1   IN THE SUPREME COURT OF THE UNITED STATES

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3   UNITED STATES,   :

4   Petitioner   :   No. 12-167

5   v.   :

6   ANTHONY DAVILA   :

7   - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Monday, April 15, 2013

10

11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 11:12 a.m.

14   APPEARANCES:

15   ERIC J. FEIGIN, ESQ., Assistant to the Solicitor

16   General, Department of Justice, Washington, D.C.; on

17   behalf of Petitioner.

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

19   Respondent.

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C O N T E N T S

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1   P R O C E E D I N G S

2   (11:12 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument next in Case 12-167, United States v. Davila.

5   Mr. Feigin? It is Feigin, right?

6   ORAL ARGUMENT OF ERIC J. FEIGIN

7   ON BEHALF OF THE PETITIONER

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

9   CHIEF JUSTICE ROBERTS: Thank you.

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

11   and may it please the Court:

12   The court of appeals' practice of

13   automatically granting appellate relief for every

14   violation of Rule 11(c)(1), irrespective whether it

15   prejudiced the defendant, is flawed. As this Court

16   recognized in United States v. Vaughn, Rule 11(h) was

17   adopted for the precise purpose of ending the

18   then-common practice of automatically reversing even for

19   non-prejudicial Rule 11 errors.

20   It would be especially inappropriate to

21   apply an automatic reversal rule in a case like this one

22   that comes to the appellate courts in a plain error

23   posture.

24   Erroneous judicial participation --

25   JUSTICE GINSBURG: May -- may I ask you a

1   question about that? It's plain error because the

2   defendant didn't make an objection in the lower court.

3   But the defendant doesn't know about Rule 11 and doesn't

4   know about 11(c) that says a judge is not supposed to

5   participate in plea bargaining, and his lawyer doesn't

6   tell him the judge is doing something wrong because his

7   lawyer wants him to plea. So he lacks the information

8   necessary to make a prompt objection.

9   So it seems a bit unfair to say that he's

10   subjected to plain error when he hasn't got a clue that

11   the judge -- magistrate wasn't supposed to do what he

12   did.

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

14   I'd respectfully disagree with the notion that just

15   because Respondent's counsel was advising him to plead

16   guilty, that Respondent's counsel had so advocated -- so

17   abdicated his representation that he couldn't be

18   expected to object to an error that the judge made.

19   I'd also point out that if the Court were to

20   create an exception to the plain error doctrine, this

21   would be a particularly inappropriate case in which to

22   do it because not only was there not a contemporaneous

23   objection, there wasn't an objection before the district

24   judge in the months and proceedings that followed.

25   They didn't raise any claim of error on

1   appeal until the court of appeals raised it. And in

2   fact, in this case, Respondent did file a motion in the

3   district court to withdraw his plea. And he didn't

4   mention the magistrate's comments or any pressure he

5   felt from those comments at all.

6   JUSTICE KENNEDY: Well, suppose you just

7   stick with Justice Ginsburg's hypothetical, or perhaps

8   not even a hypothetical, what happened in this case.

9   Just assume that the defense attorney likes this

10   judicial intervention and he -- he wants this to take

11   place. It -- it seems quite unfair to talk about the

12   plain error because he doesn't tell -- as Justice

13   Ginsburg says, what does the defendant know about Rule

14   11(c)? He doesn't know about it.

15   MR. FEIGIN: Well, Your Honor, if Respondent

16   wants to make an ineffective assistance of counsel claim

17   on collateral review, he can make that. But I'm not

18   aware of any court of appeals that has abandoned the

19   plain error doctrine in this kind of case and I don't

20   think there should be any sort of special exception that

21   says when -- that we assume when counsel is advising his

22   client to plead guilty, that we can't expect counsel to

23   make objections to errors that occur based on the

24   judge's comments.

25   JUSTICE SOTOMAYOR: It doesn't really

1   matter --

2   JUSTICE GINSBURG: But this is a lawyer that

3   had filed an Anders brief. So he didn't -- even at that

4   stage, the lawyer, the -- I don't want to absorb your

5   time beyond this, but I think the plain error is

6   questionable when it seems that the judge, the lawyer,

7   they arranged against the -- the defendant, and the

8   defendant doesn't know that he has this route.

9   MR. FEIGIN: Well, Your Honor, let me just

10 say one other word about that. I don't think it's going

11 to be easy for courts of appeals to tell exactly why the

12 lawyer may not have made an objection, and I just don't

13 think it's fair to assume that in every Rule 11(c)(1)

14 case that the lawyer is effectively acting at contrary

15 purposes to his client.

16   I mean, lawyers advise clients to plead

17 guilty all the time and that doesn't mean that they've

18 abandoned the representation to the point where you

19 can't assume they're acting on the client's behalf and

20 will raise objections. But our basic point in this --

21   JUSTICE SOTOMAYOR: Excuse me. Does this

22 issue go -- it doesn't go to whether you should apply

23 the prejudice prong because either under normal harmless

24 error or plain error you have to get to whether it

25 prejudices someone.

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

2   Sotomayor. That was exactly the next sentence that was

3   going to come out of my mouth is that our basic point in

4   this case is that you have to apply prejudice analysis

5   in some form, and whether it's harmless error or plain

6   error, the court of appeals refuses to do it. And we

7   think --

8   JUSTICE SOTOMAYOR: One of the most powerful

9   arguments of your adversary is that in the most common

10   of situations -- and it's how I read the advisory

11   notes -- it's going to be awfully difficult to say that

12   a judge's intervention hasn't influenced a defendant.

13   This is the unusual case where you might actually have a

14   no prejudice argument because of the unique facts.

15   But it -- there is a purpose for keeping

16   judges out of this, and that's because the subtle

17   influence that judges exert is not so subtle. It's very

18   palpable and does influence most decision making, both

19   by lawyers and defendants.

20   So if that's the standard, why isn't it a

21   rebuttable presumption that prejudice exists?

22   MR. FEIGIN: Well --

23   JUSTICE SOTOMAYOR: It has to be an awfully

24   high presumption, otherwise, you make mockery of the

25   rule, in my mind.

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

2   I want to take issue with the notion that all Rule

3   11(c)(1) errors are alike. There's actually a variety

4   of different kinds of Rule 11(c)(1) errors.

5   Rule 11(c)(1) has been held to cover, for

6   example, a judge pressuring the government outside the

7   defendant's presence to offer a plea, a judge

8   discouraging a plea, a judge commenting in a

9   well-intentioned manner about the obvious difference in

10   potential sentencing consequences between a potential

11   plea agreement and a trial, or a judge, having rejected

12   one plea agreement that the parties reached, indicating

13   a bit too strongly what kind of plea agreement the judge

14   might accept.

15   I think adopting some sort of "one size fits

16   all" rule would -- would be inappropriate, and a

17   rebuttable presumption I think would also be

18   inappropriate, for a few reasons.

19   First of all, I don't think courts should

20   have to distinguish between different types of errors to

21   see whether a rebuttable presumption should apply.

22   Second of all --

23   JUSTICE SOTOMAYOR: Well, I don't disagree

24   that one doesn't' have to use the word "rebuttable

25   presumption," but there has to be a strong prejudice

1   factor --

2   MR. FEIGIN: Well, Your Honor --

3   JUSTICE SOTOMAYOR: -- whether rebuttable or

4   not, assumed in a judge's intervention.

5   MR. FEIGIN: -- I think that's already built

6   into Rule 52 in a couple of different ways.

7   First of all, Rule 52 places a presumption

8   based on whether or not the defendant objected. If the

9   defendant objected, the burden's on the government. If

10   the defendant didn't object, the burden is on the

11   defendant.

12   But also, I don't -- I want to be clear on

13   this, the type of error -- if there is a very serious

14   error, the nature of the error and the error's

15   seriousness would of course be a factor, and a very

16   important factor, in the prejudice analysis.

17   But, as Your Honor has recognized with this

18   case, there may be other circumstances that indicate

19   the error did not, in this case, have a reasonable

20   probability of affecting the decision of the plea.

21   JUSTICE BREYER: But that's the problem. Is

22   there a way of doing this, which I -- I don't see at the

23   moment? But the judge intervenes in a serious way and

24   says, you go listen to your lawyer and this is a very

25   harsh penalty and, boy, you are in da da da -- okay?

1   Serious problem.

2   And now to track down whether that affected

3   substantial rights, you have to try to track down the

4   state of mind of the defendant and would he have pled

5   guilty anyway. And that's sometimes quite difficult to

6   do, very hard.

7   But if you don't insist on doing it, and you

8   have an absolute rule of structural error or something,

9   then you suddenly discover these minor things. The

10 judge says, go to lunch, or -- or, you know, some really

11 trivial intervention, and you are going to say that --

12 the guilty plea, he can just void his guilty plea.

13   So there should be a way of distinguishing

14 the trivial from the -- from the really important in

15 terms of how serious the intervention was, but I don't

16 see any way to do that. Have -- have you thought about

17 that at all? Do we have to go all the one way or all

18 the other way?

19   MR. FEIGIN: I have thought about that a

20 little bit, Your Honor, and I'd say that trying to break

21 Rule 11(c)(1) into different pieces and adopt different

22 rules based on different kinds of error would be

23 inappropriate, for three main reasons.

24   The first one is I think it would be

25 inconsistent with this Court's approach in Neder v. the

1   United States, which makes clear that in deciding

2   whether an error is structural you have to look at the

3   entire class of errors.

4   And Rule 11(c)(1) defines the class of

5   errors as cases in which a judge participates in plea

6   negotiations in some way, and it doesn't define

7   subcategories.

8   Second, I think breaking this up into pieces

9   would essentially be an incomplete and unsatisfactory

10 form of prejudice analysis. That is, reviewing courts

11 would still be looking at errors and differentiating

12 between them in order to decide whether relief is

13 warranted, but they would be narrowly focused only on

14 the binary inquiry of how to categorize the error,

15 they'd be disregarding how serious that particular error

16 was versus other errors in that category, and they would

17 be disregarding all the other facts and circumstances

18 the courts always look at and are well familiar with how

19 to look at in a normal prejudice analysis, to determine

20 whether the error affected the outcome.

21   Third, particularly because the

22 subcategories don't exist in the rule and would be

23 something of judicial invention, I think that approach

24 would be inherently inadministrable and manipulatable

25 and lead to inconsistent results.

1   It could be very difficult to tell whether a

2   particular type of error should fall into one category

3   or another, and under the approach you're suggesting,

4   which I think is the approach Respondent is

5   advocating -- I don't think Respondent is actually

6   advocating the per se rule that the Eleventh Circuit

7   adopted here -- I think under that approach, you know,

8   everything turns on a narrow question of categorization.

9   I think the much better approach, and the

10   approach that Rule 52 adopts, is to look at all the

11   facts and circumstances to attempt to determine the

12   effects on the outcome.

13   JUSTICE GINSBURG: Mr. Feigin, is there any

14   situation in which a -- a judge participating in a plea

15   bargaining, any situation that would be prejudicial --

16   that you recognize would be prejudicial, and if there is

17   can you describe what that would be?

18   MR. FEIGIN: Certainly, Your Honor.

19   We -- the government loses many of these

20   cases even in circuits that have prejudice analysis. In

21   fact, one example the Court might want to look to, there

22   was a certiorari petition I think filed at the end of

23   last term, a case, 11-8966, Rebollo-Andino, which was a

24   case of Rule 11(c)(1) error. The government conceded

25   that even on a plain error analysis that that was

1   prejudicial.

2   I can describe --

3   JUSTICE GINSBURG: What -- what makes it

4   prejudicial and this not?

5   MR. FEIGIN: Well, let me take -- let me

6   take a different example.

7   The Fourth Circuit's decision in United

8   States v. Bradley, the judge essentially told the

9   defendants that he -- it boggled his mind that they were

10 going to trial and kept essentially harassing them about

11 why they were going to trial. And, eventually, they

12 said, all right, Your Honor, we are going to -- we're

13 going to plead guilty. I mean, that kind of thing

14 obviously is going to be prejudicial.

15   But the advantage of a prejudice approach is

16 it allows you to separate that kind of case from kinds

17 of cases when there are less serious errors, or even a

18 case where there is a fairly serious error -- and this

19 case may fall within that category -- but there are

20 facts and circumstances that indicate that the error

21 didn't have a reasonable probability of affecting the

22 defendant's decision to plead.

23   And while we're not asking the Court to

24 resolve the prejudice analysis here in the first

25 instance, we -- we're just asking the Court to remand

1   the case to the court of appeals to do that, I think

2   it's just worth noting that -- a couple of the factors.

3   One is that -- there was a 3-month break between the

4   magistrate judge's comments and the entry of the plea,

5   and a month into that a speedy trial motion was filed,

6   which indicated at least some intent at that point to go

7   to trial.

8   The plea and the sentencing occurred in

9   front of the district judge, not the magistrate judge to

10   -- who made the comments.

11   JUSTICE GINSBURG: On that point, do we

12   know -- do we know if the district judge who did preside

13   at the plea hearing knew about the episode with the

14   magistrate 3 months earlier?

15   MR. FEIGIN: I don't -- I'm not aware of

16   anything in the record that reflects whether he did or

17   did not. There's never been an allegation that -- that

18   he said something about them, or that he was aware of

19   them or --

20   JUSTICE GINSBURG: The same for the

21   prosecutor?

22   MR. FEIGIN: Your Honor, my understanding is

23   the government was not aware of this because it occurred

24   in an ex parte hearing in which the government wasn't in

25   attendance. The government wasn't aware of it until the

1   Eleventh Circuit conducted its own review of the record

2   and asked for further briefing on the issue.

3   JUSTICE ALITO: Suppose there's a case where

4   the -- the defendant would not have pled guilty without

5   this court saying something inappropriate about it's a

6   case where the defendant would be crazy to go to trial

7   because the trial would lead to a much more severe

8   sentence. Would there be prejudice there?

9   MR. FEIGIN: Yes, Your Honor. He has a

10 right to go to trial if he wants to go to trial, even if

11 it would be crazy. So under that circumstance, if he

12 wouldn't have, you know, pleaded guilty without the

13 erroneous comments from the judge, there would be

14 prejudice.

15   JUSTICE KENNEDY: That's -- what happens

16 under -- under the rule if the magistrate asked that the

17 defendant be excused -- I don't know quite how you do

18 that, the defendant has to be present. But can the --

19 can the judge just have the attorneys before him and

20 say, now, I want you to be very, very clear that this is

21 a mandatory minimum, that we should try to avoid if at

22 all possible.

23   Can he do that?

24   MR. FEIGIN: Well, Your Honor, I think

25 that's --

1   JUSTICE KENNEDY: It's awfully hard to have

2   a hypothetical where you exclude the defendant.

3   MR. FEIGIN: Well, Your Honor, this actually

4   happened in a non-hypothetical fashion in a case we cite

5   in our reply brief, called In re United States, in which

6   the judge was apparently unhappy with the government's

7   conduct in that case and had the prosecutor and defense

8   counsel in chambers, or at least in court, without the

9   defendant's presence, and was urging the parties to

10   reach a plea agreement.

11   I think if something like that happened, Your

12   Honor, there'd be some question whether the defendant

13   was made aware of it, and whether it actually influenced

14   the defendant's decision to plead. I don't think there

15   can be a presumption that just because counsel heard it,

16   that it necessarily --

17   JUSTICE ALITO: What -- what if the judge

18   sees what the judge thinks is ineffective assistance of

19   counsel, under our decision in Lafler, taking place? Is

20   there anything that can be done?

21   MR. FEIGIN: So -- Your Honor, I think one

22   of our main concerns in bringing this case before the

23   Court is the interaction of this Court's decisions in

24   Lafler and Frye with Rule 11(c)(1), and Frye suggests

25   that one way a judge can try to guard against a later

1 claim of ineffective assistance of counsel is to conduct

2 a colloquy with the defendant -- not a colloquy, but a

3 discussion with the defendant -- during the initial

4 proceedings to try to establish that he understands the

5 consequences of his plea and that he's receiving

6 effective assistance of counsel.

7   I think that could be done very carefully by

8 asking very general questions, but I think it's very

9 easy to see how a judge might slip up and say, oh,

10 that's an interesting offer. Did you discuss that with

11 your counsel? That seems like something you ought to

12 discuss with your counsel.

13   And I think what the automatic reversal rule

14 the court of appeals has adopted is it really puts

15 judges, and, frankly, the government, in kind of a box.

16 On the one hand, judges have to guard against these

17 later ineffective assistance of counsel claims by

18 discussing plea discussions, and on the other hand, any

19 slipup in that discussion is going to lead to automatic

20 reversal on appeal.

21   Now, I -- I just want to add one -- one more

22 thing, which is, I think, the best evidence that we have

23 that this -- the magistrate judge's comments here did

24 not create a reasonable probability of effecting the

25 defendant's decision to plead is, again, defendant

1   himself moved pro se to withdraw his plea in the

2   district court, and his reasons for withdrawing his

3   plea, which start on page 58 of the Joint Appendix,

4   never mention the magistrate's comments. Instead, in

5   his own words, what he says is, "Your Honor, my decision

6   to enter the plea was a strategic decision.

7   The reason being is that I knew that the

8   prosecutor had a duty with the courts to disclose the

9   information relevant for this court's determination of

10 the acceptance or rejection of the plea."

11   And what he means by that is that he took

12 issue with some aspects of the allegations in the

13 indictment, although he's quite clear, both in that

14 proceeding and at his guilty plea proceeding, that he

15 did commit the conspiracy offense, and he just believed

16 that those allegations in the record would be cleaned up

17 or have to be withdrawn by the prosecutor if he pleaded

18 guilty.

19   Now, he was wrong about that. But what we

20 have in this case is a clear unvarnished explanation by

21 the defendant, in his own words, about why he pleaded

22 that doesn't mention the magistrate's comments.

23   The Court of Appeals erred in disregarding

24 that.

25   And if the Court has no further questions, I'll

1   reserve the balance of my time.

2   CHIEF JUSTICE ROBERTS: Thank you, counsel.

3   Mr. Yablon?

4   ORAL ARGUMENT OF ROBERT M. YABLON

5   ON BEHALF OF THE RESPONDENT

6   MR. YABLON: Mr. Chief Justice, and may it

7   please the Court:

8   By imploring Anthony Davila to forego his

9   trial rights, confess his alleged crimes, and accept a

10   plea deal, the magistrate judge abandoned his role as

11   neutral arbiter and fundamentally distorted the pretrial

12   process.

13   JUSTICE KENNEDY: I -- I don't want to

14   interrupt your opening because I think -- I just didn't

15   hear your first -- "by foregoing"?

16   MR. YABLON: By foregoing --

17   JUSTICE KENNEDY: By foregoing.

18   MR. YABLON: -- his trial rights.

19   This -- the right at issue in this case is

20   not one that should be subject to post hoc speculation.

21   Judges, when an error of this kind occurs --

22   JUSTICE SOTOMAYOR: You're creating a sui

23   generis structural error analysis. You're basically --

24   because even with respect to constitutional violations

25   that we have found structural error in, we've created

1   the plain error rule that still requires a proof of --

2   of prejudice. So you're asking us to create something

3   that's really sui generis in saying it's always a

4   structural error.

5   MR. YABLON: That's -- that's not correct,

6   Your Honor. First, let's put to one side the fact that

7   we do argue that we should not be in a plain error

8   framework at all in this case because of the

9   circumstances in which the judge's improper intervention

10   occurred.

11   JUSTICE SOTOMAYOR: Assume I accept that

12   argument.

13   MR. YABLON: So this Court has --

14   JUSTICE SOTOMAYOR: You're -- you're saying

15   this is a structural error always.

16   MR. YABLON: And this Court has, at the very

17   least, strongly suggested that substantial rights, when

18   you're dealing with a structural error, are affected,

19   per se, where they've left the door open to some

20   additional analysis is the fourth prong of the plain

21   error standard where the Court is called upon to

22   consider whether the error affects the fairness,

23   integrity, or public reputation of the proceedings.

24   And the government has never, in this case,

25   invoked that fourth prong. They've never claimed that

1   the error here is one that -- that does not affect the

2   fairness, integrity, or public reputation.

3   So when you're only dealing with the third

4   prong of the plain error standard, does the error affect

5   substantial rights? That language is the same in Rule

6   52(b), the plain error standard, as it is in Rule 52(a),

7   affects substantial rights. And if it means in Rule

8   52(a) that this is the sort of error for which an

9   individualized prejudice inquiry is not appropriate,

10   then the same analysis necessarily carries over to Rule

11   52(b).

12   So I would not say that this is at all the

13   kind of sui generis example that -- that you're

14   indicating.

15   And I do want to -- to -- and try to show

16   that this error is quite similar, both to constitutional

17   and nonconstitutional violations in with -- which this

18   Court has said that an error should be said to affect

19   substantial rights without the sort of specific showing

20   of prejudice that the government is demanding.

21   When you have a judge that, as in this case,

22   is stepping out of his proper role, is acting contrary

23   to his duties to guard against ill-considered and

24   involuntary waivers of the defendant's basic trial

25   rights, is actually ratcheting up the already tremendous

1   pressure on the defendant to plead guilty, that is a

2   systematic distortion of the process. That is not

3   unlike the kind of error that occurs when a defendant is

4   denied an impartial adjudicator, is not unlike the

5   kind of error that occurs when a defendant is denied

6   counsel or is forced to --

7   CHIEF JUSTICE ROBERTS: What -- what if you

8   have the situation where the judge is conveying purely

9   factual information? There's a -- a plea bargain on the

10   table for one year and the judge says, you should know

11   that I -- I have these cases a lot. The last ten cases

12   that went to trial where the defendant was found guilty,

13   I sentenced them to a minimum of 12 years. Pure facts.

14   The facts might have the effect of pushing

15   the defendant one way or another, but it's also factual

16   information of which he ought to be aware.

17   MR. YABLON: That's right, Your Honor, and

18   this raises a question about what the scope of the

19   participation prohibition actually is.

20   And we're in a strange posture in this case

21   because the government has conceded that we're dealing

22   with a conceded plain violation of the rule, and yet

23   their analysis, instead of proceeding from that

24   violation, it goes out to the periphery and tries to

25   figure out where are the boundaries of Rule 11.

1   Now -- and they cite some appellate cases

2   that arguably have applied too broad a construction of

3   the rule and have reversed where maybe there was just a

4   one-off comment or a purely informational comment, but

5   it's not clear that that is actually what the text of

6   Rule 11 forbids, particularly when you consider the

7   context of the rule and its underlying purposes. So --

8   CHIEF JUSTICE ROBERTS: Well, we do need to

9   have a good sense of how far your -- your per se

10   structural argument is going to reach before we

11   decide -- in deciding whether it's appropriate or not.

12   MR. YABLON: That's right, Your Honor, and

13   there are -- there are two ways to break it down. One

14   is we do argue that the remedy that we seek should apply

15   for all cases of judicial participation. And the

16   question then is: Are judicial participation violations

17   as expansive a category as the government suggests that

18   they are?

19   Our second argument is that --

20   JUSTICE KAGAN: Well, on that, what's the

21   most minor thing that the government could do that would

22   still count as a Rule 11(c)(1) violation?

23   MR. YABLON: The most minor thing that the

24   government could do or a judge could do?

25   JUSTICE KAGAN: That the judge could do.

1   I'm sorry.

2   MR. YABLON: Well, the most minor -- we

3   think that Rule 11 is concerned with judicial pressure

4   to plead guilty. And so the most -- I mean, a judge

5   might make a comment that, viewed from the transcript,

6   would suggest that the evidence against the defendant is

7   overwhelming or that the defendant is likely to get a

8   much lower sentence if he pleads guilty than if he goes

9   to trial. Those we think are --

10   CHIEF JUSTICE ROBERTS: What -- what about

11   the hypothetical that I posed?

12   MR. YABLON: So that hypothetical, if -- if

13   we were talking about a purely informational statement

14   like that, then, actually, we don't think that that is

15   likely to be a violation of Rule 11(c)(1). And the

16   reason is, if you look at 11(b), the rule expects that

17   judges are, in fact, going to be offering a lot of

18   advice to defendants before the defendant pleads guilty.

19   And so if a judge is making the kinds of

20   comments that Rule 11(b) is contemplating, informing the

21   defendant about the nature of the charges against him,

22   attempting to make sure that the defendant understands

23   that his trial right is a real one, telling the

24   defendant a little bit about what, in fact, the -- the

25   sentencing exposure might be if he is convicted, those

1   purely informational statements we don't think is what

2   is meant to be prohibited by the rule.

3   CHIEF JUSTICE ROBERTS: So if he -- if it's

4   my example and he says, this is what I've done the past

5   ten times, so you ought to think long and hard about

6   whether a bargain for one year is a good deal.

7   MR. YABLON: So -- and -- and this is

8   getting -- and then the judge may well be crossing the

9   line. And what the judge --

10   CHIEF JUSTICE ROBERTS: It's kind of a fine

11   line to -- to draw, isn't it?

12   MR. YABLON: There's no question that there

13   will be close cases. I would say that if you look to

14   the majority of cases that are actually out there, most

15   judges, of course, are very scrupulous about following

16   the rule. And when a judge is not, the judge is not

17   usually being circumspect about it, the judge is trying

18   to get a message across to the defendant.

19   And so there may be difficult line-drawing

20   cases, and that's true whether you're looking at the

21   remedial approach that we're asking for or the remedial

22   approach that the government's asking for.

23   JUSTICE GINSBURG: Mr. Yablon, the -- the

24   case that you're presenting would be quite strong if the

25   same judge -- if the magistrate judge also presided at

1   the plea hearing, but here we have two factors that are

2   special in this case. One is it's a different judge,

3   and two is we have the interval of some three months in

4   between. And then we have a plea hearing that looks to

5   me like it's exemplary. The district judge did go

6   through everything that Rule 11 calls for.

7   So it is a different case, isn't it, when we

8   have a plea hearing with a judge who is exerting no

9   pressure at all, has nothing to do with encouraging the

10   defendant to plead, but there was an earlier episode

11   where a magistrate judge did overbear?

12   MR. YABLON: And at no point during the plea

13   colloquy hearing is the district judge in any way

14   acknowledging or disavowing the magistrate judge's

15   comments, which, we submit, there is at least a very

16   strong probability that those comments affected the

17   defendant's thinking and the reason that the defendant

18   is at the Rule 11 hearing in the first place.

19   JUSTICE GINSBURG: But -- but the -- but the

20   judge did ask, do you recognize that your -- your

21   conduct satisfied the elements of the conspiracy? And

22   the defendant answered yes. And the -- the judge asked,

23   has anyone pressured you to plead guilty? And he

24   answers no. So --

25   MR. YABLON: And, of course, in that

1   situation, the defendant is likely not thinking about

2   pressure that may come from the judiciary itself. And

3   also, not to nitpick, but when he's asking that pressure

4   question he's asking whether anyone pressured him to

5   plead guilty today, which may not cause the defendant to

6   think back on why he actually started down the negotiation

7   road.

8   I think an important --

9   JUSTICE SOTOMAYOR: Mr. Yablon, I agree with

10   you totally. I'm not as much convinced by the delay in

11   pleading because defendants often think about it and I

12   can imagine a hypothetical where the lawyer comes in and

13   says, I told him to plead guilty and he said to me, I

14   don't want to, but the judge told me to.

15   So I don't think the time limit -- we don't

16   know if that happened. But what did happen is that the

17   defendant made a motion to withdraw his plea and he

18   directly said, "I entered the plea because I

19   strategically decided that the government would

20   eventually have to come forth and vacate the charges

21   against me." He said it himself with no pressure by a

22   lawyer because he was making the motion. How do you get

23   past that statement?

24   MR. YABLON: That statement reveals just how

25   little confidence we actually should have in the plea

1   decision that he made. Here is a defendant who for the

2   better part of a year was adamant about his desire to go

3   to trial and exercise his rights. It's the reason that

4   the in camera hearing happened in the first place

5   because he was unhappy that his lawyer just wanted him

6   to plead guilty. After that hearing, suddenly there are

7   plea negotiations and a plea deal, which it's clear that

8   he is never happy about from the start.

9   Even at the plea hearing, he is attempting

10   to tell the judge, look, I don't think that my conduct

11   actually is consistent with the conspiracy charge as

12   alleged. And he says later on at the sentencing hearing

13   when they are discussing the withdrawal motion that

14   basically he went forward because his lawyer was

15   instructing him that it was the right thing to do. And

16   if you look at that sentencing --

17   JUSTICE SOTOMAYOR: But that is the whole

18   point, which is this may be IAC, but I don't know how --

19   how you prove that what the magistrate judge said to him

20   led to his decision.

21   MR. YABLON: And we don't need to prove

22   that.

23   JUSTICE SOTOMAYOR: That's only if we don't

24   accept that prejudice is a consideration here.

25   MR. YABLON: Either way, if you were looking

1 at whether this conduct should be viewed as inherently

2 prejudicial the reason that you might do that is because

3 you might think that at least in all of these cases

4 there might at least be a reasonable probability that it

5 would affect where the defendant is. And here you have

6 a defendant who has been adamant that he's not going to

7 plead, and when you have the judge making these comments

8 in front of the defendant, having him lose confidence in

9 his right to go to trial, then it's likely that that is

10 shifting the defendant's mind set in a way that gets him

11 to the negotiating table. And it also reaffirms the

12 defense lawyer's position in this case.

13   And so you have a defense lawyer who may

14 then go back to the prosecutor and say, we're just going

15 to get this deal done, and it may not be the deal that

16 the defendant would otherwise have reached.

17   JUSTICE BREYER: You want us to basically

18 not apply the 11(h) with the harmless error business, and

19 you basically want to prevent bizarre results by making

20 a tough definition of the word "participate." That's

21 how I understand you. And maybe you are right, but it

22 sounds to me as you say it in reading the briefs that

23 this is really a job for the rules committee.

24   This is a rule. We don't normally have

25 structural errors in respect to rules. We have rules

1   committees there to listen to this kind of complaint, to

2   weigh it in the system as a whole and to come up with

3   better rules.

4   MR. YABLON: Let me address that in two ways

5   because we have two separate arguments and I want to try

6   to keep them distinct. One is that if you look at the

7   text and history of Rule 11, there is strong evidence

8   that Congress actually made an affirmative judgment not

9   to sweep in Rule 11 violations within the scope of Rule

10   11(h).

11   Our second argument is that even if Rule 11(h)

12   applies to all Rule 11 errors, that all Rule 11(h) does

13   is apply the same substantial rights language that you

14   see in Rule 52(a) and (b). And this Court has

15   recognized that, while that substantial rights language

16   is often synonymous with a case of specific prejudice

17   inquiry, that's not always true. And there are a number

18   of examples. The Court is familiar with the

19   constitutional cases in which the Court has said that an

20   error is structural without trying to determine -- make

21   a case-specific determination of prejudice.

22   But there are a number of nonconstitutional

23   cases as well in which the Court has said that an

24   individualized prejudice inquiry is simply

25   inappropriate, that the error affects substantial rights

1   by its nature. So one example that I think is fairly

2   close to the one we have here is -- is Gomez v. United

3   States, where you have the Court addressing a statutory

4   provision that prevents magistrate judges from

5   conducting the jury voir dire. And that provision is

6   violated and the Court is asked to conduct a prejudice

7   analysis, did it matter that the magistrate judge

8   conducted voir dire?

9   And the Court said, we are not going to go there.

10   This is -- this is in effect a structural defect in the

11   proceedings.

12   JUSTICE KAGAN: Well, Mr. Yablon, have we

13   ever said that about the violation of a rule of criminal

14   procedure, that it's structural error no matter what the

15   circumstances?

16   MR. YABLON: First, Justice Sotomayor, this

17   Court has said that rules of criminal -- I'm so sorry --

18   JUSTICE SOTOMAYOR: That's the first time

19   that has happened.

20   MR. YABLON: And I should be --

21   JUSTICE KAGAN: You worked for her, too, I

22   think.

23   MR. YABLON: Makes it that much more

24   embarrassing. She used to sit over there.

25   This Court has said that Federal rules and

31

1   statutes stand on equal footing, so whether we are

2   talking about applying this with respect to a rule or a

3   statute, it shouldn't make a difference; the analysis

4   should be the same. And in fact there is at least one

5   case where the Court did apply, in effect, a

6   structural analysis to -- to a rule violation and a

7   second case in which the Court at least left open the

8   possibility.

9   So the case in which the Court did so is the

10   McCarthy case, which is discussed extensively in the

11   briefs. And the Court referred to the 1966 version of

12   Rule 11 and said that prejudice adheres in a violation

13   of that rule and that it was not going to conduct an

14   individualized prejudice analysis. It was simply going

15   to grant relief where there had not been full compliance

16   with that provision.

17   Of course, the rule has been amended since

18   then, but that provides evidence that the Court is not

19   unwilling to adopt this kind of rule in the context of

20   the Federal Rules.

21   JUSTICE KAGAN: I would think, Mr. Yablon,

22   that one of the effects of doing what you are asking us

23   to do is that the rule will just get narrower and

24   narrower. In other words, if automatic reversal is

25   always the effect of finding a violation -- and I think

1 you acknowledge this in a way -- that people will just

2 find fewer and fewer violations. And I'm wondering why

3 we should do something like that rather than interpret

4 the rule as it was meant to be interpreted, but then

5 say, you know, somebody can look and say it really just

6 didn't matter that it was violated in this case.

7   MR. YABLON: So we think that our approach

8 is consistent with how the rule is, in fact, meant to be

9 interpreted. The rule really is about this problem of

10 placing judicial pressure on defendants to plead guilty,

11 and those are the cases that ought to be reversed.

12   But the Court has a line-drawing decision to

13 make either way. Either the line that the Court should

14 focus on is the line that separates participation from

15 nonparticipation or, again, a narrower class of

16 participation. And I want to get to this point that --

17   JUSTICE ALITO: But you are arguing for a

18 narrower interpretation of Rule 11(c)(1) than a number

19 of courts of appeals have adopted, isn't that correct?

20   MR. YABLON: There -- I believe there are

21 some decisions out there that have adopted probably a

22 broader construction than we think is necessary and

23 appropriate. But what is easier for reviewing courts

24 to monitor? Is it easier for them to monitor the

25 narrowing -- the improper narrowing of the rule over time,

1   or is it easier for them to monitor improper applications

2   of the harmless error rule, especially applications of it

3   that are happening in this kind of setting, where it's

4   going to be almost inherently a very speculative analysis,

5   an attempt to read the defendant's mind and ascertain

6   whether the defendant was influenced by what the judge

7   was saying.

8   And it would be much easier for appellate

9   courts to focus on the line-drawing exercise that

10   determines whether or not a violation had occurred or,

11   if you think that the rule is broader, whether the kind

12   of violation that occurred in this case occurred, than

13   it would be to try to make these case-by-case scouring

14   the record, individualized prejudice determinations.

15   JUSTICE ALITO: Could you say something

16   about Mr. Feigin's comments regarding what a judge can

17   and cannot do if the judge thinks that he or she sees a

18   violation of Lafler and Frye taking place?

19   MR. YABLON: So there ought to be things

20   that a judge is able to do in that situation. Suppose,

21   for example, that the judge becomes aware that the

22   defense attorney has given the -- his client false

23   information about the elements of the charge. It would

24   not violate Rule 11(c)(1) for the judge to say, I

25   understand that you were told that the elements of the

1   charge are A, B, and C, but in fact they are X, Y, and

2   Z.

3   So there are -- there are certainly steps

4   that a judge can take to help root out the violation.

5   And I would say that the fact is that generally when it

6   comes to ineffective assistance of counsel claims, there

7   is only so much that the trial court can do. So

8   the fact that the trial court may not be able to solve

9   or prevent every ineffective assistance claim in this

10 context is not necessarily an argument against the rule

11 because the judge often is not aware of the privileged

12 communications. Now --

13   JUSTICE ALITO: What if the judge knows as a

14 result of pretrial motions that the evidence in the case

15 is very, very strong.

16   Let's say there's a -- there's been a motion

17 to suppress extremely incriminating evidence and the

18 motion has been denied, so the judge knows this is going

19 to come in. And the judge thinks if this comes in,

20 there's virtually very little chance that the defendant

21 is going to be acquitted, and yet the defendant -- and

22 the judge knows that a plea bargain -- a plea offer was

23 made and the defendant initially was going to take it,

24 and then before it was accepted, it's rejected.

25   Is there anything a judge can do in that

1   situation? Just sit back and, you know, wait for the

2   case to be -- to be reversed?

3   MR. YABLON: Well, the judge's role in that

4   situation is -- is not to step in as defense counsel or,

5   in effect, as second prosecutor. The judge -- I think

6   that there may be ways in that case for the judge to try

7   to alleviate the error without -- without crossing the

8   line. But when -- but when you start to make exceptions

9   in that -- in that situation, you -- you go down the

10   road of -- of the judge being the one who is evaluating

11   the evidence and who is, in effect, potentially

12   presuming the defendant's guilt. And the judge --

13   JUSTICE ALITO: It just puts -- puts the

14   judge in a very difficult position. It could -- can the

15   judge say, you -- do you realize that I denied your

16   motion to suppress that wiretap? And do you recognize

17   that on that wiretap, you conceded that the loss in this

18   case is $20 million, and do you know that under the

19   sentencing guidelines, the sentence where the loss is

20   $20 million is whatever it is, ten years in jail.

21   If the judge says all of that, has the judge

22   violated Rule 11(c)(1)?

23   MR. YABLON: And if this is happening in the

24   context of active discussions of whether the defendant

25   should or should not take a plea, then that -- that may

1 well cross the line.

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

3 happen because there's no colloquy when there's a guilty

4 plea. The colloquy happens when there's a not guilty

5 plea.

6   MR. YABLON: I think -- isn't it the

7 opposite, Justice Kennedy? The colloquy happens after

8 the defendant --

9   JUSTICE KENNEDY: No, no -- you're correct.

10 You're correct.

11   MR. YABLON: So -- so taking -- so in that

12 instance, again, you have a situation that may not be

13 different from situations that arise in completely

14 different contexts, where the attorney is doing

15 something that's ineffective, for example, and the judge

16 just doesn't know about it. And -- and whether or not

17 that can be cured in this -- in this setting of the --

18 of plea discussions, it's just a little bit tangential,

19 I think, to the key issue.

20   CHIEF JUSTICE ROBERTS: Now -- well, but

21 you've answered a lot of these questions by saying, you

22 know, it's hard to draw the line and, you know, maybe in

23 that case, maybe in this case.

24   Most -- our precedents where we recognize

25 structural error and -- and plain error are ones that

1   are pretty easily categorized. Did a magistrate conduct

2   voir dire or did he not? You know right away one way or

3   the other. Here did he participate enough? You know,

4   well, if he told them how many times he sentenced people

5   this way, it's not, but if he said you ought to -- you

6   ought to pay attention to what I'm telling you when

7   you'd consider whether to plea or not, well, then it is.

8   It -- it seems to me in the typical plain

9   error cases, we're very -- the categories are very

10   sharply defined.

11   MR. YABLON: That's actually not --

12   not accurate. I would say, for example, take the

13   defendant's right to self-representation. And do you --

14   there may be obvious cases and when the defendant's

15   right to self-representation has been clearly denied.

16   But there are going to be line-drawing problems when

17   you're trying to figure out did standby counsel

18   intervene so much that he denied that right.

19   Or similarly with the public trial,

20   obviously, a court can be totally closed, but then there

21   are going to be difficult cases when you have to decide

22   whether the justifications for closing the courtroom

23   are --

24   CHIEF JUSTICE ROBERTS: I would say in both

25   of those examples, the line -- the gray area, if you

1   were, is really quite narrow than here, where almost

2   every time you've been asked a question about a

3   difficult hypothetical, you say, well, maybe, maybe not.

4   And I think that's quite different than saying is the

5   court closed or not or was the person -- you know, did

6   he represent himself in fact or not. And those just

7   strike me as much easier cases.

8   MR. YABLON: And, of course, I'm being asked

9   all of the difficult hypotheticals.

10   If you look at the cases that actually

11   rise --

12   CHIEF JUSTICE ROBERTS: Yes, but if you were

13   -- if you were arguing whether or not it's -- it's

14   categorical error when the magistrate conducts voir

15   dire, it'd be pretty hard for somebody to come up with a

16   tough hypothetical.

17   MR. YABLON: In that instance, yes. But

18   there certainly are instances in which the structural --

19   in which the Court has found structural error, even when

20   there will be difficult line-drawing problems. And --

21   JUSTICE GINSBURG: Mr. Yablon, one problem

22   with calling this structural error is that it's not so

23   clear that this is a -- a bad thing. That is, some

24   States, even today, allow a judge to participate in plea

25   bargaining, and the advisors -- the rules advisory

1   committee -- said, when it -- when it framed this rule,

2   that some commentators had said it was quite -- quite a

3   frequent thing that happened, that judges participated.

4   So it isn't like not having a public trial or not giving

5   a person counsel of choice.

6   It's, this was -- this was something that

7   still some jurisdictions think it's okay.

8   MR. YABLON: Your Honor, no jurisdiction

9   endorses judicial exhortations to plead guilty. And --

10   and so this Court can resolve the case just on that

11   narrower basis, that there is a category of cases that

12   clearly do involve direct judicial pressure. And no

13   State allow -- allows it, and those are clear violations

14   of the rules. So without needing to draw these other

15   lines about how broad participation may reach, the Court

16   can do that.

17   But even in those States, it's important to

18   note that -- that the Federal system has made a

19   different structural choice. So whether or not it may

20   violate the Constitution for States to have carefully

21   tailored procedures that allow some type of judicial

22   involvement, that's not the structure that the Federal

23   system has chosen. And when you're dealing with the

24   structural choice that was made in Rule 11, that judges

25   shall not, must not participate in plea discussions,

1   that that is as elemental to the Federal system of plea

2   bargaining that we have as many of the familiar elements

3   of -- of the trial are. And so the fact that States

4   have made -- made different structural choices does not

5   mean that it's not a structural error here.

6   Now, I do want to get back to this

7   line-drawing issue because I think that this is not

8   something that should trouble the Court too much, for a

9   couple of reasons.

10   First, in most cases, the line will not be

11   that hard to draw when you consider the purpose of Rule

12   11(c)(1), which is reducing judicial pressure, and

13   instances in which judges are stepping out of their role

14   as impartial adjudicators, and when reviewing courts

15   take that as the touchstone, there may be difficult

16   cases, but they're going to be able to resolve most of

17   them.

18   Now, if the Court feels like it may be

19   difficult to do line drawing, and it is uncomfortable

20   extending the rule -- the remedy that we're seeking that

21   far, it is entirely appropriate for the Court to -- to

22   take out a subcategory of Rule 11(c)(1) violations.

23   JUSTICE KAGAN: But that seems a bit odd,

24   don't you think, Mr. Yablon? You know, you're saying,

25   well, there are core violations as opposed to noncore

1   violations. I mean, presumably, that's part of what the

2   Court would think about when it was doing prejudice

3   analysis.

4   MR. YABLON: It would factor into the

5   prejudice analysis that the Court undertakes, but it

6   also is a reason just to -- to draw the line. I mean,

7   this Court in -- in various instances has

8   indicated that -- I mean, there are some -- some broad

9   rules out there, the right to the assistance of counsel.

10   It comes in different shapes. And the prejudice

11   analysis that applies for a total denial of the right to

12   counsel is different from the one that applies when

13   you're dealing with mere deficiency in counsel's

14   performance.

15   And there is -- and again, this is -- this

16   is a comparative line-drawing problem. Either you draw

17   the line looking at what a violation is or looking at

18   what a judicial exhortation is from the statement that

19   is made, or you engage in this freewheeling speculation

20   that the government wants engaged in, where you were

21   trying to read the defendant's mind. And that is simply

22   not how harmless error analysis normally proceeds, where

23   you have a closed universe of a record, you have

24   specific criteria that are being applied, and you can

25   posit what a reasonable juror is.

1   There is no reasonable defendant that can be

2 posited in the same way because defendants are

3 idiosyncratic and are entitled to be idiosyncratic.

4   JUSTICE KAGAN: Mr. Yablon, do you know of

5 any case where there is one of these core violations,

6 these exhortation cases, where the Court did not find

7 prejudice?

8   MR. YABLON: The answer is no, and that

9 would be -- and we would urge the Court that if it does

10 not accept our primary submission, that it make clear

11 that judicial exhortations like this are highly unlikely

12 to be harmless.

13   That is what the Fourth Circuit has done,

14 the Fifth Circuit, the Seventh Circuit, the Tenth

15 Circuit, the D.C. Circuit. They are in effect applying

16 a per se analysis, they're just not calling it that.

17 They are reversing in all of these cases.

18   And so if this Court is uncomfortable

19 calling it a per se rule, at least it should give very

20 strong indications that comments like this cannot be

21 written off, that they are highly likely, given the

22 position of the judge relative to the defendant, to

23 affect the defendant's thinking, to affect the way that

24 the defense counsel approaches the case, and possibly

25 the prosecution as well in those cases in which the

1   prosecution is aware of the error.

2   And we would go further and say that if the

3   Court were to go down this road, it would be useful for

4   the Court to provide the additional guidance of holding

5   that this particular error was not harmless. That would

6   send a signal to the lower courts that this conduct is

7   clearly off limits, and it would give them an indication

8   that the court means what it's saying, that these kind

9   of comments, where a judge is exhorting a defendant to

10   come to the cross, that he needs to plead guilty --

11   CHIEF JUSTICE ROBERTS: How do we -- if

12   we're giving this guidance, what do we say about the

13   fact that he had a different judge subsequent to this,

14   that he filed a speedy trial motion after this coercion,

15   which suggests that he wasn't coerced all that much.

16   Are we supposed to take all that into

17   consideration, too?

18   MR. YABLON: You should say that those

19   inferences are not adequate to overcome the inference

20   that you draw from this type of participation,

21   particularly here.

22   I mean, consider the change in judge. The

23   reason this hearing occurred before the magistrate judge

24   is because the defendant sent a letter to the district

25   court asking -- explaining his problems with his

1   counsel. He got a response from the magistrate judge.

2   So in the defendant's mind, the magistrate judge and the

3   district court are effectively one and the same, and you

4   would not want a system where district courts are

5   encouraged to send these issues to magistrate judges, so

6   magistrate judges can engage in these kind of comments,

7   but then the district court judge can basically just

8   cleanse it. It is going to affect the way that the

9   process plays out.

10   Now, the speedy trial issue, if I may

11   just -- we can equally draw the inference that that was

12   only done because counsel wanted to put some pressure on

13   the government to actually reach a deal. And it is that

14   kind of speculation that makes this error ill-suited to

15   the kind of remedial analysis the government favors.

16   CHIEF JUSTICE ROBERTS: Thank you, counsel.

17   Mr. Feigin, 13 minutes.

18   REBUTTAL ARGUMENT OF ERIC J. FEIGIN

19   ON BEHALF OF THE PETITIONER

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

21   I just want to make one quick point in

22   response to the notion that we're asking for some form

23   of new prejudice analysis here.

24   This is the exact same prejudice analysis

25   from Dominguez Benitez, that looks whether there is a

1   reasonable probability that the error affected the plea.

2   Unless the Court has any further questions,

3   I will rest --

4   JUSTICE KAGAN: Mr. Feigin, can I ask you

5   the same question that I asked Mr. Yablon, do you know

6   of any cases where in these -- where there are really

7   core violations, where a judge exhorts the defendant to

8   plea it -- does the Court ever find that

9   non-prejudicial?

10   MR. FEIGIN: I am aware of one or two State

11 cases in which the court has looked at the passage of

12 time as a reason why that kind of error wouldn't have

13 been prejudicial.

14   But otherwise, I agree with Respondent that

15 in the Federal courts of appeals, that does tend to get

16 reversed. And I think that supports the idea that if

17 the Court adopts the normal prejudice approach, and

18 reaffirms that approach in this case, that there's

19 not really that --

20   JUSTICE SOTOMAYOR: Do you disagree with how

21 the Fourth and Seventh Circuits and other circuits apply

22 a prejudice analysis, but one that says that it's highly

23 unlikely that you're not going to find prejudice? Do

24 you disagree with their analysis and approach?

25   MR. FEIGIN: Well, Your Honor, there --

1   my -- I'm not going to go so far as to endorse the

2   results they've reached in every single case --

3   JUSTICE SOTOMAYOR: No.

4   MR. FEIGIN: -- but I think insofar as they

5   approach the matter that -- you know, if there's a

6   fairly serious error and the defendant pleads guilty

7   right after that, that that's very likely absence of

8   extenuating circumstances to be prejudicial; we don't

9   have a problem with that.

10   Unless there are further questions --

11   CHIEF JUSTICE ROBERTS: Thank you, counsel.

12   Counsel.

13   The case is submitted.

14   (Whereupon, at 12:01 p.m., the case in the

15   above-entitled matter was submitted.)

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