3 39:8 looked 46:9 looking 11:10 25:19 28:23 42:14,14 looks 26:3 45:23 lose 29:6 loses 12:18 loss 36:15,17 lot 22:10 24:16 37:19 lower 4:2 24:7 44:3 lunch 10:9</p> <hr/> <p style="text-align: center;">M</p> <p>M 1:18 2:6 19:3 magistrate 4:11 14:3,8,13 15:15</p>	<p>17:22 19:9 25:24 26:10,13 28:17 31:2,5 37:24 39:12 44:21,24,25 45:3,4 magistrate's 5:3 18:3,21 main 10:22 16:21 majority 25:13 making 7:17 24:18 27:20 29:5,17 mandatory 15:20 manipulatable 11:23 manner 8:8 matter 1:11 5:25 31:5,12 33:4 47:3,13 McCarthy 32:8 mean 6:15,16 13:12 24:3 41:3 41:23 42:3,5 44:20 means 18:10 21:6 44:5 meant 25:1 33:2 33:6 mention 5:3 18:3 18:21 mere 42:10 message 25:17 million 36:16,18 mind 7:24 10:3 13:8 29:8 34:3 42:18 44:25 minimum 15:20 22:12 minor 10:8 23:20 23:22 24:1 minutes 45:15 mockery 7:23 moment 9:22 Monday 1:9</p>	<p>monitor 33:21,22 33:24 month 14:4 months 4:23 14:13 26:2 motion 5:1 14:4 27:15,20 28:11 35:14,16 36:14 44:12 motions 35:12 mouth 7:2 moved 17:25</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1 narrow 12:7 38:24 narrower 32:21 32:21 33:13,16 40:9 narrowing 33:22 33:23 narrowly 11:12 nature 9:13 24:20 30:24 necessarily 16:15 21:9 35:8 necessary 4:8 33:20 Neder 10:24 need 23:7 28:19 needing 40:12 needs 44:7 negotiating 29:9 negotiation 27:5 negotiations 11:5 28:5 neutral 19:10 never 14:16 18:3 20:23,24 28:6 new 45:21 nitpick 27:2 nonconstitutio... 21:16 30:20 noncore 41:22</p>
--	---	--	---	---

nonparticipation 33:13	open 20:18 32:6	people 32:24 38:2	28:4 29:5 33:8 40:7 44:7	prejudiced 3:15
non-hypothetical 16:3	opening 19:13	performance 42:11	pleaded 15:11 18:16,20	prejudices 6:24
non-prejudicial 3:19 46:7	opposed 41:22	periphery 22:23	pleading 27:9	prejudicial 12:14 12:15,25 13:3 13:13 28:25 46:11 47:6
normal 6:22 11:18 46:15	opposite 37:5	person 39:3 40:3	pleads 24:7,17 47:4	presence 8:6 16:8
normally 29:22 42:19	oral 1:11 2:2,5 3:6 19:3	petition 12:21	please 3:11 19:6	present 15:17
note 40:16	order 11:11	Petitioner 1:4,17 2:4,10 3:7 45:17	pled 10:3 15:3	presenting 25:23
notes 7:10	ought 17:10 22:15 25:4 33:9 34:17 38:3,3	pieces 10:20 11:7	point 4:18 6:17 6:19 7:2 14:5 14:10 26:11 28:16 33:14 45:19	preside 14:11
noting 14:1	outcome 11:19 12:11	place 5:10 16:18 26:17 28:2 34:16	posed 24:10	presided 25:24
notion 4:13 8:1 45:20	outside 8:5	places 9:6	posit 42:22	pressure 5:3 21:25 24:2 26:8 27:1,2,19 33:8 40:10 41:9 45:10
number 30:15,20 33:16	overbear 26:10	placing 33:8	posited 42:24	pressured 26:22 27:3
	overcome 44:17	plain 3:22 4:1,10 4:19 5:11,18 6:4,23 7:4 12:24 19:25 20:6,19 21:3,5 22:21 37:23 38:6	position 10:24 29:10 36:12 43:19	pressuring 8:5
	overwhelming 24:6	plays 45:7	possibility 32:6	presumably 41:23
O	P	plea 4:5,7 5:2 8:6 8:7,10,11,12 9:19 10:11,11 11:4 12:13 14:3 14:7,12 16:9 17:4,17,25 18:2 18:5,9,13 19:9 22:8 25:25 26:3 26:7,11 27:15 27:16,23 28:5,5 28:7 35:20,20 36:23 37:2,3,16 38:5 39:22 40:23,24 45:24 46:6	possibly 43:21	presuming 36:10
O 2:1 3:1	P 3:1	pled 4:14 5:21 6:15 13:12,21 16:13 17:24 21:25 24:3 26:9 26:22 27:4,11	post 19:19	presumption 7:20,23 8:16,20 8:24 9:6 16:14
object 4:17 9:9	page 2:2 18:2		posture 3:23 22:19	pretrial 19:10 35:12
objected 9:7,8	palpable 7:16		potential 8:9,9	pretty 37:24 39:13
objection 4:2,8 4:22,22 6:11	part 27:25 41:23		potentially 36:9	prevent 29:17 35:7
objections 5:22 6:19	parte 14:23		powerful 7:7	prevents 31:2
obvious 8:8 38:11	participate 4:5 29:18 38:1 39:22 40:23		practice 3:12,18	primary 43:7
obviously 13:13 38:18	participated 40:2		precedents 37:22	privileged 35:9
occur 5:22	participates 11:4		precise 3:17	pro 17:25
occurred 14:7,22 20:9 34:8,10,10 44:21	participating 12:13		prejudice 6:22 7:3,13,20 8:24 9:15 11:9,18 12:19 13:14,23 15:7,13 20:1 21:8,19 28:22 30:14,19,22 31:4 32:10 34:12 41:24 42:2,8 43:4 45:21,22 46:15 46:20,21	probability 9:19 13:20 17:23 26:15 29:2 45:24
occurs 19:20 22:2,4	participation 3:24 22:18 23:14,15 33:12 33:14 40:13 44:18			probably 33:19
odd 41:20	particular 11:14 12:1 44:2			problem 9:20,25 33:7 39:19 42:13 47:7
offense 18:14	particularly 4:20 11:20 23:5 44:19			problems 38:14
offer 8:6 17:9 35:20	parties 8:11 16:8			
offering 24:16	passage 46:9			
oh 17:8	pay 38:4			
okay 9:24 40:5	penalty 9:24			
ones 37:23				
one-off 23:3				

<p>39:18 44:23 procedure 31:12 procedures 40:19 proceeding 18:13,13 22:22 proceedings 4:23 17:3 20:22 31:9 proceeds 42:19 process 19:11 22:1 45:6 prohibited 25:1 prohibition 22:18 prompt 4:8 prong 6:22 20:19 20:24 21:3 proof 19:25 proper 21:21 prosecution 43:22,23 prosecutor 14:20 16:6 18:7,16 29:12 36:3 prove 28:17,19 provide 44:1 provides 32:16 provision 31:2 32:14 proviso 31:3 public 20:21 21:1 38:17 40:2 Pure 22:12 purely 22:7 23:3 24:12,25 purpose 3:17 7:14 41:8 purposes 6:14 23:6 pushing 22:13 put 20:5 45:10 puts 17:13 36:11 36:11 p.m 47:12</p> <hr/> <p style="text-align: center;">Q</p> <hr/>	<p>question 4:1 12:7 16:11 22:17 23:15 25:11 27:3 38:25 46:3 questionable 6:5 questions 17:7 18:24 37:19 45:25 47:8 quick 45:19 quite 5:10 10:4 15:16 18:12 21:15 25:23 38:24 39:2,25 40:1</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 raise 4:24 6:19 raised 4:25 raises 22:17 ratcheting 21:24 reach 16:9 23:9 40:13 45:11 reached 8:11 29:14 46:25 read 7:9 34:3 42:18 reading 29:20 reaffirms 29:9 46:16 real 24:22 realize 36:13 really 5:24 10:9 10:13 17:13 20:2 29:21 33:3 33:7 38:24 46:4 46:17 reason 18:6 24:15 26:16 28:1,25 42:3 44:21 46:10 reasonable 9:18 13:20 17:23 29:2 42:22,23 45:24</p>	<p>reasons 8:17 10:22 18:1 41:7 Rebollo-Andino 12:22 rebuttable 7:20 8:16,20,23 9:2 REBUTTAL 2:8 45:16 receiving 17:4 recognize 12:15 26:19 36:14 37:22 recognized 3:16 9:16 30:13 record 14:15,25 18:15 34:12 42:20 reducing 41:9 referred 32:9 reflects 14:15 refuses 7:5 regarding 34:14 rejected 8:10 35:22 rejection 18:9 relative 43:19 relevant 18:8 relief 3:13 11:11 32:13 remand 13:24 remedial 25:20 25:20 45:13 remedy 23:13 41:17 reply 16:4 represent 39:4 representation 4:16 6:17 reputation 20:22 21:1 requires 19:25 reserve 18:25 resolve 13:23 40:8 41:13 respect 19:23</p>	<p>29:23 32:1 respectfully 4:13 Respondent 1:19 2:7 5:1,14 12:3 12:4 19:4 46:12 Respondent's 4:14,15 response 44:24 45:20 rest 46:1 result 35:12 results 11:24 29:17 46:25 reveals 27:22 reversal 3:21 17:12,19 32:22 reversed 23:2 33:9 35:25 46:14 reversing 3:18 43:14 review 5:16 14:25 reviewing 11:9 33:21 41:11 right 3:5 6:25 13:11 15:9 19:18 22:16 23:11 24:22 28:13 29:7,19 37:25 38:10,12 38:16 42:6,9 47:5 rights 10:2 19:8 19:17 20:16 21:4,6,18,24 28:1 30:11,13 30:23 rise 39:9 road 27:5 36:8 43:25 ROBERT 1:18 2:6 19:3 ROBERTS 3:3,9 19:1 22:6 23:7</p>	<p>24:9 25:2,9 37:18 38:22 39:10 44:9 45:14 47:9 role 19:9 21:21 36:1 41:11 root 35:2 route 6:7 rule 3:14,16,19 3:21 4:3 5:12 6:12 7:24 8:1,3 8:4,15 9:5,6 10:7,20 11:3,21 12:5,9,23 15:15 16:23 17:12 19:25 21:4,5,6 21:9 22:21,24 23:2,5,6,21 24:2,14,15,19 25:1,15 26:5,17 29:22 30:5,7,8 30:9,10,10,12 31:11 32:1,5,9 32:11,15,17,21 33:2,6,7,16,23 33:25 34:9,22 35:8 36:20 39:25 40:22 41:9,17,19 43:16 rules 10:21 29:21 29:23,23 30:1 31:15,24 32:18 39:23 40:12 42:6</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 satisfied 26:20 saying 15:4 20:2 20:13 34:5 37:19 39:2 41:21 44:5 says 4:4 5:12,20 9:23 10:9 18:4</p>
--	---	--	---	--

22:9 25:3 27:11 28:10 36:19 46:20 scope 22:17 30:8 scouring 34:11 scrupulous 25:14 se 12:5 17:25 20:18 23:8 43:13,16 second 8:21 11:7 23:18 30:9 32:5 36:3 see 8:20 9:21 10:15 17:8 30:12 seek 23:13 seeking 41:17 sees 16:17 34:15 self-represent... 38:11,13 send 44:3 45:3 sense 23:8 sent 44:22 sentence 7:1 15:7 24:7 36:17 sentenced 22:12 38:2 sentencing 8:9 14:7 24:24 28:10,14 36:17 separate 13:15 30:3 separates 33:12 serious 9:12,22 9:24 10:14 11:14 13:16,17 47:4 seriousness 9:14 set 29:8 setting 34:1 37:15 Seventh 43:11 46:19 severe 15:6 shapes 42:7	sharply 38:8 shifting 29:8 show 21:14 showing 21:18 side 20:5 signal 44:3 similar 21:15 similarly 38:17 simply 30:22 32:12 42:18 single 46:25 sit 31:23 35:24 situation 12:13 12:14 22:7 26:25 34:18 35:24 36:2,7 37:10 situations 7:9 37:11 size 8:14 slip 17:8 slipup 17:18 Solicitor 1:15 solve 35:6 somebody 33:3 39:13 sorry 23:25 31:16 sort 5:19 8:14 21:7,18 Sotomayor 5:24 6:20 7:1,7,22 8:22 9:2 19:21 20:10,13 27:7 28:15,21 31:14 31:17 46:18 47:1 sounds 29:20 special 5:19 26:1 specific 21:18 30:14 42:21 speculation 19:19 42:16 45:12 speculative 34:2	speedy 14:4 44:12 45:8 stage 6:3 stand 31:25 standard 7:19 20:19 21:3,5 standby 38:15 start 18:2 28:6 36:6 started 27:5 state 10:3 40:11 46:8 statement 24:12 27:21,22 42:15 statements 24:25 States 1:1,3,12 3:4,16 10:25 13:7 16:4 30:25 39:22 40:15,18 41:1 statute 32:2 statutes 31:25 statutory 31:1 step 36:2 stepping 21:21 41:10 steps 35:1 stick 5:6 strange 22:19 strategic 18:5 strategically 27:17 strike 39:5 strong 8:24 25:23 26:15 30:5 35:13 43:17 strongly 8:12 20:16 structural 10:7 11:1 19:22,24 20:3,14,17 23:9 29:23 30:18 31:8,12 32:4	37:23 39:16,17 39:20 40:17,22 41:2,3 structure 40:20 subcategories 11:6,21 subcategory 41:19 subject 19:19 subjected 4:10 submission 43:7 submit 26:14 submitted 47:11 47:13 subsequent 44:11 substantial 10:2 20:16 21:4,6,18 30:11,13,23 subtle 7:15,16 suddenly 10:8 28:4 suggest 24:5 44:13 suggested 20:16 suggesting 12:2 suggests 16:23 23:16 sui 19:21 20:2 21:12 supports 46:14 suppose 5:5 15:2 34:18 supposed 4:4,11 44:14 suppress 35:15 36:14 Supreme 1:1,12 sure 24:21 sweep 30:7 synonymous 30:14 system 29:25 40:16,21,24 45:2	systematic 22:1 <hr/> T <hr/> T 2:1,1 table 22:9 29:9 tailored 40:19 take 5:9 8:1 13:4 13:5 35:2,21 36:23 38:10 41:12,19 44:14 talk 5:10 talking 24:12 32:1 tangential 37:16 tell 4:6 5:11 6:10 11:25 28:8 telling 24:22 38:4 ten 22:10 25:4 36:18 tend 46:13 Tenth 43:11 term 12:22 terms 10:14 text 23:4 30:5 thank 3:8,9,10 19:1 45:14,18 47:9 then-common 3:18 they'd 11:14 thing 13:12 17:21 23:20,22 28:13 39:21 40:1 things 10:8 34:17 think 5:19 6:4,9 6:12 7:6 8:14 8:16,18 9:4 10:23 11:7,22 12:3,4,6,8,21 13:25 15:23 16:10,13,20 17:6,7,12,21 19:13 24:2,8,13 24:25 25:4 27:5 27:6,9,13 28:8
---	--	---	--	---

29:1 30:24 31:21 32:19,23 33:5,20 34:9 36:3 37:4,17 39:2 40:5 41:5 41:21,24 46:14 47:2 thinking 26:16 26:25 43:20 thinks 16:17 34:15 35:17 third 11:20 21:2 thought 10:15,18 three 10:22 26:2 time 6:4,16 18:25 27:13 31:18 33:23 38:25 46:10 times 25:4 38:2 today 27:4 39:22 told 13:7 27:11 27:12 34:23 38:2 total 42:8 totally 27:8 38:18 touchstone 41:12 tough 29:18 39:14 track 10:1,2 transcript 24:4 tremendous 21:24 trial 8:10 13:9,10 14:4,6 15:5,6,9 15:9 19:8,17 21:23 22:11 24:8,22 28:1 29:7 35:5,6 38:17 40:3 41:1 44:12 45:8 tries 22:23 trivial 10:10,13 trouble 41:6 true 25:19 30:15	try 10:2 15:20 16:24 17:3 21:14 30:4 34:11 36:4 trying 10:19 25:16 30:18 38:14 42:18 turns 12:7 two 23:12 25:25 26:2 30:2,3 46:8 type 9:12 12:1 40:19 44:2,18 types 8:19 typical 38:6 <hr/> U <hr/> uncomfortable 41:16 43:15 underlying 23:6 understand 29:19 34:23 understanding 14:21 understands 17:3 24:21 undertakes 42:2 unfair 4:9 5:10 unhappy 16:5 28:3 unique 7:13 United 1:1,3,12 3:4,16 10:25 13:6 16:4 30:25 universe 42:20 unsatisfactory 11:8 unusual 7:12 unvarnished 18:19 unwilling 32:17 urge 43:6 urging 16:8 use 8:23 useful 43:25	usually 25:16 <hr/> V <hr/> v 1:5 3:4,16 10:24 13:7 30:25 vacate 27:18 variety 8:2 various 42:4 Vaughn 3:16 version 32:9 versus 11:15 viewed 24:4 28:24 violate 34:22 40:18 violated 31:4 33:4 36:20 violation 3:14 22:21,23 23:21 24:14 31:11 32:5,10,23 34:8 34:10,16 35:2 42:14 violations 19:23 21:16 23:15 30:7 32:25 40:11 41:19,22 41:23 43:2 46:5 virtually 35:18 void 10:11 voir 31:3,6 37:25 39:12 <hr/> W <hr/> wait 35:24 waivers 21:23 want 6:3 8:1 9:11 12:20 15:19 17:20 19:12 21:14 27:12 29:15,17 30:3 33:14 41:4 45:2 45:19 wanted 28:3	29:14 45:10 wants 4:7 5:9,15 15:9 42:17 warranted 11:12 Washington 1:8 1:16,18 wasn't 4:11,22 14:23,24 44:13 way 9:21,22 10:12,15,16,17 11:5 16:24 22:14 26:12 28:23 29:8 32:24 33:11 37:25 38:3 42:24 43:20 45:6 ways 9:5 23:12 30:3 36:4 weigh 29:25 well-intentioned 8:8 went 22:11 28:12 we're 13:11,22 13:24 22:19,20 25:20 29:12 38:7 41:17 44:10 45:20 we've 19:24 wiretap 36:14,15 withdraw 5:2 17:25 27:15 withdrawal 28:11 withdrawing 18:1 withdrawn 18:16 wondering 32:25 word 6:9 8:23 29:18 words 18:4,20 32:22 worked 31:20 worth 14:1 wouldn't 15:11 46:10 written 43:18	wrong 4:6 18:18 <hr/> X <hr/> x 1:2,7 34:24 <hr/> Y <hr/> Y 34:24 Yablon 1:18 2:6 19:2,3,5,15,17 20:4,12,15 22:16 23:11,22 24:1,11 25:6,11 25:22 26:11,24 27:7,22 28:19 28:23 30:2 31:10,14,19,22 32:19 33:5,18 34:17 36:1,21 37:4,9 38:9 39:6,15,19 40:6 41:21 42:1 43:1 43:5 44:16 46:3 year 22:9 25:5 27:25 years 22:12 36:18 <hr/> Z <hr/> Z 34:25 <hr/> \$ <hr/> \$20 36:16,18 <hr/> 1 <hr/> 11 3:19 4:3 22:24 23:5 24:2 26:5 26:17 30:5,7,10 32:10 40:22 11(b) 24:15,19 11(c) 4:4 5:13 11(c)(1) 3:14 6:12 8:2,3,4 10:20 11:3 12:23 16:23 23:21 24:14 33:16 34:22
--	---	---	---	--

36:20 41:9,19 11(h) 3:16 29:16 30:8,9,10 11-8966 12:22 11:12 1:13 3:2 12 22:12 12-167 1:4 3:4 12:01 47:12 13 45:15 15 1:9 19 2:7 1966 32:9				
<hr/> 2 <hr/>				
2013 1:9				
<hr/> 3 <hr/>				
3 2:4 14:13 3-month 14:2				
<hr/> 4 <hr/>				
45 2:10				
<hr/> 5 <hr/>				
52 9:5,6 12:9 52(a) 21:5,7 30:12 52(b) 21:5,10 58 18:2				