

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -
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.

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

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

25 MS. RATNER: Well, I -- Justice

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

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

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

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

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

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

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

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

20 JUSTICE KAVANAUGH: Keep going.

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

1 sentence or we don't see this as an abuse of
2 discretion. And then, if we look to the
3 circumstances you are raising for the first
4 time, nothing in there suggests that our
5 analysis of substantive reasonableness is plain
6 error. That's sort of option 1 they do.

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

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

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

20 JUSTICE KAVANAUGH: It's extremely
21 small?

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

1 review.

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

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

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

25 If there are no further questions, we

1 would ask the Court to vacate and remand.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Allen.

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

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

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

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

23 Those are the legal and factual
24 grounds underpinning a substantive
25 reasonableness argument. And under the best

1 interpretation of Rule 51, a statement of
2 grounds is necessary to preserve a claim of
3 error.

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

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

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

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

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

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

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

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

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

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

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

24 However, I don't think that means that
25 it won't always have some benefit. And I think

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

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

1 have put too much weight on an impermissible
2 factor, not enough weight on a very important
3 factor.

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

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

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

1 argued either way. And I think the courts of
2 appeals have sometimes struggled with what it
3 is.

4 JUSTICE KAVANAUGH: Well, they mostly
5 get funneled into procedural.

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

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

22 In that circumstance, it would seem to
23 serve the purposes of Rule 51 to have a rule
24 that asks the parties to apprise the court of --
25 of the -- that the court has used reasoning or

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

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

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

1 of permissible sentences the court could have
2 imposed. The district court --

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

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

23 And so, yes, it's a -- it's -- the way
24 this Court put it in Gall, I believe, Mr. Chief
25 Justice, was, if there's an unusually harsh or

1 unusually lenient sentence that's not justified
2 by the reasons the district court gave.

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

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

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

22 And the basis for a substantive
23 reasonableness argument, I think, are two
24 things. One is the sentence is -- is outside
25 the range of permissible sentences that could

1 have been imposed under 3553(a) in light of the
2 specific facts of the case and, two, the reasons
3 for why that's true.

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

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

22 But that's not the issue that's
23 presented by the Fifth Circuit's practice, is
24 it? The issue that's presented by the Fifth
25 Circuit's practice is this requirement that --

1 that in -- that after the sentence is given in
2 the district court, the defendant have to step
3 up and say, you know, I object to that, Your
4 Honor.

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

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

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

23 MR. ALLEN: I -- I -- I don't think
24 that would be the best reading of Rule 51 and
25 that's not the -- the approach we've put to the

1 Court. Again, I don't think the timing of the
2 objection should matter.

3 JUSTICE KAGAN: I hate to press that a
4 little bit --

5 MR. ALLEN: No, go ahead.

6 JUSTICE KAGAN: -- but not the best
7 reading of Rule 51?

8 MR. ALLEN: It -- it -- it --

9 JUSTICE KAGAN: Is that --

10 MR. ALLEN: -- it would be an
11 incorrect reading of Rule 51 --

12 JUSTICE KAGAN: Okay.

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

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

1 you have a viable substantive reasonableness
2 argument to make. But --

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

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

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

23 CHIEF JUSTICE ROBERTS: Well, yeah,
24 but I'm not trying -- I don't mean think of
25 every argument you have. I mean, do some --

1 figure out, well, we do have an argument on this
2 point, but we don't think we're going to -- if
3 we don't win on this point, we don't think we'll
4 win on that, so we're only going to make this.
5 I mean, it's a little more nuanced than
6 objections during the course of the trial.

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

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

1 intended to serve, which is to keep defense
2 counsel on their toes and to alert the court
3 that they think the court has made some error
4 that has caused it to reach an incorrect result,
5 so that the district court is considering that
6 in the first instance and that courts of appeals
7 aren't having to consider that.

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

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

23 I just think you have to apprise the
24 court at some point that the sentence that's
25 imposed is outside the range of permissible

1 sentences it could impose and explain why and
2 explain --

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

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

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

19 JUSTICE KAGAN: So if --

20 JUSTICE KAVANAUGH: And you --

21 JUSTICE KAGAN: Please.

22 JUSTICE KAVANAUGH: Go ahead.

23 JUSTICE KAGAN: No, go ahead.

24 JUSTICE KAVANAUGH: Go ahead.

25 JUSTICE KAGAN: This outside the

1 range, where -- where do you think that that
2 comes from? Because it seems to me that that
3 comes from the reasonableness, the substantive
4 reasonableness standard, which is an appellate
5 standard.

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

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

16 But the range seems a task for the
17 appellate court and not for the district court.

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

23 And I guess, Justice Kagan, I have
24 trouble envisioning, kind of imagining what that
25 discretion is if it's not discretion to pick

1 amongst a number of sentence all -- sentences,
2 all of which are sufficient but not greater than
3 necessary to serve the sentencing purposes.

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

8 JUSTICE KAGAN: Let me give --

9 MR. ALLEN: -- reach different
10 sentences.

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

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

24 And so too here, why isn't the
25 directive to the trial court to say: Pick the

1 sentence that's the appropriate -- the single
2 appropriate sentence you think under 3553, and
3 then it's for the appellate court to say whether
4 that falls within the range of reasonableness?

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

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

23 JUSTICE KAGAN: But there are many
24 examples where that might occur, you know, you
25 ask the trial court to do something, it says no.

1 And then, in all these non-sentencing contexts,
2 do you have to say, you know, Your Honor, not
3 only is that not what I asked you to do, but
4 it's also an abuse of discretion?

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

17 I think sentencing should be a -- a
18 context in which we require something similar to
19 that because of the parsimony principle in
20 3553(a), because of the -- the significance --
21 the -- the -- you know, the significant guided
22 nature of the court's discretion and the
23 obligation -- special obligation the court has
24 to explain its sentencing -- sentence under
25 3553(c).

1 So the short answer is I would not
2 require the same requirement in those other
3 contexts. The reason we would -- I think we
4 should require it here is sentencing --
5 sentencing is meaningfully different.

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

16 MR. ALLEN: Yeah.

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

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

1 like satisfy plain error review. But I don't
2 think the --

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

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

15 JUSTICE KAVANAUGH: Yeah.

16 MR. ALLEN: -- but I don't think the
17 Court should prejudge that. And just --

18 CHIEF JUSTICE ROBERTS: By
19 substantively unreasonable, you mean nothing
20 more than an erroneous application of the 3553
21 standards, right?

22 MR. ALLEN: Well, correct, Mr. Chief
23 Justice, although it would have to be so
24 erroneous that it falls outside the range of
25 substantial discretion that we understand

1 district courts to have at sentencing. So it's
2 not just it's wrong.

3 JUSTICE KAVANAUGH: And the way
4 it's --

5 MR. ALLEN: It's very wrong.

6 JUSTICE KAVANAUGH: -- the way it's
7 articulated in many of the appellate courts is
8 very deferentially articulated.

9 MR. ALLEN: That's correct, Justice
10 Kavanaugh.

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

19 That does come up in other
20 circumstances. We were looking into this. It
21 -- it comes up in cumulative error circumstance
22 where parties are arguing cumulative error,
23 there were a number of errors below, some of
24 which were preserved, some of which were not.
25 It can come up in the ineffective assistance of

1 counsel area, where you argue that counsel was
2 ineffective for some reasons but not others.

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

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

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

1 Well, I think, in most cases, you
2 won't know whether the district court's
3 justification is sufficiently compelling until
4 you hear the court's sentence and the reasons
5 for it. It's only then whether you can assess
6 whether the justifications are sufficient to
7 support the unusually harsh or unusually lenient
8 sentence.

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

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

22 And that's when an imposed sentence
23 differs dramatically from the guidelines range
24 and likely the sentence that the parties have
25 been advocating before it. In that

1 circumstance, I think it's important to craft a
2 rule that asks the parties to engage with the
3 district court about the sentence it imposed and
4 the reasons that it gave for doing so.
5 Otherwise, courts of appeals will have to
6 address that -- that -- address those issues in
7 the first instance.

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

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Two minutes, Ms. Ratner. I'm sorry,
18 Ms. Turner.

19 REBUTTAL ARGUMENT OF KENDALL TURNER
20 ON BEHALF OF THE PETITIONER

21 MS. TURNER: Thank you, Mr. Chief
22 Justice.

23 The amicus's test is trying to fix a
24 problem that does not exist. Nine courts of
25 appeals show that the Fifth Circuit's rule is

1 not necessary to the effective functioning of
2 courts. Not only is it not necessary to the
3 effective functioning of courts, it is
4 inconsistent with Rule 51 in two ways.

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

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

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

20 This facts-and-circumstances argument
21 is, as Justice Kagan remarked, outside the
22 question presented. But just to briefly say a
23 few things, all we are asking this Court to do
24 is to leave it to -- to lower courts to apply
25 the same fair notice standard that they apply in

1 other contexts in this context, and the grounds
2 language that my friend is relying on is not
3 found anywhere in Rule 51. It is only --

4 JUSTICE SOTOMAYOR: Where do you
5 disagree with the government? Where do you
6 disagree with the government?

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

10 JUSTICE SOTOMAYOR: Where is the
11 window where it's not?

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

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

24 But, as I was saying, in Rule 46,
25 there is this grounds language. It is not

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

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

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

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

22 The case is submitted.

23 (Whereupon, at 12:00 p.m., the case
24 was submitted.)

25

Official - Subject to Final Review

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