

**SUPREME COURT  
OF THE UNITED STATES**

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IN THE SUPREME COURT OF THE UNITED STATES

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|----------------------------|---|-------------|
| GONZALO HOLGUIN-HERNANDEZ, | ) |             |
| Petitioner,                | ) |             |
| v.                         | ) | No. 18-7739 |
| UNITED STATES,             | ) |             |
| Respondent.                | ) |             |

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Pages: 1 through 55  
Place: Washington, D.C.  
Date: December 10, 2019

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1           IN THE SUPREME COURT OF THE UNITED STATES  
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3   GONZALO HOLGUIN-HERNANDEZ,                    )  
4                            Petitioner,                    )  
5                            v.                                    ) No. 18-7739  
6   UNITED STATES,                                    )  
7                            Respondent.                    )  
8   - - - - -  
9                            Washington, D.C.  
10                            Tuesday, December 10, 2019  
11  
12                    The above-entitled matter came on for  
13   oral argument before the Supreme Court of the  
14   United States at 11:13 a.m.  
15   APPEARANCES:  
16   KENDALL TURNER, ESQ., Washington, D.C. ;  
17                    on behalf of the Petitioner.  
18   MORGAN L. RATNER, Assistant to the Solicitor  
19                    General, Department of Justice, Washington, D.C. ;  
20                    on behalf of the Respondent in support of vacatur.  
21   K. WINN ALLEN, ESQ., Washington, D.C. ;  
22                    for the Court-appointed amicus curiae in support  
23                    of the judgment below.  
24  
25

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P R O C E E D I N G S

(11:13 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 18-7739, Holguin-Hernandez versus United States.

Ms. Turner.

ORAL ARGUMENT OF KENDALL TURNER

ON BEHALF OF THE PETITIONER

MS. TURNER: Thank you, Mr. Chief Justice, and may it please the Court:

Rule 51 tells parties to criminal proceedings how to preserve claims of error for appeal. A party does so by telling the court what action the party wants the court to take when a ruling is made or sought. There's no need to tell the court twice.

In every federal court of appeals except the Fifth Circuit, this rule means what it says in the context of sentencing proceedings. Specifically, it means that a criminal defendant who argues for a particular sentence in district court preserves for appeal a challenge to a longer sentence.

In the Fifth Circuit, however, a criminal defendant, like Petitioner here, must

1 argue for a particular sentence in district  
2 court during the sentencing hearing and must  
3 object to any longer sentence as substantively  
4 unreasonable after the sentence issues. That  
5 post-sentencing objection requirement flouts  
6 Rule 51, which expressly says that exceptions  
7 are not required.

8 Nor is there any practical merit to  
9 the Fifth Circuit's rule. In fact, there's no  
10 evidence that a district court has ever  
11 reconsidered a sentence in light of a  
12 post-sentencing objection. And that makes  
13 sense. The sentencing court will have just  
14 heard and rejected the same arguments in issuing  
15 a sentence.

16 Recognizing that the Fifth Circuit's  
17 rule is indefensible, the government does not  
18 defend it. Instead, it supports amicus -- or  
19 Petitioner here. An amicus tries to defend the  
20 judgment below on alternative grounds.  
21 According to amicus, a party must identify the  
22 length beyond which a sentence is substantively  
23 unreasonable.

24 But substantive reasonableness is not  
25 a free-standing requirement under the Sentencing

1 Reform Act. It is simply a standard of  
2 appellate review. And there is no need for  
3 parties to frame their claims in terms of that  
4 standard of appellate review while they are  
5 still in district court, just as they need not  
6 frame their objections to evidentiary rulings in  
7 terms of abuse of discretion or to factual  
8 findings in terms of clear error while they are  
9 still in the trial court.

10 Because Petitioner here adequately  
11 preserved his challenge to the length of his  
12 sentence, this Court should reverse.

13 I'm open to questions. But, if you  
14 have none, there are really two problems.

15 JUSTICE ALITO: Well, I'll ask --

16 JUSTICE GINSBURG: The defense said --

17 JUSTICE ALITO: -- I'll ask --

18 JUSTICE GINSBURG: Counsel -- counsel  
19 argued for the preferred -- the defendant's  
20 preferred sentence. Didn't say that anything  
21 other than that would be excessive.

22 MS. TURNER: That's correct, Justice  
23 Ginsburg. And that is fine to put the court on  
24 notice of his claim that his sentence is too  
25 long.

1           And there are sort of two parts to my  
2 answer. The first is that the better reading of  
3 Section 3553(a) is that the district court's  
4 task is to identify the particular sentence that  
5 is sufficient but not greater than necessary to  
6 serve the statute's objectives. And "sufficient  
7 but not greater than necessary" necessarily  
8 means that there is a sentence that is  
9 sufficient but not greater than necessary. If  
10 one -- if 10 months is sufficient, 15 months is  
11 obviously greater. So, by asking the court for  
12 a particular sentence, the party puts the  
13 district court on notice of their objections to  
14 any other sentence.

15           But even if you don't agree with that  
16 reading of Section 3553(a), there is no need to  
17 inform the court of all possible actions it  
18 might take. There's no -- there's no basis for  
19 that requirement in Rule 51 and in other areas  
20 of the law where there are -- or a district  
21 court can take a range of actions. For example,  
22 in the context of Rule 11 sanctions or a length  
23 of continuance or reasonable attorneys' fees, a  
24 party simply has to ask for the result it wants.  
25 It doesn't have to identify all possible actions

1 the district court might take to preserve that  
2 claim for appeal.

3 CHIEF JUSTICE ROBERTS: But, I mean,  
4 let's say the -- the defendant says I think my  
5 sentence should be, you know, two years, and the  
6 district court says in its decision: Well, I  
7 think I'm going to sentence you to two years and  
8 six months because I think you've, you know,  
9 misunderstood this particular provision about,  
10 you know, history or deterrence or -- or  
11 whichever.

12 And is the district court supposed to  
13 appreciate, and the court of appeals, if the  
14 defendant does nothing else, that he thinks it's  
15 substantively unreasonable for the district  
16 court to have added those six months, for a  
17 reason that the -- may not even have been  
18 addressed by the defendant in his submission?

19 MS. TURNER: So two points, Your  
20 Honor. The first is that, you know, the  
21 district court doesn't really have to appreciate  
22 that it is substantively unreasonable because,  
23 again, that's just the appellate standard of  
24 review. The district court just has to  
25 understand that the party objects to the



1 particular sentence. But also --

2 CHIEF JUSTICE ROBERTS: Well, but --  
3 but I don't know how the district court knows  
4 that if you don't require an objection after the  
5 district court has explained why he's adding the  
6 six months. As far as he knows, well, maybe  
7 that's okay with the defendant; he wanted two  
8 years, but he can't really say that it's  
9 unreasonable to get two years and six months.  
10 Particularly since I pointed out to him  
11 precisely why I'm adding those six months.

12 MS. TURNER: So, again, we think the  
13 better view of Section 3553(a) is that it really  
14 instructs the district court to identify a  
15 particular sentence, and so, by identifying a  
16 particular sentence, the defendant necessarily  
17 communicates that other sentences -- that he  
18 doesn't agree with other sentences.

19 And while it's true that a defendant  
20 might not have identified every factor in  
21 Section 3553(a) in requesting a particular  
22 sentence -- you know, there are only five, I  
23 think -- and district courts and defense  
24 attorneys are familiar with those factors and  
25 there's no need to specifically run through

1       them.

2                       Similarly, in other contexts, other  
3 areas of the law, there's no need to -- for --  
4 to -- example, when someone -- when a district  
5 court makes an evidentiary ruling that a party  
6 disagrees with, the party doesn't have to say  
7 this is an abuse of discretion, even if the  
8 district court identifies reasons --

9                       CHIEF JUSTICE ROBERTS: Yeah, but, I  
10 mean, it could end up to particularly odd  
11 results. I mean, without a particular  
12 objection, the district judge might, you know,  
13 be sitting there in the court of appeals and the  
14 brief that is filed is, you know, 40 pages  
15 objecting to, you know, a particular provision.  
16 And the district court says: Well, that's not  
17 what I was looking at at all. I was looking at  
18 something else.

19                      MS. TURNER: In this -- in this  
20 hypothetical, the party is raising different  
21 arguments on appeal, is that --

22                      CHIEF JUSTICE ROBERTS: Well, the  
23 whole point, I -- I guess, of a post-decision  
24 objection --

25                      MS. TURNER: Yes.

1           CHIEF JUSTICE ROBERTS: -- is that it  
2 puts people on notice as to what the defendant  
3 is objecting to. And that can shape, you know,  
4 whether it's subsequent proceedings in the  
5 district court or appellate review, when,  
6 instead, if you just say, well, so long as it's  
7 more than the defendant asked for, in a regime  
8 where there are a lot of factors -- I'd count  
9 more than five despite the subsections -- it's  
10 particularly helpful to the process that people  
11 know what the concern really is going forward.

12           MS. TURNER: But, again, that is just  
13 the appellate standard of review. And Rule 51  
14 is explicit in saying that post-ruling  
15 objections are not required if you have already  
16 informed the court of the action that you wish  
17 it to take. And there's no reason to -- to  
18 alter that approach in the sentencing context.

19           JUSTICE ALITO: Do you think that  
20 under the so-called parsimony principle, there  
21 is one precise sentence in every case that  
22 serves all the interests of sentencing but  
23 doesn't do so to an excessive extent?

24           MS. TURNER: That is the district  
25 court's task, is to find the sentence the

1 district court determines is sufficient but not  
2 --

3 JUSTICE ALITO: And there's just one.  
4 So it's -- let's say it's 11 months, that is the  
5 -- that is the sentence called for by the  
6 Sentencing Reform Act, not 10, not 12. Eleven.

7 MS. TURNER: So it's not that there is  
8 some Platonically correct sentence. But the  
9 district court's task is to determine the  
10 sentence that, in its view, is sufficient but  
11 not greater than necessary. And that's, you  
12 know, inherent in sort of this parsimony  
13 principle. I mean, that's what that language  
14 means. If 10 months is sufficient but not  
15 greater than necessary, 10 months and one day is  
16 greater than necessary.

17 JUSTICE ALITO: Well, if that -- if it  
18 is not the case that there -- the parsimony  
19 principle identifies one particular, precise  
20 sentence that is the correct sentence, then  
21 saying -- then for defense counsel to say 11 --  
22 I -- I -- I urge you to sentence my client to no  
23 more than 11 months, that's different from  
24 saying that a -- a sentence of 12 months would  
25 be outside the range of reasonableness --

1 MS. TURNER: Again, Your Honor, it --

2 JUSTICE ALITO: -- which is what would  
3 have to be shown on appeal.

4 MS. TURNER: -- it -- you know, it is  
5 sort of a different argument on appeal, but it  
6 is no different than, again, if you were on  
7 appeal and you had to argue that the district  
8 court's ruling was an abuse of discretion,  
9 you -- you don't have to make that abuse of  
10 discretion argument in district court, even  
11 though that is how you would have to frame your  
12 argument on appeal. It's exactly the same here.

13 And we're just asking for those same  
14 rules to apply in this context.

15 JUSTICE ALITO: What if --

16 JUSTICE SOTOMAYOR: Ms. Kendall -- I'm  
17 sorry.

18 JUSTICE ALITO: What if defense --  
19 just along the same lines very quickly.

20 What if defense counsel says, look, I  
21 understand that the -- the guidelines range is  
22 10 to 12 months and I -- and I know that that's  
23 presumptively reasonable and I'm not going to  
24 argue with that, but I urge you to sentence my  
25 client to no more than 10. And the judge says,

1 well, I'm sorry, I'm going to choose 11.

2 Can the defense counsel then argue on  
3 appeal 11 was unreasonable?

4 MS. TURNER: If the defense counsel  
5 has said -- has said that 10 to 12 would be  
6 acceptable or if he's only asked for 10?

7 JUSTICE ALITO: He says, I understand  
8 that's the range and that's a reasonable range,  
9 but I think the appropriate sentence here is 10.

10 MS. TURNER: So, if -- if the defense  
11 counsel simply identified the guidelines range  
12 and then asked for a particular sentence, then,  
13 yes, I think that defense counsel could argue on  
14 appeal that 11 months was substantively  
15 unreasonable.

16 However, if a district court -- or if  
17 a defense counsel said something like, anything  
18 in the 10 to 12 months range is fine with us and  
19 we think that's -- you can do that, in that  
20 case, arguably, he has not preserved an  
21 objection to an 11-month sentence, but it -- you  
22 know, it would depend on the context of what  
23 exactly defense counsel had said.

24 And there's no reason to craft unique  
25 rules in this context.

1 JUSTICE SOTOMAYOR: Ms. Kendall, the  
2 amici seems in my mind to be arguing not  
3 differently than you are, that you don't need to  
4 make necessarily an objection after the fact in  
5 all circumstances.

6 He seems to be arguing that the  
7 circumstances, though, in which you don't have  
8 to renew afterward are those where you lay forth  
9 the reasons for why you want something, and so  
10 that you merely saying, I think 10 months is  
11 enough is not enough, that that doesn't put the  
12 district court on notice of the reasons you  
13 think 10 months are enough.

14 And so that he's basically, I think,  
15 he'll speak for himself, obviously, but assuming  
16 his argument in my question, that you need to  
17 put the district court on some sort of notice  
18 what the basis is for you believing that 10 or  
19 12 or 11 months is the right number, and that if  
20 you don't do that, then you do need to -- you  
21 haven't preserved your objection adequately.

22 How do you address that argument?

23 MS. TURNER: So as a -- just as a  
24 first point and a practical matter, it is  
25 vanishingly rare that a defense attorney will

1 have not filed objections to the PSR and will  
2 simply stand up and say, Section 3553(a)  
3 requires a shorter sentence and sit down.

4 JUSTICE SOTOMAYOR: I -- I agree with  
5 you. It -- it never happened in my experience,  
6 but it doesn't mean it can't. And so the  
7 question is for a reviewing court, when it gets  
8 that situation, what is it looking at --

9 MS. TURNER: So --

10 JUSTICE SOTOMAYOR: -- to make a  
11 judgment as to whether or not the objection was  
12 adequately preserved when it wasn't restated at  
13 the end? I'm sorry.

14 MS. TURNER: Thank you.

15 The Court's simply applying the same  
16 fair notice standard that it applies in every  
17 other context to determine whether a factual --  
18 an argument is preserved. It's the test that  
19 this Court laid out in Beech Aircraft.

20 And anything more specific, requiring  
21 very specific facts and circumstances, as amicus  
22 tends to suggest, is unwise because it would  
23 create new problems for this Court to resolve,  
24 such as if someone argued in district court that  
25 his client was sick and deserved a shorter



1 sentence and then argued on appeal that he was  
2 going to die and deserved a shorter sentence,  
3 the Court would have to determine whether that  
4 was the same fact and circumstance.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Ms. Ratner.

8 ORAL ARGUMENT OF MORGAN L. RATNER  
9 ON BEHALF OF THE RESPONDENT  
10 IN SUPPORT OF VACATUR

11 MS. RATNER: Mr. Chief Justice, and  
12 may it please the Court:

13 I want to be very clear about what is  
14 and is not preserved when a defendant argues for  
15 a lower sentence than he receives. There are  
16 three key points.

17 First, a defendant who argues for a  
18 lower sentence does preserve the claim that the  
19 district court unreasonably declined to grant  
20 the leniency requested.

21 Second, a defendant does not preserve  
22 any procedural challenges or any challenges,  
23 however labeled, that go to something other than  
24 the length of the sentence.

25 And, third, a defendant who argues for

1 leniency on one ground in the district court  
2 does not preserve a claim for leniency on a  
3 different ground.

4           Those three points all come from the  
5 same overarching principle that parties need to  
6 give the district court an opportunity to  
7 consider and resolve their claims. But, under  
8 Rule 51, they need to give the district court  
9 one opportunity, not two. And that's  
10 fundamentally where the court below erred.

11           I think that Petitioner has  
12 highlighted some of the problems.

13           JUSTICE KAVANAUGH: On your -- on your  
14 first two points, in my experience, a  
15 substantive unreasonableness claim is almost  
16 always coupled with a procedural failure to  
17 explain claim. And you're saying you don't need  
18 to object for the first, but you do need to  
19 object for the second, when they're almost  
20 always coupled.

21           MS. RATNER: So let me make this very  
22 clear. We think Rule 51 applies equally to both  
23 of those. We think that as a practical matter,  
24 the first half of Rule 51, the affirmative  
25 request, is often going to be the way that

1 substantive reasonableness claims are preserved,  
2 whereas, as a practical matter, the second half  
3 of Rule 51 is often going to be the way the  
4 procedural reasonableness claims are preserved.

5           And that's just because of the way  
6 sentencing hearings occur. So the whole point  
7 of a sentence hearing -- sentencing hearing is  
8 for parties to advocate to the Court what they  
9 think the appropriate sentence is. They put the  
10 district court then on notice of those  
11 arguments.

12           By contrast, a party isn't going to  
13 have the opportunity to tell the district court  
14 in advance, we think you've given an  
15 insufficient explanation until they've actually  
16 heard the explanation. And so it's just because  
17 of that practical reason that those are -- are  
18 going to tend to be after-the-fact objections  
19 instead of in-advance requests.

20           And that we -- we really do think is  
21 the key point here, that we're not asking for  
22 any sort of exception for Rule 51. It applies  
23 the same in the sentencing context as outside  
24 the sentencing context. It applies to  
25 substantive reasonableness claims and procedural

1       reasonableness claims.

2                       We're just asking, is this particular  
3       claim one that the district court has already  
4       had an opportunity to consider?

5                       And --

6                       JUSTICE ALITO:  On your -- on your  
7       third point about providing the ground for  
8       the -- the -- the claim on -- on appeal, by  
9       that, do you mean just a citation to the -- a  
10      general category of -- of sentencing  
11      consideration, or do you mean a specific  
12      argument or pointing out specific facts?

13                      What do you mean?

14                      MS. RATNER:  We mean that the  
15      circumstances that the defendant feels are  
16      important under Section 3553(a) in order to  
17      entitle him to the lower sentence he's asking  
18      for.

19                      And so, to -- to give a simple  
20      hypothetical, a defendant who is in the district  
21      court and says:  I deserve a below-guidelines  
22      sentence because of my family background and  
23      mitigating circumstances in my family history,  
24      has not preserved a claim for appeal that he  
25      deserves a below-guidelines sentence because of

1 his reduced role in the offense.

2 That hasn't fairly put the district  
3 court on notice of the substance of his claim,  
4 and so that can't be thought of as having  
5 sufficiently preserved the --

6 JUSTICE KAVANAUGH: But how --

7 JUSTICE KAGAN: I take it that you're  
8 not suggesting that one of those grounds has to  
9 be specifically linked to a statutory factor, is  
10 that correct?

11 MS. RATNER: We aren't -- again, the  
12 overarching question is going to be an issue of  
13 fair notice. So, as a general matter, no, it's  
14 not necessarily the case that those types of  
15 factual circumstances have to be particularly  
16 tied up to deterrence or the seriousness of the  
17 offense or what have you.

18 I -- I could imagine a case where a  
19 defendant's argument is so intimately tied to  
20 one of those factors that it hasn't really given  
21 the district court notice, fair notice, which,  
22 again, we think is the touchstone, but in the  
23 ordinary case, no, we don't think that that's  
24 going to have to be tied up that neatly.

25 JUSTICE SOTOMAYOR: How do we write --

1 JUSTICE KAVANAUGH: In your --

2 JUSTICE SOTOMAYOR: I'm sorry.

3 JUSTICE KAVANAUGH: Go ahead.

4 JUSTICE SOTOMAYOR: How do we write  
5 this opinion? Do we need to get into all of  
6 this? Are you asking us to give a sort of  
7 bible, this preserves enough, that doesn't  
8 preserve enough?

9 Is it adequate for us just to say it's  
10 too absolute a rule to require a specific  
11 objection under all circumstances so long as a  
12 defendant has given us a fair -- given the  
13 district court notice of its grounds for a  
14 particular different sentence than given, that  
15 that's enough?

16 MS. RATNER: So, Justice Sotomayor, I  
17 think you could write an opinion that says the  
18 Fifth Circuit's rule is wrong; it's too absolute  
19 a rule in requiring a post hoc objection. But I  
20 do think there would be significant value in the  
21 Court offering some clarity, not just --

22 JUSTICE SOTOMAYOR: For you,  
23 obviously, but --

24 MS. RATNER: Well, I -- Justice  
25 Sotomayor, the reason that I'm saying that is

1 that I think the courts of appeals have largely  
2 got these questions correct. There's really  
3 just one outlier in one direction or another.  
4 And I do think there could be some potential in  
5 this Court's decision here to introduce  
6 confusion if it's not clear about just what  
7 is -- what is and is not preserved when a  
8 defendant makes these sorts of arguments.

9           As for what an opinion would look  
10 like, we would -- we think that Judge -- Judge  
11 Sutton's opinion for the en banc Sixth Circuit  
12 in United States against Vonner navigates these  
13 various issues. It describes how Rule 51  
14 applies in these contexts and, again, doesn't  
15 suggest that there are any exceptions to Rule 51  
16 but explains how, as a practical matter, that  
17 analysis is going to look a little different in  
18 some contexts than others.

19           JUSTICE KAVANAUGH: Back to your  
20 hypothetical with Justice Alito, I'm not sure  
21 how appellate courts are supposed to do this  
22 because it's not that it's not preserved; it's  
23 that it's reviewed under plain error. So you  
24 would have, say, family history reviewed under  
25 substantive unreasonableness and reduced role in

1 the offense reviewed under plain error for one  
2 inquiry of overall substantive unreasonableness,  
3 when substantive unreasonableness, let me just  
4 add this, itself, when you actually apply it in  
5 practice, is a lot like plain error. Obvious  
6 it's so deferential in most courts of appeals,  
7 that kind of obvious errors when you say  
8 substantive -- substantively unreasonable.

9 So I'm not sure how a judge can keep  
10 all that straight.

11 MS. RATNER: Well, I think, in  
12 practice, it hasn't been that complicated,  
13 Justice Kavanaugh, and courts -- again, this is  
14 the rule that we think is in play in --

15 JUSTICE KAVANAUGH: Well, I think that  
16 supports --

17 MS. RATNER: -- most of the courts of  
18 appeals. And --

19 JUSTICE KAVANAUGH: Keep going.

20 MS. RATNER: The way that that shakes  
21 out is usually one of two ways. So, first, a  
22 court of appeals might say, looking at all of  
23 those circumstances that you preserved, we don't  
24 see this as a substantively unreasonable  
25 sentence or we don't see this as an abuse of



1 discretion. And then, if we look to the  
2 circumstances you are raising for the first  
3 time, nothing in there suggests that our  
4 analysis of substantive reasonableness is plain  
5 error. That's sort of option 1 they do.

6 Option 2, and -- and sort of going to  
7 your second point that this is already a  
8 deferential standard, we see fairly often courts  
9 say, well, even assuming that all of this had  
10 been preserved, it wouldn't be a substantively  
11 unreasonable sentence, or it wouldn't be an  
12 abuse of discretion.

13 JUSTICE KAVANAUGH: Would -- can you  
14 imagine a sentence that's substantively  
15 unreasonable but not plain error?

16 MS. RATNER: Yes, we do think that  
17 there is a small sliver of daylight between  
18 these standards. I --

19 JUSTICE KAVANAUGH: It's extremely  
20 small?

21 MS. RATNER: It is very small. We  
22 think that's exactly why, if this case is  
23 vacated and remanded, we would advocate for the  
24 same outcome under a substantive reasonable  
25 review.

1           You might think of it as analogous to  
2 double deference under AEDPA, that -- there's  
3 already a deferential standard of review, but if  
4 you were to add plain error on top, you'd get  
5 sort of an extra little bit of deference.  
6 Again, it probably wouldn't be dispositive in  
7 most cases, and that's why it doesn't create  
8 that many difficulties for courts in practice.

9           But, at the end of the day, the key  
10 problem with the Fifth Circuit's rule here is  
11 that it's requiring parties to say, in the  
12 district court, the applicable appellate  
13 standard of review. And that's just not  
14 something that litigants are required to do in  
15 any other context.

16           The district court's job, under Rita  
17 and Kimbrough and Gall, is to decide the  
18 sentence that is appropriate under the  
19 Section 3553(a) factors. And reasonableness is  
20 just not an inquiry that comes into play until  
21 the case is appealed, and that's the inquiry  
22 that the court of appeals will apply in the  
23 first instance.

24           If there are no further questions, we  
25 would ask the Court to vacate and remand.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Mr. Allen.

4 ORAL ARGUMENT OF K. WINN ALLEN  
5 FOR THE COURT-APPOINTED AMICUS CURIAE  
6 IN SUPPORT OF THE JUDGMENT BELOW

7 MR. ALLEN: Thank you, Mr. Chief  
8 Justice, and may it please the Court:

9 The question in this case is what a  
10 party must do in the district court to preserve  
11 a substantive reasonableness argument for  
12 appeal. In particular, under Rule 51, what must  
13 a party argue and when must they argue it? Let  
14 me start with the what.

15 To preserve a substantive  
16 reasonableness argument, a party must argue two  
17 things. One, they must make the distinct legal  
18 argument that an imposed sentence is beyond the  
19 range of choice a district court has under  
20 3553(a) and, two, identify the facts and  
21 circumstances supporting that argument.

22 Those are the legal and factual  
23 grounds underpinning a substantive  
24 reasonableness argument. And under the best  
25 interpretation of Rule 51, a statement of

1 grounds is necessary to preserve a claim of  
2 error.

3           Now let me turn to the when. In most  
4 cases, these arguments are most sensibly made  
5 after sentencing because it's only then that the  
6 parties know the imposed sentence and the  
7 district court's reasoning for it. And in most  
8 cases, I think you need to know those things to  
9 really determine whether you have a viable  
10 substantive reasonableness argument to assert.

11           But, technically, nothing in Rule 51  
12 stops a party from making those arguments prior  
13 to imposition of a sentence, and so preservation  
14 pre-sentencing is possible in certain cases.

15           The government appears to agree with  
16 at least part of this rule, in particular, the  
17 government agrees that a party must present the  
18 district court with the facts and circumstances  
19 supporting a substantive reasonableness argument  
20 in order to rely -- rely on those same facts and  
21 circumstances on appeal.

22           And, frankly, that does not seem to be  
23 a controversial or novel proposition. A party  
24 that never argued below that a sentence was  
25 substantively impermissible, because, for

1 example, it created unwarranted sentencing  
2 disparities, should not be able to advance that  
3 same argument for the first time on appeal.

4           The somewhat harder question, and the  
5 question on which I part ways with the -- with  
6 the government, concerns the first part of the  
7 rule. To preserve a substantive reasonableness  
8 argument, is it simply enough to ask for a  
9 shorter sentence in the district court, or must  
10 a party do more than that?

11           And for several reasons, I think the  
12 Fifth Circuit is correct to require parties to  
13 do more. Most fundamentally, merely arguing for  
14 a shorter sentence does not address the same  
15 issue that is before the court of appeals on a  
16 substantive reasonableness challenge.

17           The court of appeals will not evaluate  
18 the reasonableness of the defendant's requested  
19 sentence. Rather, the court will evaluate the  
20 reasonableness of the imposed sentence. A party  
21 seeking to preserve a substantive reasonableness  
22 argument must present that same issue to the  
23 district court, but --

24           JUSTICE KAVANAUGH: I think one of the  
25 strongest things Ms. Turner said, in addition to

1 her legal arguments, was that, in practice, this  
2 never produces a different result because the  
3 judge, presumably, has already -- and in  
4 reality, has already thought about what is the  
5 reasonable sentence. So for them to object I  
6 think that's unreasonable is going to go  
7 nowhere. So why, in addition to the legal  
8 points, as a practical matter require that?

9 MR. ALLEN: A couple responses to  
10 that, Justice Kavanaugh. First of all, I fully  
11 concede that in most cases it probably won't  
12 make much of a difference, but I think that's  
13 more because of the very limited nature of  
14 substantive reasonableness challenges than it is  
15 because of the preservation rules.

16 Substantive reasonableness challenges  
17 are very difficult to win because, most of the  
18 time, district courts are sentencing well within  
19 the discretion that they have. So I fully  
20 concede that most of the time it won't make a  
21 difference.

22 However, I don't think that means that  
23 it won't always have some benefit. And I think  
24 it will have benefit in those cases where a  
25 substantive reasonableness argument is likely to

1 have the most viability. And that's a case in  
2 which, for whatever reason, the imposed sentence  
3 differs dramatically from the sentence that --  
4 from the guidelines range and from the sentence  
5 the parties have requested. For example, if a  
6 defendant requests a 40-month sentence and the  
7 government -- the court imposes a 200-month  
8 sentence. And these cases do happen from time  
9 to time in the courts of appeals.

10 In that circumstance, I think it's  
11 likely that the -- that the district court has  
12 used reasoning and rationales that the parties  
13 might not theretofore have addressed or had an  
14 opportunity to argue about. And so, in that  
15 situation, there is some benefit, I think, to  
16 having a party to -- to -- to apprise the court  
17 to say: Your Honor, I think the sentence you  
18 imposed is not only one I disagree with but is  
19 so excessive, it's outside the range of  
20 permissible sentences you could impose, and let  
21 me explain to you why that is. Let me engage  
22 with you on some of the reasoning you gave, why  
23 the party thinks the court -- the court might  
24 have put too much weight on an impermissible  
25 factor, not enough weight on a very important

1 factor.

2           So the short answer is, in most cases,  
3 it probably won't make much of a difference, but  
4 in the cases where a substantive reasonableness  
5 argument is likely to matter the most, it very  
6 well could have -- could make a difference.

7           JUSTICE KAVANAUGH: In the case -- in  
8 the hypo you raised, the counsel almost always  
9 raise a procedural failure to explain.  
10 Objection -- in your hypo -- Judge, you haven't  
11 explained that sufficiently. Right?

12           MR. ALLEN: Correct. You know -- so  
13 -- and I think that gets to two points. One is  
14 I think what's procedural and what's substance  
15 in this circumstance can get very difficult  
16 sometimes, and it's an issue that the courts of  
17 appeals have struggled with. For example, if  
18 you disagree with the district court's  
19 reasoning, is it a procedural problem because  
20 the court failed to adequately explain it, or is  
21 it a substantive problem because the court  
22 explained it, you just disagree with the  
23 reasoning the court gave? I think it could be  
24 argued either way. And I think the courts of  
25 appeals have sometimes struggled with what it



1 is.

2 JUSTICE KAVANAUGH: Well, they mostly  
3 get funneled into procedural.

4 MR. ALLEN: A lot of times they do.  
5 And, you know, as -- as this Court said very  
6 clearly in Gall, you know, failure to adequately  
7 explain a chosen sentence is a procedural  
8 problem that I think everybody standing up here  
9 arguing today agrees that if you think a  
10 district court has not adequately explained its  
11 chosen sentence, a party should object to that  
12 in the district court and give the district  
13 court judge an opportunity to correct it.

14 Well, if that's not true -- if that's  
15 true, I guess it's hard for me to see why a  
16 party shouldn't also object if they disagree  
17 with some of the reasoning the district court  
18 gave and that reasoning hadn't been discussed  
19 previously in sentencing.

20 In that circumstance, it would seem to  
21 serve the purposes of Rule 51 to have a rule  
22 that asks the parties to apprise the court of --  
23 of the -- that the court has used reasoning or  
24 rationales that the parties disagree with, that  
25 it believes are incorrect, that it believes are

1 impermissible and have the court -- have the  
2 parties engage with the court on that to give  
3 the district court an opportunity to address  
4 that in the first instance, such that the court  
5 of appeals aren't having to address it for the  
6 first time on appeal.

7 I do think, in thinking about this,  
8 the jury instruction analogy is somewhat  
9 helpful, and I would concede that the jury  
10 instructions are governed by a specific rule,  
11 the Federal Rules of Criminal Procedure, Rule  
12 30. But, in the jury instruction context, we do  
13 require parties to object to a provided  
14 instruction if they believe it's impermissible  
15 and we require that even if they had previously  
16 proposed an instruction to the district court  
17 that has been rejected.

18 I think the same principle applies  
19 here. Just because a party has requested a  
20 particular sentence does not mean they've  
21 necessarily and inevitably argued that the  
22 actually imposed sentence is so excessive and so  
23 extreme that it's outside the range of -- of --  
24 of permissible sentences the court could have  
25 imposed. The district court --

1 CHIEF JUSTICE ROBERTS: Is that -- is  
2 that the standard, so excessive and so extreme?  
3 I mean, the argument really is simply that it  
4 doesn't comply with the factors in 3553, right?

5 MR. ALLEN: That is the -- you know,  
6 that's the -- the argument on appeal -- the  
7 excessive or extreme is my shorthand. That's  
8 not the standard that a substantive  
9 reasonableness is, but I think when you view  
10 substantive reasonableness through the  
11 deferential analysis that this Court has said  
12 courts of appeals are to apply to district  
13 courts, generally, what courts of appeals are  
14 doing is saying, we think the sentence you've  
15 imposed is outside the discretion you had to  
16 impose the sentence based off the 33(a) factors  
17 and the reasons you gave, the reasons just --  
18 even though district courts have substantial  
19 discretion, the reasons the court gave do not  
20 support the sentence it imposed.

21 And so, yes, it's a -- it's -- the way  
22 this Court put it in Gall, I believe, Mr. Chief  
23 Justice, was, if there's an unusually harsh or  
24 unusually lenient sentence that's not justified  
25 by the reasons the district court gave.

1 JUSTICE KAGAN: But, Mr. Allen, in  
2 saying what you just did, are you suggesting  
3 that substantive reasonableness is the standard  
4 that a district court should use in -- in  
5 assessing what the proper punishment is?

6 MR. ALLEN: I don't think so, Justice  
7 Kagan. What I -- I think my argument is not so  
8 much that a district court should be asking  
9 whether the sentence is substantively  
10 unreasonable or a party should be saying it's  
11 substantively unreasonable in the district  
12 court. I think I'm asking that the -- the party  
13 assert the grounds for that argument, the basis  
14 for that argument in the district court.

15 And so, when you think about the  
16 purposes of Rule 51, we want parties to argue  
17 the same thing in the district court that  
18 they're then going to argue -- go on to argue on  
19 appeal.

20 And the basis for a substantive  
21 reasonableness argument, I think, are two  
22 things. One is the sentence is -- is outside  
23 the range of permissible sentences that could  
24 have been imposed under 3553(a) in light of the  
25 specific facts of the case and, two, the reasons

1 for why that's true.

2           And I think the rule that we've put to  
3 the Court and the rule that I think the Fifth  
4 Circuit applies is just asking parties to make  
5 those same arguments in the district court.  
6 That's going to be what they present to the  
7 Fifth Circuit or a Court of Appeals when they  
8 appeal it. We want parties to make those  
9 same -- the exact same arguments in the district  
10 court.

11           JUSTICE KAGAN: That doesn't seem to  
12 be what the question presented is. I mean, yes,  
13 there might be questions in a particular case,  
14 you know, if you say the sentence should be X  
15 because I cooperated with the government and  
16 then the appeals court, you say, the sentence  
17 should be X because I'm a very sick man, you  
18 know, then you have an issue about what grounds  
19 you presented.

20           But that's not the issue that's  
21 presented by the Fifth Circuit's practice, is  
22 it? The issue that's presented by the Fifth  
23 Circuit's practice is this requirement that --  
24 that in -- that after the sentence is given in  
25 the district court, the defendant have to step

1 up and say, you know, I object to that, Your  
2 Honor.

3 MR. ALLEN: So I don't think that's  
4 actually what the Fifth Circuit's doing in  
5 practice. And I think this is an important  
6 point that might help the Court.

7 I think the Fifth Circuit's rule is  
8 much more about what a party must say than when  
9 a party must say it. We found no Fifth Circuit  
10 case in which the Fifth Circuit has said the  
11 timing of an objection is dispositive, that  
12 where the Fifth Circuit said, you clearly  
13 objected to the substantive reasonableness of  
14 the sentence before imposition of a sentence,  
15 but you didn't repeat it after --

16 JUSTICE KAGAN: If the Fifth Circuit  
17 had the rule that I'm suggesting the Fifth  
18 Circuit has and that you're saying it doesn't  
19 have, the -- if the Fifth Circuit had that rule,  
20 would it be a violation of the rules?

21 MR. ALLEN: I -- I -- I don't think  
22 that would be the best reading of Rule 51 and  
23 that's not the -- the approach we've put to the  
24 Court. Again, I don't think the timing of the  
25 objection should matter.

1 JUSTICE KAGAN: I hate to press that a  
2 little bit --

3 MR. ALLEN: No, go ahead.

4 JUSTICE KAGAN: -- but not the best  
5 reading of Rule 51?

6 MR. ALLEN: It -- it -- it --

7 JUSTICE KAGAN: Is that --

8 MR. ALLEN: -- it would be an  
9 incorrect reading of Rule 51 --

10 JUSTICE KAGAN: Okay.

11 MR. ALLEN: -- to answer the question  
12 directly. I don't think Rule 51 requires these  
13 objections to be made at any specific point in  
14 time during the sentencing proceeding. All they  
15 require is that a party state the grounds at  
16 some point. And the grounds are what I started  
17 off articulating my argument with.

18 Now I think most sensibly, I think  
19 these are arguments that should really be made  
20 after sentencing because it's only then that you  
21 know what your sentence is and what the district  
22 court's reasons for it. And I think only then  
23 would you be in a position to determine whether  
24 you have a viable substantive reasonableness  
25 argument to make. But --

1 CHIEF JUSTICE ROBERTS: Well, and  
2 maybe not even then. I mean, the question of  
3 what arguments you're going to raise on appeal  
4 is not something that's immediately obvious when  
5 -- when the sentence comes down. It's something  
6 that usually requires some consideration, some  
7 tactical analysis, all sorts of things.

8 So I wonder what specificity you're  
9 requiring in this, I won't call it an exception  
10 since that's a problem for you, but this  
11 objection, this post hoc objection?

12 MR. ALLEN: So two responses to that,  
13 Mr. Chief Justice. One is the concern about  
14 having to think about arguments on your feet  
15 isn't unique to the sentencing context,  
16 obviously. There's all kinds of circumstances  
17 in criminal trials and -- and other proceedings  
18 where we do expect lawyers to be on their toes  
19 in court and to raise arguments that -- that  
20 come up to them on the spot.

21 CHIEF JUSTICE ROBERTS: Well, yeah,  
22 but I'm not trying -- I don't mean think of  
23 every argument you have. I mean, do some --  
24 figure out, well, we do have an argument on this  
25 point, but we don't think we're going to -- if



1 we don't win on this point, we don't think we'll  
2 win on that, so we're only going to make this.  
3 I mean, it's a little more nuanced than  
4 objections during the course of the trial.

5 MR. ALLEN: Perhaps. But I also think  
6 that parties do do a tremendous amount of work  
7 going in to preparing for a sentencing  
8 proceeding. You know, they review the PSR.  
9 They know what they're going to go in and argue  
10 for on behalf of their client and then they can  
11 hear the district court's reasoning and  
12 determine whether there's something in that  
13 reasoning that they think is factually wrong or  
14 the court is putting too much weight on an  
15 inappropriate factor or not enough weight on a  
16 factor that they think is very important.

17 So it might be more difficult in ---  
18 in cases where sentencing proceedings go for an  
19 entire day than it will be for a case like this  
20 one, where it took five or six minutes. But I  
21 don't think it's unreasonable to require parties  
22 to do that, and, in fact, you know, it -- it --  
23 it's what I think the purpose of Rule 51 is  
24 intended to serve, which is to keep defense  
25 counsel on their toes and to alert the court

1 that they think the court has made some error  
2 that has caused it to reach an incorrect result,  
3 so that the district court is considering that  
4 in the first instance and that courts of appeals  
5 aren't having to consider that.

6 JUSTICE KAVANAUGH: Most of the  
7 grounds will have been identified in the  
8 sentencing memos after the PSR and at the  
9 sentencing hearing, presumably. If they've all  
10 been identified there, do they -- do you have to  
11 raise it again in your view, do you think that's  
12 the best reading of --

13 MR. ALLEN: I don't think you have to  
14 raise anything again. I -- I think that would  
15 be an unreasonable reading of Rule 51. I think  
16 you just have to preserve them at some point  
17 during the entire process, so you don't have to  
18 repeat arguments you might have raised in a  
19 presentencing memo or raised earlier in the  
20 proceeding.

21 I just think you have to apprise the  
22 court at some point that the sentence that's  
23 imposed is outside the range of permissible  
24 sentences it could impose and explain why and  
25 explain --

1 JUSTICE KAVANAUGH: Do you think  
2 there's a lot of daylight between your position  
3 and what the government has been saying?

4 MR. ALLEN: The only daylight I see is  
5 in the first part of my rule. Remember, my rule  
6 has two points: One is you have to make the  
7 distinct legal argument that an imposed sentence  
8 is beyond the range of permissible choice; and  
9 then two is you have to state the facts and  
10 circumstances.

11 The government agrees with part 2. So  
12 really all it is, I think, is my requirement to  
13 require some more specificity that, hey, I'm  
14 raising the grounds for a substantive  
15 reasonableness argument as opposed to just  
16 simply asking for a shorter sentence.

17 JUSTICE KAGAN: So if --

18 JUSTICE KAVANAUGH: And you --

19 JUSTICE KAGAN: Please.

20 JUSTICE KAVANAUGH: Go ahead.

21 JUSTICE KAGAN: No, go ahead.

22 JUSTICE KAVANAUGH: Go ahead.

23 JUSTICE KAGAN: This outside the  
24 range, where -- where do you think that that  
25 comes from? Because it seems to me that that

1 comes from the reasonableness, the substantive  
2 reasonableness standard, which is an appellate  
3 standard.

4 3553, which is the statute that's  
5 directed to the trial judge, doesn't talk about  
6 ranges. To the contrary, it talks about, you  
7 know, there's a particular point.

8 And, of course, your particular point,  
9 your particular sentence might be different from  
10 somebody else's particular point and particular  
11 sentence and the appellate court can say, you  
12 know, both of those are within the range of  
13 reasonableness.

14 But the range seems a task for the  
15 appellate court and not for the district court.

16 MR. ALLEN: Well, so the way I read  
17 this Court's decisions in Rita, Booker, and  
18 Gall, that they all emphasize the extraordinary  
19 amount of discretion that courts of -- that  
20 district courts have in sentencing.

21 And I guess, Justice Kagan, I have  
22 trouble envisioning, kind of imagining what that  
23 discretion is if it's not discretion to pick  
24 amongst a number of sentence all -- sentences,  
25 all of which are sufficient but not greater than

1 necessary to serve the sentencing purposes.

2 I think those decisions seem to  
3 recognize that you could have the same defendant  
4 convicted of the same crime presented to three  
5 different district court judges, all of whom --

6 JUSTICE KAGAN: Let me give --

7 MR. ALLEN: -- have different  
8 sentences.

9 JUSTICE KAGAN: -- you an example from  
10 a different context, and it's much like the one  
11 that Ms. Turner gave. I mean, suppose we had  
12 some decision which is subject to an abuse of  
13 discretion standard.

14 What we wouldn't want to have happen  
15 is for the trial court to be making that  
16 decision and saying, I -- this is -- is this an  
17 abuse of discretion? No, we would want the  
18 trial court to be making the best decision that  
19 the court can make and then leave it to the  
20 appellate court to make -- to apply the abuse of  
21 discretion standard.

22 And so too here, why isn't the  
23 directive to the trial court to say: Pick the  
24 sentence that's the appropriate -- the single  
25 appropriate sentence you think under 3553, and

1 then it's for the appellate court to say whether  
2 that falls within the range of reasonableness?

3 MR. ALLEN: So I -- I -- I want to be  
4 very clear. I do think it's still the district  
5 court's job to pick the sentence that's  
6 sufficient but not greater than necessary. And  
7 I -- I don't think courts should be thinking  
8 about this in terms of what's reasonable or  
9 abuse of discretion.

10 But I do think that -- that we still  
11 want to require parties to speak up and object  
12 if they believe that -- that the sentence the  
13 district court has imposed is not just one that  
14 they disagree with but one that has given rise  
15 to a new argument that they're going to make on  
16 appeal, which is that, Your Honor, the sentence  
17 is not just one that I think is an exercise of  
18 discretion that I disagree with; it's one that's  
19 outside the range of discretion that I think  
20 this Court has in the -- in the first instance.

21 JUSTICE KAGAN: But there are many  
22 examples where that might occur, you know, you  
23 ask the trial court to do something, it says no.  
24 And then, in all these non-sentencing contexts,  
25 do you have to say, you know, Your Honor, not

1 only is that not what I asked you to do, but  
2 it's also an abuse of discretion?

3 MR. ALLEN: The short answer is no, I  
4 don't think so in those other contexts. The  
5 longer answer is I do think there are some  
6 contexts in which we do require something  
7 similar to what I'm asking for here. Jury  
8 instructions is probably the best example,  
9 because district court judges do have discretion  
10 in how they shape jury instructions, and Rule 30  
11 does require that if you think the district  
12 court has kind of gone outside the bounds of  
13 what it can do in the jury instruction context,  
14 you do have to apprise the court of that.

15 I think sentencing should be a -- a  
16 context in which we require something similar to  
17 that because of the parsimony principle in  
18 3553(a), because of the -- the significance --  
19 the -- the -- you know, the significant guided  
20 nature of the court's discretion and the  
21 obligation -- special obligation the court has  
22 to explain its sentencing -- sentence under  
23 3553(c).

24 So the short answer is I would not  
25 require the same requirement in those other

1 contexts. The reason we would -- I think we  
2 should require it here is sentencing --  
3 sentencing is meaningfully different.

4 JUSTICE KAVANAUGH: Even -- under the  
5 Fifth Circuit's rule, even if you don't object,  
6 it's going to be reviewed for plain error on  
7 appeal. And I'll ask the same question I asked  
8 Ms. Ratner, which is, can you imagine a sentence  
9 that's substantively unreasonable but not plain  
10 error? Because usually when judges find --  
11 appellate judges find it's substantively  
12 unreasonable, they're saying, wow, the district  
13 judge really jumped the rails there.

14 MR. ALLEN: Yeah.

15 JUSTICE KAVANAUGH: And that sounds --  
16 and that's the common reaction that -- to a  
17 sentence that is found substantively  
18 unreasonable, and that sounds like plain error.

19 MR. ALLEN: I agree with Ms. Ratner on  
20 this. I -- I -- I think there is some daylight  
21 between plain error and abuse of discretion,  
22 probably not much. I do think many sentences  
23 that are deemed substantively unreasonable will  
24 like satisfy plain error review. But I don't  
25 think the --



1                   JUSTICE KAVANAUGH: It's exceedingly  
2 rare for an appellate court to find a sentence  
3 substantively unreasonable.

4                   MR. ALLEN: It's exceedingly rare.  
5 Yes, Justice Kavanaugh. But I don't think  
6 that's an issue this Court should prejudge  
7 because plain error review, as this Court has  
8 said, is a very fact-intensive case-by-case  
9 determination, and so I don't think the Court  
10 should just say, well, every substantively  
11 unreasonable sentence will be plain error. It  
12 might well turn out to be the case --

13                   JUSTICE KAVANAUGH: Yeah.

14                   MR. ALLEN: -- but I don't think the  
15 Court should prejudge that.

16                   CHIEF JUSTICE ROBERTS: And by  
17 substantively unreasonable, you mean nothing  
18 more than an erroneous application of the 3553  
19 standards, right?

20                   MR. ALLEN: Well, correct, Mr. Chief  
21 Justice, although it would have to be so  
22 erroneous that it falls outside the range of  
23 substantial discretion that we understand  
24 district courts to have at sentencing. So it's  
25 not just it's wrong.

1 JUSTICE KAVANAUGH: And the way  
2 it's --

3 MR. ALLEN: It's very wrong.

4 JUSTICE KAVANAUGH: The way it's  
5 articulated in many of the appellate courts is  
6 very deferentially articulated.

7 MR. ALLEN: That's correct, Justice  
8 Kavanaugh.

9 There's one question you asked that --  
10 that I did want to address. You asked the  
11 government of -- what would happen in a  
12 situation where we -- you have some preserved  
13 arguments and some unpreserved arguments and  
14 some of which are subject to explain error and  
15 some of which subject to harmless error review,  
16 for example.

17 That does come up in other  
18 circumstances. We were looking into this. It  
19 -- it comes up in cumulative error circumstance  
20 where parties are arguing cumulative error,  
21 there were a number of errors below, some of  
22 which preserved, some of which were not. It can  
23 come up in the ineffective assistance of counsel  
24 area, where you argued that counsel was  
25 ineffective for some reasons but not others.

1           The short answer is it's -- it can be  
2 difficult, but courts of appeals have found ways  
3 to deal with it. And the way they do it is  
4 typically what Ms. Ratner said, they start by  
5 looking at the preserved errors, sort through  
6 those to see whether there's any grounds to  
7 reverse on that, and then go to the -- to the  
8 unpreserved errors.

9           But I guess the point I would make is  
10 courts of appeals have found a way to deal with  
11 it. They haven't just said, oh, just because --  
12 you know, because we have this problem, we're  
13 just going to assume everything is preserved and  
14 -- and go on to -- to consider it.

15           A couple more points, Mr. Chief  
16 Justice. One thing this Court had said in Gall  
17 I think is helpful in thinking about this. This  
18 Court said in Gall that if a district court  
19 judge determines that an outside guideline  
20 sentence is warranted, he must "consider the  
21 extent of the deviation and ensure that the  
22 justification is sufficiently compelling to  
23 support the degree of the variance."

24           Well, I think, in most cases, you  
25 won't know whether the district court's

1 justification is sufficiently compelling until  
2 you hear the court's sentence and the reasons  
3 for it. It's only then whether you can assess  
4 whether the justifications are sufficient to  
5 support the unusually harsh or unusually lenient  
6 sentence.

7           And if it's not, I -- I think it's  
8 reasonable, I think, to require a party to  
9 object and explain to the court why that's true.  
10 And I think that's something that Rule 51  
11 reasonably requires in -- in asking parties to  
12 preserve their grounds for the argument.

13           If there are no further questions, let  
14 me leave the Court with one final thought in  
15 thinking about this case. I think it's  
16 beneficial to consider not the run-of-the-mill  
17 sentencing case but the sentencing proceeding in  
18 which a -- a substantive reasonableness argument  
19 is likely to have the most viability.

20           And that's when an imposed sentence  
21 differs dramatically from the guidelines range  
22 and likely the sentence that the parties have  
23 been advocating before it. In that  
24 circumstance, I think it's important to craft a  
25 rule that asks the parties to engage with the

1 district court about the sentence it imposed and  
2 the reasons that it gave for doing so.  
3 Otherwise, courts of appeals will have to  
4 address that -- that -- address those issues in  
5 the first instance.

6 The better rule, I think, is if a  
7 party believes that an imposed sentence is so  
8 excessive that it's beyond the range of choice  
9 that 3553(a) allows, they should make that  
10 specific argument to the district court and  
11 identify the facts and circumstances supporting  
12 it.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Two minutes, Ms. Ratner. I'm sorry,  
16 Ms. Turner.

17 REBUTTAL ARGUMENT OF KENDALL TURNER  
18 ON BEHALF OF THE PETITIONER

19 MS. TURNER: Thank you, Mr. Chief  
20 Justice.

21 The amicus's test is trying to fix a  
22 problem that does not exist. Nine courts of  
23 appeals show that the Fifth Circuit's rule is  
24 not necessary to the effective functioning of  
25 courts. Not only is it not necessary to the

1 effective functioning of courts, it is  
2 inconsistent with Rule 51 in two ways.

3 First is insofar as it requires a  
4 post-sentencing objection that is inconsistent  
5 with both part (a) and part (b) of the rule,  
6 which express -- part (b) expressly makes clear  
7 that exceptions are not required.

8 Second, to frame the argument in terms  
9 of substantive reasonableness or the other  
10 articulations that my friend used, outside the  
11 range of reasonableness, abuse of discretion,  
12 that's just the appellate standard of review.  
13 And there is no need to frame objections in  
14 district court in terms -- in those terms.

15 And, second, Rule 51 just says that  
16 parties are required to tell the court what  
17 action the party wants the court to take.

18 This facts-and-circumstances argument  
19 is, as Justice Kagan remarked, outside the  
20 question presented. But just to briefly say a  
21 few things, all we are asking this Court to do  
22 is to leave it to -- to lower courts to apply  
23 the same fair notice standard that they apply in  
24 other contexts in this context, and the grounds  
25 language that my friend is relying on is not

1 found anywhere in Rule 51. It is only --

2 JUSTICE SOTOMAYOR: Where do you  
3 disagree with the government? Where do you  
4 disagree with the government?

5 MS. TURNER: The -- well, I think the  
6 government's position and our position is -- are  
7 very close. I think --

8 JUSTICE SOTOMAYOR: Where is the  
9 window where it's not?

10 MS. TURNER: Where we might disagree  
11 is about where arguments are preserved, when a  
12 district court has fair notice. I think we both  
13 agree that the fair notice standard applies, but  
14 we might find more arguments -- that the  
15 district court had more -- had fair notice of  
16 more arguments than the -- than the government  
17 is willing to concede.

18 So, for example, here, I think they --  
19 they are not -- don't expressly address the  
20 public dangerousness argument that we raised  
21 below. But that's an area where we disagree.

22 But, as I was saying, in Rule 46,  
23 there is this grounds language. It is not  
24 present in Rule 51, and Rule 51 postdates Rule  
25 46. So the rule enactors clearly knew how to

1 require that if they wanted to. But even if you  
2 think there is some sort of grounds requirement  
3 in Rule 51 that's sort of implied, all that  
4 means is that the party needs to preserve the  
5 legal grounds on which they are relying. It  
6 does not mean they have to preserve every fact  
7 and circumstance.

8 Finally, as I mentioned earlier in  
9 response to Justice Sotomayor's questions, this  
10 facts-and-circumstances test would mire the  
11 courts in very fact-bound disputes.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Mr. Allen, this Court appointed you to  
16 brief and argue this case as an amicus curiae in  
17 support of the judgment below. You have ably  
18 discharged that responsibility, for which we are  
19 grateful.

20 The case is submitted.

21 (Whereupon, at 12:00 p.m., the case  
22 was submitted.)

23

24

25



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