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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES BENJAMIN PUCKETT, :

Petitioner :

v. : No. 07-9712

UNITED STATES. :

- - - - - x

Washington, D.C.

Wednesday, January 14, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:12 a.m.

APPEARANCES:

LARS R. ISAACSON, ESQ., Lewisville, Tex.; on behalf of the Petitioner.

LISA H. SCHERTLER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:12 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Case 07-9712, Puckett v. United States.

Mr. Isaacson.

ORAL ARGUMENT OF LARS R. ISAACSON

ON BEHALF OF THE PETITIONER

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

This case is framed by two major facts: Jimmy Puckett pled guilty and waived his fundamental rights to trial in exchange for a promise by the government that they agreed he would -- qualified for a three-level reduction in his offense level; and the government of the United States breached this promise.

The teachings of this Court in the situation are instructive. For a plea to be valid, it must be voluntary and intelligent.

JUSTICE GINSBURG: Mr. Isaacson, you said there were two facts. Aren't there three? Isn't there the fact that after the plea bargain, the defendant, in -- in essence, broke his side of the bargain by committing a crime while he was in jail?

MR. ISAACSON: No, Your Honor. He did not breach the plea agreement by doing that. He --

1 JUSTICE SCALIA: Well, I -- I used to teach
2 contract law and I'll tell you that would have been a
3 breach of contract. It would have been a breach on his
4 part.

5 Now, the government has conceded the breach of
6 -- of the plea agreement. I -- I don't -- can't understand
7 why they did that, but they apparently have conceded it.
8 Does that mean that we have to ignore it for purposes of
9 deciding what the -- what the remedy is? Ignore the
10 reality that there was a breach?

11 I mean, you know, if -- if the government said,
12 we -- we will ask the court to -- to sentence at the lower
13 end because of the -- the remorse that the defendant has
14 shown, and the defendant then demonstrates that he has no
15 remorse by -- you know, suppose he comes and stabs the
16 judge. Is the government really supposed to have to go
17 before the judge and say, Your Honor, this man is really
18 remorseful and you should sentence him at the lower end?

19 It seems to me it's a basic principle of
20 contract law that a party to a contract cannot take action
21 which makes it impracticable for the other side to carry
22 out his part of the bargain, and that's what your client
23 did. The government couldn't practicably go in and make
24 that argument when he had demonstrated himself to be an
25 unremorseful criminal.

1 MR. ISAACSON: The government in this case
2 drafted the plea agreement, and in most plea agreements --
3 I practice in the Northern District of Texas quite often,
4 and virtually every plea agreement has a provision in it
5 that says if a defendant does some type of criminal
6 activity, thus it will render it void. This plea agreement
7 did not have that in there.

8 JUSTICE SCALIA: Oh.

9 MR. ISAACSON: So it's different than most plea
10 agreements.

11 JUSTICE KENNEDY: So -- so you want to us make
12 the inference that the impermissible or criminal activity
13 was permitted by the absence of this specific clause. You
14 say there's no implied condition -- no implied covenant.

15 MR. ISAACSON: Well, I'm not -- what we're
16 saying is the government needs to obey the promise in the
17 plea agreement. The promise in the plea agreement is --

18 JUSTICE KENNEDY: Well, but the questions so
19 far indicate that one of the promises was an implied
20 promise that you'll keep the terms of the agreement by
21 lawful behavior. So that just -- what you say just begs
22 the question.

23 Now, I recognize the government has conceded a
24 breach and will probably move on from that point. But, as
25 Justice Scalia indicates, it -- it puts the case in a very

1 artificial posture, it seems to me.

2 MR. ISAACSON: It is -- well, it is up to the
3 judge to determine whether or not the defendant gets the
4 acceptance points or not. The bargain here was not that
5 Mr. Puckett would get the points, but that the government
6 would agree that he was qualified to receive those points.

7 CHIEF JUSTICE ROBERTS: And -- and there's
8 nothing theoretically inconsistent with the government --
9 you can feel remorse. It doesn't mean you're not going to
10 do it again. You're going to feel remorse every time you
11 do it, but that doesn't mean he didn't feel remorse from
12 the crime he was pleading to.

13 MR. ISAACSON: Well, yes, 3E1.1 -- there's a
14 number of different factors that go into whether or not
15 someone gets the acceptance points. It is the judge's
16 discretion to give those points, and there are a number of
17 different factors that go into it. Certainly the
18 termination of criminal activity is one of those factors the
19 court looks at, but it's not the only one.

20 JUSTICE GINSBURG: But this judge said -- and
21 he was quite open in his thinking. He said, unheard of to
22 me that I would give acceptance of responsibility credit to
23 someone that as soon as he gets sent to jail is out there
24 committing another crime.

25 MR. ISAACSON: That is what the --

1 JUSTICE GINSBURG: The judge did say that. He
2 said it was unknown to him that judges give acceptance of
3 responsibility credit to someone who, in the interval
4 between the plea and when he shows up in court for
5 sentencing, commits another crime.

6 MR. ISAACSON: That is what Judge Sanders did
7 say.

8 JUSTICE SOUTER: Your -- your point is not that
9 he should have gotten the reduction. Your point is that
10 the government should have made the -- the recommendation.

11 MR. ISAACSON: Well, the -- the position --

12 JUSTICE SOUTER: Isn't that -- isn't that your
13 point?

14 MR. ISAACSON: Yes.

15 JUSTICE SOUTER: The agreement called for them
16 to make a recommendation and they didn't make it. In fact,
17 they recommended the contrary. And that's -- that's your
18 gripe. Right?

19 MR. ISAACSON: The plea agreement did not say
20 the government had to get up there and make a statement at
21 sentencing that he was supposed to get his points. They
22 disagreed he was entitled to his acceptance points.

23 There was two parts of the plea agreement. The
24 first part that they agreed to was, you know, that he was
25 entitled to those points. And the second part was that

1 they would recommend at sentencing that he get the lower in
2 the guideline range. The first part was not -- did not say
3 they had to get up there and say that. They chose on their
4 own to get up there and breach the plea agreement by saying
5 he's not entitled to those points.

6 JUSTICE SCALIA: Where -- where is that in the
7 record? Do you know offhand where the plea agreement is?

8 MR. ISAACSON: It's page 54a of the joint
9 appendix, volume 1, paragraphs 8 and 9.

10 JUSTICE SCALIA: Thank you.

11 CHIEF JUSTICE ROBERTS: I suppose Justice
12 Ginsburg's point is relevant, though, on the question of
13 prejudice. If the judge gets up there and says, I don't
14 care what the government says, I'm not going to give
15 anybody a departure when they've committed another crime,
16 then you haven't been prejudiced by the government's
17 breach.

18 MR. ISAACSON: Well -- I believe he has been
19 prejudiced by the government's breach, because once the
20 government violates the plea agreement, the first level, as
21 we know under the prior precedents of this case, it makes
22 the actual plea agreement void.

23 And secondly, the Santobello case clearly talks
24 about it is not important the effect on the sentencing
25 judge what the -- in Santobello the government breached a

1 plea agreement and the judge said it doesn't matter the
2 government breached the plea agreement. I would have done
3 the same thing anyway. It makes no different. This Court
4 said specifically that's not relevant.

5 JUSTICE ALITO: Well, the judge would have
6 known about what happened anyway from -- from the
7 presentence investigation, wouldn't he?

8 MR. ISAACSON: Correct.

9 I guess the point I am trying to make is the
10 agreement here was not that Judge Sanders would have given
11 him acceptance points. The fact was the government made a
12 position, and I should point out that Mr. Puckett -- he
13 gave up all of his rights just for this slim reed of hope.

14 JUSTICE GINSBURG: But he could have, if he
15 felt that way -- I mean, there they were in the courtroom.
16 All of them knew about the plea agreement because there had
17 been the Rule 11 colloquy when it was taken. Right?

18 MR. ISAACSON: I'm sorry, ma'am. I didn't --

19 JUSTICE GINSBURG: When -- when the plea was
20 taken --

21 MR. ISAACSON: Yes.

22 JUSTICE GINSBURG: -- it was the same judge,
23 wasn't it?

24 MR. ISAACSON: Yes, Judge Sanders.

25 JUSTICE GINSBURG: And so they were all there

1 and the defendant was asked all these questions, and the
2 government -- and the judge knew about the government's
3 side of the plea bargain.

4 MR. ISAACSON: Right, yes.

5 JUSTICE GINSBURG: So it was not a secret to
6 anyone that the government said it would ask for the extra
7 acceptance of responsibility credit. And yet the defendant
8 and his lawyer stand there and they don't say a word. Wait
9 a minute, judge. They didn't object at -- there was no
10 motion to withdraw the plea, was there?

11 MR. ISAACSON: Mr. Puckett had made a motion
12 prior to the sentencing to withdraw his plea on his own.
13 He had -- basically pro se had done that. But not --

14 JUSTICE GINSBURG: But --

15 MR. ISAACSON: I'm sorry.

16 JUSTICE GINSBURG: Yes. There was -- before
17 the judge, there was no plea to withdraw the plea.

18 MR. ISAACSON: During the sentencing, no, there
19 was not.

20 JUSTICE GINSBURG: And so that's why we -- if
21 he had asked to withdraw the plea, then we'd have a
22 different case. But he didn't, so we're here on plain-
23 error review.

24 MR. ISAACSON: We -- our point is that we
25 suggest plain error shouldn't be applied in this case.

1 This Court in Santobello said 35 years ago when the
2 government breaches a plea agreement it can never stand.

3 JUSTICE GINSBURG: But Santobello was a case
4 where there was a timely objection.

5 MR. ISAACSON: That is correct, but the
6 principles of whether or not -- when the government
7 breaches a plea agreement that renders the underlying
8 conviction void raises it to a different level.

9 JUSTICE ALITO: Why should that be the case? I
10 know plea agreements are not strictly governed by contract
11 law, but there's an analogy. And your whole argument seems
12 to be that the government's breach rendered the plea
13 agreement void. But why would that be so? There -- there
14 was a plea agreement, voluntarily entered into, and then
15 there was a breach. So, why shouldn't the issue be what is
16 the remedy for the breach? And why shouldn't it be
17 governed by the plain-error rule like most errors that
18 occur at trial?

19 MR. ISAACSON: I would suggest it goes to the
20 very heart of whether or not he actually pled.

21 During -- Justice Ginsburg has raised a great
22 point about the Rule 11 colloquy that Judge Sanders did in
23 this case. He was long involved. The promises in the plea
24 agreement were talked about. Mr. Puckett had every right to
25 rely upon those promises when he foreclosed his right to

1 jury trial, his right to present witnesses on his behalf.
2 This is a solemn --

3 JUSTICE ALITO: But you can say that in every
4 case in which parties enter into a contract and later
5 there's a breach. The fact that one of the parties later
6 breaches doesn't mean that there never was a contract.
7 There was an agreement that he voluntarily entered into at
8 that time.

9 MR. ISAACSON: But the --

10 JUSTICE ALITO: And then there was a -- and
11 subsequently there was a breach, but that doesn't mean that
12 he -- he did not voluntarily enter into the agreement, does
13 it?

14 MR. ISAACSON: I would suggest this Court's
15 precedent, that it has to be a knowing waiver of his
16 rights, that promises that are unfulfilled or unfulfillable
17 render the plea itself void. The constitutional due
18 process overtones or overpinnings of a plea agreement as
19 opposed to a normal contract makes this different.

20 JUSTICE GINSBURG: What relief are you seeking
21 now? You didn't -- you didn't ask to withdraw the plea
22 when you were before the sentencing judge.

23 MR. ISAACSON: We -- what relief do I want?

24 JUSTICE GINSBURG: Right.

25 MR. ISAACSON: Mr. Puckett would like the plea

1 agreement to be set aside and be allowed to take this case
2 to trial.

3 JUSTICE GINSBURG: Which would expose him to a
4 considerably greater penalty.

5 MR. ISAACSON: Potentially, yes.

6 JUSTICE SCALIA: Why -- why --

7 MR. ISAACSON: We believe it should be his
8 option.

9 JUSTICE SCALIA: Why wouldn't it suffice to --
10 to give your client everything that -- that he was entitled
11 to if the case were remanded to a different judge and the
12 government were required to go before that judge and make
13 the commitment that it undertook in the plea agreement?

14 MR. ISAACSON: We believe --

15 JUSTICE SCALIA: Why wouldn't that be a
16 perfectly satisfactory remedy?

17 MR. ISAACSON: We believe that the actions of
18 the government, again, rendered the plea agreement itself
19 void, without value, and he would -- Mr. Puckett --

20 JUSTICE SCALIA: Well, you -- you have to say
21 that. But let's assume I -- I don't agree with that.
22 Let's assume I agree with -- with Justice Alito, that his
23 entry into it was voluntary and all that's happened is that
24 one of the commitments on the part of one of the parties
25 has not been complied with. Why isn't it an adequate

1 remedy for that problem to send it back to a new judge and
2 have the government come before that judge and make the
3 same commitment it was supposed to under the agreement?

4 MR. ISAACSON: Certainly that is a remedy some
5 circuits have used. Why that is not effective -- it just
6 -- we believe the defendant should have the right to be
7 able to choose. When it reaches this level, the plea
8 agreement is -- is void.

9 JUSTICE STEVENS: May -- may I ask -- I guess I
10 actually have two questions.

11 You mentioned the fact that this is not -- this
12 is an unusual agreement, and that some of the provisions
13 were -- were negotiated and the record shows they were --
14 they were deliberately undertaken. It seems to me that
15 this was probably a scrivener's error. The normal -- most
16 plea agreements would include a provision that if the
17 defendant engaged in unlawful conduct, all bets are off.
18 And my hunch was that somebody just forgot to put the
19 language in the agreement. Is that fair to say? I can't
20 imagine the government negotiating an agreement that doesn't
21 include that clause.

22 MR. ISAACSON: I -- certainly I can't put
23 myself on the sides of back then. I think it's fair to say
24 it's unusual. The government in its breach -- or sorry --
25 in its brief indicated it could have included it in there.

1 JUSTICE GINSBURG: They did include it in the
2 motion, didn't they?

3 MR. ISAACSON: It was --

4 JUSTICE GINSBURG: Wasn't there a motion --

5 MR. ISAACSON: Yes.

6 JUSTICE GINSBURG: -- for credit for acceptance
7 of responsibility and had as a condition that the defendant
8 be law-abiding?

9 MR. ISAACSON: Yes, that was included in the --
10 the motion filed the next day for the additional point.
11 That is correct.

12 JUSTICE GINSBURG: So isn't it odd that the --
13 that these documents, both meant to serve the same purpose,
14 one has the provision for law-abiding conduct in the future
15 and the other doesn't?

16 MR. ISAACSON: Well, one is a plea agreement
17 that is entered in open court with the defendant present
18 with his attorney, and the second is a motion filed by the
19 United States attorney the day after. So I mean, they're
20 different. Certainly they have different, I would suggest,
21 importance.

22 JUSTICE STEVENS: But going back to my -- isn't
23 it a likely explanation for the defendant's lawyer's
24 failure to object that he just didn't realize this
25 agreement didn't have this normal provision in it?

1 MR. ISAACSON: I -- I can't -- as to whether --
2 I would suggest that is -- this is a -- normally -- these
3 are normally included in these agreements, I would suggest
4 to you.

5 JUSTICE STEVENS: Right.

6 MR. ISAACSON: But I would suggest to you also
7 that it was not included in this agreement, and since the
8 government drafted it, I don't think we can just assume it
9 should be there.

10 JUSTICE STEVENS: No. No, I understand that.
11 But the other thing I wanted to ask you -- you keep using
12 the term "void." Do our cases say that any breach of a
13 plea agreement renders it void rather than subject to some
14 kind of other remedy?

15 MR. ISAACSON: Well, if it's -- I think the
16 language of -- of Brady -- certainly a plea must stand
17 unless it's induced by misrepresentation, unfulfilled or
18 unfulfillable promises. Recently in the Bousley, case,
19 statements in there can't go. Not good if it's induced by
20 misrepresentation, Machibroda --

21 JUSTICE STEVENS: But those are cases that say
22 that -- that the remedy is setting aside the -- the guilty
23 plea, but they don't characterize the -- the agreement as
24 having become void, if I -- if I remember correctly.

25 MR. ISAACSON: Well, again, I'm -- citing from

1 Machibroda. A guilty plea if induced by promises or
2 threats which would deprive it of a private or voluntary
3 act are void.

4 JUSTICE STEVENS: Yes, but that goes to the
5 integrity of the guilty plea, not to whether or not the
6 underlying contract became void, I think. Maybe I'm
7 missing something.

8 MR. ISAACSON: Well, I -- I think what we're
9 saying is once the government takes its action, it deprives
10 the plea of its voluntary character.

11 JUSTICE SCALIA: It doesn't -- it doesn't
12 retroactively render the government's promise a
13 misrepresentation. I mean, every time a -- a party to a
14 contract fails to comply with the contract, he hasn't been
15 guilty of fraud. Misrepresentation would mean the
16 government had no intention of complying with it when --
17 when it entered into it, and you -- you don't assert that
18 was the case, do you?

19 MR. ISAACSON: No, but I would suggest that
20 Santobello, again, talks about the intent, whether or not
21 -- in that case there were two prosecutors who didn't know
22 what one -- the other one was doing, and this Court said
23 that's not important. It's the integrity of the plea
24 that's important and the government's breach thereof.

25 JUSTICE KENNEDY: It's -- it's -- under the law

1 of contracts, I assume -- I haven't looked it up yet --
2 that you can't rescind for a nonmaterial breach. A trivial
3 breach doesn't always allow rescission. And isn't it
4 trivial if the district court said, you know, I don't care
5 if the Attorney General of the United States and the
6 Solicitor General himself both came into the court on their
7 hands and knees begging me to do this, I wouldn't do this.
8 I wouldn't give you an increase.

9 MR. ISAACSON: Well --

10 JUSTICE KENNEDY: So it seems to me an
11 immaterial breach, other than as to one level -- and
12 correct me if I am wrong. I take it as to level one -- or
13 as to the third level, they need the recommendation before
14 they have the authority to reduce. Am I right about that?

15 MR. ISAACSON: I'm sorry. I'm missing -- what
16 are you talking about?

17 JUSTICE KENNEDY: There are some instances in
18 which the -- the prosecution must make the recommendation
19 before the district judge has the authority to depart
20 downward. Am I correct?

21 MR. ISAACSON: I -- I'm sorry. For the
22 downward departure and acceptance of responsibility are
23 different. For the first two points, it can be done in the
24 plea agreement. The third has to be done by the
25 prosecution.

1 JUSTICE KENNEDY: That's right. So -- so this
2 -- this district judge, I take it, did not have the
3 authority to go down by a third without the recommendation.

4 MR. ISAACSON: Well, the government filed a
5 motion. I don't know if they'd officially withdrawn it or
6 not. I know at sentencing they argued against it, so --
7 I'm not sure if the judge had the power to or not. The
8 motion was already on file. The government had already
9 asked for that. Now, they changed their mind and --

10 JUSTICE KENNEDY: Even as to the third level,
11 the district judge said, you know, I will assume that
12 they've made the argument. I will assume they've made the
13 argument. I wouldn't hear the -- I wouldn't grant -- I
14 wouldn't follow the recommendation. I am not going to
15 depart downward even assuming the government -- it seems to
16 me that there's -- the government's breach is immaterial.

17 MR. ISAACSON: Well, in terms of materiality of
18 the breach, in Santobello the -- those exact words. The
19 government is in a very poor position to talk materiality
20 after they've breached the --

21 JUSTICE KENNEDY: My reading of Santobello is
22 the same as yours on that point, and it's difficult for me
23 to understand.

24 JUSTICE GINSBURG: There was --

25 JUSTICE ALITO: Counsel --

1 JUSTICE GINSBURG: -- a part of this agreement
2 that was honored. In fact, the judge, after having said
3 that I never heard of giving credit for responsibility for
4 somebody who commits a crime in the interim, but he said, I
5 understand there was an agreement to sentence at the low
6 end, and that's what I'm going to do.

7 MR. ISAACSON: That's correct.

8 JUSTICE GINSBURG: So if you say what you want
9 is a trial, the defendant would be exposed to as much as the
10 upper level. Plus, weren't there add-ons in this case that
11 the judge ordered to be served concurrently rather than
12 consecutively?

13 MR. ISAACSON: Yes, there were three underlying
14 Federal charges that he was on supervisory release for that
15 the judge ran concurrently with the sentence in this case.

16 JUSTICE ALITO: What would counsel say about a
17 case in which it's unclear whether there's a breach?
18 There's a factual dispute as to whether there was a breach.
19 Let's say the government agrees that it will reserve the
20 right to call all relevant facts to the attention of the
21 sentencing judge, but won't take a position on sentencing.
22 And the prosecutor in sentencing makes certain remarks that
23 might be interpreted as taking a position or might be
24 interpreted as simply calling facts to the judge's
25 attention.

1 Would it be your position that when a defendant
2 hears that, the defendant can sit back and wait and see
3 whether he or she is satisfied with the sentence and then,
4 after the sentence is imposed, raise the issue of breach on
5 appeal and not be subject to plain error, rather than
6 calling it to the attention of the sentencing judge at the
7 time when the -- the potential breach could be adjudicated?

8 MR. ISAACSON: I think there are two parts to
9 your question, Your Honor, if I could address them.

10 In regard to a de minimis breach of the plea
11 agreement, we recognize some technical defects in a plea
12 agreement may not always require automatic reversal.
13 However, the government must always fulfill completely the
14 promises they have made in the agreement. And that goes to
15 the difference between a -- a plea agreement as being
16 different than a normal contract.

17 The normal contract -- you think of a -- like
18 Exxon merging with Mobil -- things of that nature. This is
19 a situation where the government's -- the obligations in the
20 plea agreement for the vast majority are on the -- on the
21 defendant, what he has to do. He gives up his rights. He
22 must cooperate, things of that nature. Page 51a shows the
23 government's agreements are extremely small. There's only
24 two paragraphs. And that's normally how it is. Our
25 position is if the government breaches its promises, that's

1 when it must be reversed. When the government --

2 JUSTICE ALITO: I'm not sure that really
3 answers my question.

4 MR. ISAACSON: Well, I just want --

5 JUSTICE ALITO: Are you saying that there -- as
6 to some errors there is a plain-error rule -- some breaches
7 there's a plain-error rule, but not as to all breaches?

8 MR. ISAACSON: No. I'm -- what I'm saying is
9 the threshold concept of whether or not there's a breach or
10 not -- the question has been posed of whether or not every
11 single breach is automatic reversal.

12 We -- we recognize that there may be some that
13 have absolutely no basis or do not really imply or go into
14 what the government promised to do. Because the
15 government's promises as a part of the plea agreement,
16 again, are just two paragraphs of this case. Our
17 suggestion is when the government breaches what they
18 promised to do, that's when the automatic reversal --

19 JUSTICE SCALIA: So you're -- you're saying, if
20 I understand you correctly, that even if at the trial your
21 client's lawyer had objected and had -- and had said, Your
22 Honor, the government promised to recommend, you know, a
23 lower thing, what the trial judge would have to have said
24 was, the plea agreement is invalid. And the trial judge
25 could not say, oh, yes, the government has to make that

1 recommendation. You're -- you're saying it is invalidated
2 by the mere fact of the government's not having done it.
3 Right?

4 MR. ISAACSON: Yes.

5 JUSTICE SCALIA: So no objection need to be
6 made -- can be made. Right?

7 MR. ISAACSON: Well, certainly, we -- we'd
8 never suggest --

9 JUSTICE SCALIA: Wow.

10 MR. ISAACSON: Well, Your Honor, it -- it seems
11 harsh and perhaps it is harsh, but the government has to
12 abide by the contracts they make.

13 JUSTICE KENNEDY: Well, but I take it -- you
14 never really answered Justice Alito's question. I take it
15 that the defendant and his counsel can knowingly recognize
16 that an error is being committed, say nothing, listen to
17 the sentence, and then object later. That's your position.
18 Yes or no?

19 MR. ISAACSON: For it to be reversible, yes.

20 JUSTICE SCALIA: Well, that's inconsistent with
21 the answer you gave me.

22 MR. ISAACSON: I'm sorry.

23 JUSTICE SCALIA: The answer you gave me is that
24 automatically the guilty plea is washed out --
25 automatically.

1 MR. ISAACSON: If the government breaches the
2 plea agreement, yes.

3 JUSTICE SCALIA: It is automatically washed
4 out?

5 MR. ISAACSON: Well, I would suggest --

6 JUSTICE SCALIA: And, therefore, he cannot --
7 he cannot sit around and wait to see what happens. What
8 happens is -- whatever happens, it's invalid. The plea
9 agreement is no good. You have to have a new trial.

10 MR. ISAACSON: I would suggest the word "void"
11 may also be "voidable."

12 JUSTICE SCALIA: Well, then your answer to me
13 would be different. It's -- it's not void. It's voidable,
14 so that he can play dog in the manger and wait and see what
15 happens, and then if it's in interest -- in his interest to
16 void it, he does. If it's in his interest not to void it,
17 he doesn't.

18 MR. ISAACSON: Your Honor, these are not easy
19 issues. Certainly, defense attorneys should not ever sit
20 on his hands and let these things go. To take a chance and
21 to just say, oh, we're going to do nothing and to sandbag,
22 like was suggested by the government, I'm suggesting that's
23 never going to occur.

24 CHIEF JUSTICE ROBERTS: And it would not be
25 cost-free for you, because if you just sit there and then

1 say, you know, the agreement is void, the government is
2 going to say, well, fine, I will see you in court. We'll
3 have a trial, and you're going to get twice as much as you
4 would have gotten anyway.

5 You have some interest, since you entered the
6 guilty plea, in going forward with the plea.

7 MR. ISAACSON: It's absolutely -- Mr.
8 Puckett --

9 CHIEF JUSTICE ROBERTS: Well, but let's put it
10 this way. Maybe this is the same question anyway. Let's
11 say it's the same facts as we have here, but instead of
12 saying, I can't do this, the judge says, I'm going to do
13 this saying, look, I think you are remorseful. I'm going
14 to give you three points. And that's all you agreed with
15 the government. The government said, we'll recommend it,
16 and the judge says, well, you're going to get it anyway. I
17 think you should get it. The agreement has still been
18 breached. Right? The government didn't recommend.

19 MR. ISAACSON: It has -- it has been breached.

20 CHIEF JUSTICE ROBERTS: So in that situation,
21 you think you can withdraw the agreement?

22 MR. ISAACSON: I would suggest that it would be
23 at the defendant's option to do so.

24 The point that I'm trying to make --

25 JUSTICE SOUTER: But why -- why should the

1 defendant have the option to withdraw from an agreement
2 when he got everything under the best possible
3 circumstances that he could have expected?

4 MR. ISAACSON: Because the government -- well,
5 we don't know that, what the sentence would have been by
6 the sentencing judge.

7 JUSTICE SOUTER: No, but we're talking about
8 the Chief Justice's hypothetical at this point. And they
9 -- in his hypothetical, the sentencing judge says, I'm
10 going to give you the three points. You're going to get
11 everything that on the rosiest scenario you could have
12 hoped for.

13 Why should he be able to withdraw his plea at
14 that point?

15 MR. ISAACSON: Because Santobello teaches that
16 the -- the result of the effect on the sentencing judge is
17 simply irrelevant. If the government breaches --

18 JUSTICE SOUTER: In other words, your -- your
19 position is -- is kind of a -- a theoretical, formalistic
20 position. There's a -- there's a -- I'm not sure this is
21 the wrong word here. There is a -- there is a metaphysical
22 quality to the plea, and even though things turn out as
23 well for him as he could possibly have expected had the
24 agreement been kept punctiliously, if the government simply
25 omits the words, he can walk away from the plea? That -- I

1 mean, that's your position.

2 MR. ISAACSON: I believe so, yes. But there's
3 a reason for it. This Court has stated the government
4 cannot breach the plea agreement. That's all we're saying.
5 The -- the power the government has in inducing the plea,
6 the rights the defendants are giving up, it should be up to
7 the -- the option of the defendant to decide.

8 JUSTICE SOUTER: Yes, but usually -- I mean,
9 the -- the theory of -- of relief in contract law depends
10 upon relief from something. And if, in fact, there is --
11 there is no discernible damage that has been suffered. If
12 on the other hand -- again, taking the Chief's hypothetical
13 -- there is an affirmative demonstration that no damage
14 occurred, normal principles of contract would say there's
15 nothing to give him relief from.

16 The law of contract is -- is not a metaphysical
17 construct. Why should the law of plea agreements be?

18 MR. ISAACSON: I -- I'm not suggesting it be
19 metaphysical. I'm simply suggesting --

20 JUSTICE SOUTER: Well, I think you are. I
21 mean, you're -- you're saying even though he has come out
22 with, you know, a rose in his mouth, he can still, if he is
23 crazy enough, throw away the whole plea agreement.

24 MR. ISAACSON: I think that suggests that the
25 result on the judge has to do with the breach, what the

1 government does. The concept is, if the government
2 breaches the plea agreement, the defendants should have the
3 right to withdraw from that plea even if there's no effect
4 on the --

5 JUSTICE SOUTER: Okay. But what -- what I'm
6 getting at -- I think what we're all trying to get at -- is
7 in order to have a rule, an absolute rule like yours, we
8 usually look for a good reason to have that rule. And
9 since we're talking about an agreement, the place to look
10 for the good reason is in the consequences to the
11 defendant. And when the consequences are terrific, when
12 they are the best that he could possibly have hoped for,
13 there doesn't seem to be a good reason to adopt your very
14 theoretical construct of agreement.

15 Is there some reason that we are just not
16 seeing?

17 MR. ISAACSON: Because it doesn't occur. I
18 mean, the -- the government could not cite a single case in
19 which this came --

20 JUSTICE SOUTER: Never mind what the government
21 can cite. I'm asking you if there is a good reason to
22 adopt this absolute rule of yours.

23 MR. ISAACSON: There is an absolute -- the good
24 reason is the defendant should get the promises the
25 government has elicited for his giving up of his

1 fundamental constitutional rights; 99.9 percent of the time
2 that's going to be adverse to the defendant, as it was in
3 this case.

4 A possibly hypothetical situation where the --
5 the judge would forego or ignore what the -- the United
6 States attorney says and give him acceptance points is so
7 rare, as I suggest, to not really be --

8 JUSTICE STEVENS: May I ask this -- this kind
9 of conceptual question? Is it your view that a breach of a
10 plea agreement can never be concluded to be harmless error?

11 MR. ISAACSON: Harmless error? I -- if it -
12 well, if the harmless error, if you're talking about
13 structural error, I mean, that's a little different
14 analysis.

15 JUSTICE STEVENS: I'm trying to get rid of the
16 labels like "plain error" and "structural." But if in fact
17 it's totally harmless and everybody agrees it's harmless,
18 would the government still have -- would there be an
19 adverse consequence nevertheless?

20 MR. ISAACSON: Yes, I believe so.

21 JUSTICE STEVENS: So there could never be
22 harmless error -- harmless breach of a plea agreement.

23 MR. ISAACSON: Yes, Your Honor.

24 JUSTICE GINSBURG: Why wouldn't someone read
25 what happened here as -- as the defendant saying, well, I

1 didn't get the acceptance credit, but the judge is still
2 sentencing me at the low end, and he's still making the
3 sentences run concurrently? So I think -- why, if he
4 doesn't try to withdraw the plea, why isn't it the logical
5 assumption that he says, I didn't get the whole promise but
6 I got part of it, and I'll take it?

7 MR. ISAACSON: Well, I think sometimes the
8 defendant might well do that. I mean, it's not --

9 JUSTICE GINSBURG: How do we know this one
10 didn't?

11 MR. ISAACSON: Well, by certainly the appeal
12 that we raised. I mean, he certainly had -- certainly he
13 states on the record some questions or concerns about what
14 overall -- what had happened to him, and certainly he
15 pursued this appeal, Your Honor.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 We'll give you a couple minutes for rebuttal.

18 MR. ISAACSON: Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: Ms. Schertler.

20 ORAL ARGUMENT OF LISA H. SCHERTLER

21 ON BEHALF OF THE RESPONDENT

22 MS. SCHERTLER: Mr. Chief Justice, and may it
23 please the Court:

24 When the government breaches a plea agreement,
25 an objection made in the district court serves important

1 purposes that relate to the functioning of Federal courts.
2 It permits the district court and the parties to determine
3 whether a breach has occurred, and it also, in many cases,
4 may permit an immediate cure of that breach to be
5 administered, obviating the need for appellate review of
6 the issue altogether.

7 A central purpose of the contemporaneous
8 objection rule is to ensure that the district court
9 proceedings are as free of error as possible. And that
10 purpose is served in this context, the plea breach context,
11 as it is in others.

12 Rule 52(b) reinforces the contemporaneous
13 objection rule by placing a heavier burden on the party who
14 does not object in the district court to win relief on
15 appeal.

16 The government's submission to the court today
17 is that the plain-error standard does apply to forfeited
18 claims that a plea agreement has been breached, that the
19 Olano framework should be followed, and that one component
20 of the plain-error showing in this context should require a
21 defendant who did not object to a breach in the district
22 court to show a reasonable probability that the outcome of
23 the proceeding was affected by the breach.

24 JUSTICE KENNEDY: Just to explore the issue of
25 breach, suppose hypothetically, same facts here, but it's

1 all vented and discussed and aired and objected to in the
2 district court.

3 MS. SCHERTLER: Yes, Justice Kennedy.

4 JUSTICE KENNEDY: The defense attorney said,
5 well, now, if you look at paragraph 8 and so forth, and the
6 government says, well, Your Honor, he committed another
7 crime. And then the judge says -- and we're not going to
8 move for the recommendation. And the judge says, I will
9 assume that you've made the recommendation, and I'll just
10 tell you right now I wouldn't take the recommendation
11 anyway. I'm not going -- I wouldn't give a lowered
12 sentence even if you made the objection. What result?

13 MS. SCHERTLER: Well, I think the result there
14 is controlled by Santobello.

15 JUSTICE KENNEDY: Is it? Because in
16 Santobello, there was no reason given for the prosecutor to
17 violate the plea agreement. Here, there's a good reason.
18 Can you distinguish Santobello on that basis?

19 MS. SCHERTLER: I would -- I would seek to
20 distinguish Santobello. As we say in our brief, there
21 seemed to have been multiple problems going on in
22 Santobello. And in -- and it was unclear that the district
23 court in Santobello even knew what the terms of the
24 agreement were.

25 This court -- a court in that situation would

1 have been aware -- would have sorted through what the terms
2 of the agreement were. Now -- and -- and we don't believe
3 that there is a reason not to apply harmless error review
4 in this context as there is in any other context.

5 JUSTICE BREYER: Is there --

6 JUSTICE SOUTER: The problem that I have --
7 excuse me, were you -- Justice Kennedy, were you through?
8 I'm sorry. I thought you had started a question again.

9 The problem I have with the harmless error
10 suggestion that you've made is -- is this. If the
11 government does engage in some breach of the agreement, it
12 seems to me the consequence is that an individual has given
13 up a trial and, as a consequence of that, has given up
14 liberty without either the trial that he is entitled to or
15 fulfillment of the conditions for giving up the liberty.

16 And isn't there -- isn't there a very high
17 value to be placed on the fact that nobody in the United
18 States under the -- the constitutional guarantees should --
19 should be sitting behind bars without either a conviction
20 following a full trial, invocation of whatever rights he
21 wants to invoke, or a voluntary agreement to be behind
22 bars? And -- and when neither of those conditions is
23 fulfilled, don't we have an error that, as a matter of
24 constitutional law, cannot be regarded as harmless?

25 MS. SCHERTLER: Well, there's certainly -- I

1 agree, Justice Souter, that -- and although there's
2 distinguishable facts in Santobello, that that theme is
3 present in Santobello as well. And the Court there said
4 that it was not -- at the very least, the Court said when
5 the government has not fulfilled its promise and an
6 objection is raised and the defendant has suffered an
7 adverse consequence that was somehow related to the
8 government's broken promise, that the Court is not going to
9 find harmless simply based on the district court's
10 statement itself that it didn't rely on what the government
11 had said.

12 Now, we would submit, however, that there could
13 be cases -- and the Chief Justice's hypothetical would be
14 one of those -- where even in a setting where an objection
15 is raised, if the defendant receives the benefit that was
16 the aim of the -- of the promise he secured from the
17 government -- for instance, if in Santobello the defendant
18 there received the lowest possible sentence that he might
19 have gotten, that in that circumstance, Santobello should
20 not preclude harmless error review, and the defendant
21 cannot be said to have -- to be in jail having not received
22 the benefits.

23 JUSTICE SOUTER: I -- I think I would agree
24 with you there because, by whatever means, the defendant
25 has gotten everything the defendant bargained for.

1 MS. SCHERTLER: Yes, Justice Souter.

2 JUSTICE SOUTER: It may have come by a more
3 circuitous route, but he got it all.

4 MS. SCHERTLER: Yes.

5 JUSTICE SOUTER: But in the case when, unlike
6 the Chief Justice's hypothetical, when we don't know that,
7 when we -- we -- the judge sort of keeps his thoughts to --
8 to himself or herself, then don't we have the -- the
9 problem of the -- the individual behind bars, neither as a
10 result of trial nor as a result of the deal that he made?

11 MS. SCHERTLER: I agree that is -- that is the
12 strong suggestion of Santobello when there has been an
13 objection made. We would -- we would submit to the Court
14 that the analysis must differ when no objection is made in
15 the district court.

16 JUSTICE SOUTER: Doesn't -- whether we accept
17 that proposition or not that the analysis must differ,
18 doesn't that really depend on -- on what value we place on
19 the importance of the proposition that I started with? If
20 somebody is behind bars, it's either the result of a valid
21 conviction after trial or a voluntary agreement that says,
22 yes, I'll stay there. And if -- if we place a very high
23 value on -- on the liberty interest -- in -- in retaining
24 liberty except under those two conditions, then isn't it
25 fair to us -- isn't it sensible for us to say even in a

1 plain-error situation, we're going to recognize this --
2 this kind of prejudice, despite the fact that he didn't
3 object? If we place a high value on the liberty interest,
4 we -- we wouldn't accept your position. Isn't that fair?

5 MS. SCHERTLER: The high value that the Court
6 placed on the liberty interest in that situation would also
7 have to be the -- to the exclusion of other very important
8 interests that are served by making sure that objections
9 are raised in the district court.

10 JUSTICE SOUTER: You're -- you're right.
11 There's no question about it. It's -- we're -- we're
12 saying we will take a -- a less efficient process, a
13 process less efficient perhaps even for getting at the
14 truth, because we think the liberty interest is that
15 important. You're entirely right.

16 MS. SCHERTLER: And -- but I also would add on
17 to that that I don't think it's only efficiency, that that
18 is the sole interest that would be sacrificed by an -- by
19 an absolutist approach, really, that Your Honor has
20 suggested. There also would be interests, fairness
21 interests, that would be compromised by that rule, because
22 a rule that -- that --

23 JUSTICE SOUTER: Will you give me an example?

24 MS. SCHERTLER: Yes, yes. The rule -- the rule
25 that Petitioner proposes, for example, is that when a

1 government breach occurs, one need not object in the
2 district court, one may raise it on direct appeal and one
3 automatically gets to elect to withdraw the plea. That
4 would create incentives on the parts of defendants to -- to
5 withhold objections --

6 JUSTICE SOUTER: No -- no question, but it
7 seems to me that the answer to that is, it's an incentive
8 that would never come into play if the government kept its
9 word.

10 MS. SCHERTLER: Well --

11 JUSTICE SOUTER: So why -- why should -- why is
12 the government really in a position to object to that?

13 MS. SCHERTLER: The -- because this Court has
14 the -- what it permits is manipulation of the system by --
15 by counsel, really.

16 JUSTICE STEVENS: Yes, talking about
17 manipulation of the system, I just wonder if the government
18 wasn't manipulating the system when they said we should
19 grant cert in this case. You did -- you did agree that the
20 cert should be granted.

21 MS. SCHERTLER: Oh, we did acquiesce, yes.
22 Yes, Justice Stevens.

23 JUSTICE STEVENS: And are you taking the
24 position that -- that every case, that the absence of
25 objection would always be controlling?

1 MS. SCHERTLER: The --

2 JUSTICE STEVENS: For example, in this
3 particular case, it seems to me that if the -- if you had
4 -- had an objection and if the judge had agreed with the
5 objection and said I'm going to set aside the plea because
6 of adopting the arguments of your opponent, I think the
7 government would have appealed and said that that decision
8 is so wrong because it's really harmless error. And it
9 seems to me the real question is whether there's harmless
10 error available, rather than turning everything on whether
11 or not an objection was made in the -- the district court.

12 MS. SCHERTLER: Well, but this -- this is the
13 question on which the circuits have divided, and which is
14 why we acquiesced in this case to sort through that
15 question.

16 JUSTICE STEVENS: But in talking about the
17 division of the circuits, do you think all breaches of --
18 of plea agreements should be governed by precisely the same
19 standard? Or do you think there are varying facts in
20 different cases?

21 MS. SCHERTLER: Well, I think that the analysis
22 of a breach in each case will differ, and it will in the --
23 first and foremost, depend upon what the standard of
24 appellate review is and whether an objection has preserved,
25 in which case it will be the government's burden to show

1 that a breach is harmless, or in the plain-error setting,
2 the -- the burdens are reversed. And we think those -- the
3 ordinary rules, codified in rule 52(a) and (b), apply in
4 this context equally.

5 CHIEF JUSTICE ROBERTS: It's clear, isn't it,
6 that the defendant in this case was in fact prejudiced?
7 The judge, Judge Sanders, said it's very rare, he said,
8 that you would depart -- or I forget whether it's depart
9 or --

10 MS. SCHERTLER: So rare as to be unknown.

11 CHIEF JUSTICE ROBERTS: So rare -- no. He
12 said, "rare to unknown." "To be unknown." You're right.

13 MS. SCHERTLER: Yes.

14 CHIEF JUSTICE ROBERTS: But I suspect it's
15 probably rarer still for the government to recommend that.
16 So you can't really say that he wouldn't have done it or he
17 certainly wouldn't have considered it. It's one thing to
18 say I've never heard of that. It's another thing when one
19 of your colleagues is there saying this is what you should
20 do.

21 MS. SCHERTLER: The -- let me respond to that
22 immediate point. Which is -- my response would be, yes, if
23 the government were to recommend that he received
24 acceptance of responsibility in the situation, that may be
25 considered significant, but the district court judge would

1 also know that it was in fulfillment of a promise that was
2 made before renewed criminal activity occurred from jail.
3 And so, given that circumstance and the --

4 CHIEF JUSTICE ROBERTS: Yes, but none of us can
5 know what the judge would have done. I mean, we've had
6 cases here where the government's recommendation of
7 downward departures has been pretty surprising to me as
8 well, and it's because they're informants or whatever that
9 they've engaged in some pretty bad conduct. And I don't
10 know what Judge Sanders would have done.

11 MS. SCHERTLER: And here, under the plain-error
12 standard, it was the defendant's burden to show a
13 reasonable probability that something different would have
14 happened. The court of appeals made findings on this
15 record that the record showed that nothing different would
16 have happened, even had the government complied with its
17 promise.

18 JUSTICE BREYER: Looking at this, why -- can we
19 say the following? Some circuits have said that they'll
20 never recognize plain error when it's a breach of a plea
21 agreement. That's wrong. It could be plain error like any
22 other kind of a case and every other kind of issue. Sure.

23 But the error here isn't plain. On the one
24 hand, all they did, the promise was the government agreed
25 to request that his sentence be placed at the lowest end,

1 and they followed it. In the other part, they made no
2 promise. They simply agreed that he has demonstrated
3 acceptance of responsibility. And then what they did at
4 the trial, they said, we don't want him to get acceptance
5 of responsibility at this point.

6 Now, some people could argue that there is an
7 implicit promise in paragraph 1, not to say something at
8 the trial that is contrary to their recognition in
9 paragraph 8. That's where it is. On the other hand, you
10 could argue that there is implicit, also, a promise not to
11 implicitly do the first implicit, if what he has done in
12 the meantime is commit another serious crime.

13 So we have two arguments, one of which says
14 they committed error, and one of which says they didn't
15 commit error. And the argument turns on two implicit
16 readings of paragraph 8. Therefore, it is not plain. End
17 of case. What's wrong with that?

18 MS. SCHERTLER: Well, the -- the government has
19 conceded, and I -- and I don't --

20 JUSTICE BREYER: Well, I mean, the government
21 would like a whole lot of questions answered. So what I
22 don't see is how the government can come here because they
23 want a lot of questions answered and get us to take the
24 case, which I'm not sure was a wonderful idea. Maybe it
25 was. But then we take the case, and now they want us to

1 say, no, no, don't take the obvious response to it because
2 we'd like you to answer five other questions.

3 So what I want to know is, what's wrong with
4 what I said? Is that a possible outcome?

5 MS. SCHERTLER: That is a possible outcome,
6 Justice Breyer, and clarification for -- from this Court
7 that the plain-error standard does apply to this type of
8 error, as it does to others, would certainly help to
9 resolve the conflict that does exist out there in the
10 courts of appeals.

11 CHIEF JUSTICE ROBERTS: I may have gotten lost
12 in the dialogue. As you understand it, Justice Breyer's
13 suggestion was that you win. Right? You get plain error,
14 and then sometimes you apply it, it comes out one way, and
15 sometimes you apply it, the other.

16 MS. SCHERTLER: Yes. Yes, Chief Justice.

17 CHIEF JUSTICE ROBERTS: So you're happy to go
18 along with that.

19 MS. SCHERTLER: Yes. The -- the -- it does not
20 give the courts all of the guidance that would be helpful
21 about how to apply other components of the plain-error
22 standard in this context.

23 CHIEF JUSTICE ROBERTS: But that's a big
24 difference. Right? As you said earlier, harmless error,
25 the government has the burden; plain error, the defendant

1 has the burden. That's certainly going to change how you
2 approach however many different factual contexts.

3 MS. SCHERTLER: Well, yes, Mr. Chief Justice.
4 I mean, what -- the -- the reason that this case seemed to
5 us a good vehicle to address these questions is that there
6 was agreement throughout the appellate process that there
7 was an error that was plain and, therefore, it -- it
8 provides an opportunity to address -- if the Court chooses,
9 which it need not, but if the Court chooses to address how
10 the substantial rights aspect of the plain-error standard
11 and the discretionary aspect --

12 JUSTICE STEVENS: It seems to me that the
13 government has tried to pick a case in which it has the
14 strongest opportunity to win on the merits in order to have
15 us decide a rule that really is important in a lot of other
16 cases, but is totally unimportant in this case.

17 MS. SCHERTLER: Well, Justice Stevens, what one
18 finds when one looks through a lot of the -- when these
19 cases are brought, there often is a dispute and a real --
20 and a -- and a genuine dispute as to whether a breach has
21 occurred or not. And those cases, of course, do not allow
22 exposition -- explanation about the other components.

23 JUSTICE STEVENS: But don't you think it would
24 have been open to the government to make the argument that
25 Justice Breyer has made and said there really wasn't a

1 breach here? At least there was an insignificant breach
2 that should be ignored?

3 MS. SCHERTLER: As we acknowledge in our brief,
4 there might be arguments out there that there were implicit
5 terms to this plea agreement that were breached by the
6 defendant. Those arguments were never made in the court of
7 appeals in this case, and so we are accepting that record
8 as it comes before us.

9 JUSTICE BREYER: No. They have -- they can
10 only get -- they can only get your breach if they find an
11 implicit agreement. The implicit agreement is that you
12 will not tell the court that, in light of changes,
13 paragraph 8 no longer describes the situation. You didn't
14 breach paragraph 8, as taken literally. You agreed he had
15 shown that acceptance of responsibility. What you told the
16 court was, now we don't think he should have this
17 acceptance of responsibility, which previously he had
18 shown, because he's committed another crime. Those are the
19 exact words you said to the court.

20 Now, you may have made an implicit promise not
21 to do that. On the other hand, that implicit promise may
22 be negative by, you know, the other implicit acceptance of
23 the fact that this applies only where we don't commit
24 another crime.

25 So I'm just saying this. I'm not saying you

1 are even right. I'm just saying, having those two
2 arguments, it seems that you aren't plainly wrong. You
3 aren't plainly wrong. So how do I get to the other
4 questions if I believe that? Do I say, hypothetically if
5 the error here were plain, which I think it isn't, then I'd
6 like to tell you where the burden of proof lies? By the
7 way, if I happened to think that that's whatever it is,
8 then I will go into a few other things. That's really what
9 I feel you're asking me to do because I don't think it's
10 plain. Maybe the other people think it's plain.

11 MS. SCHERTLER: Well, I mean -- as I've -- as
12 I've already indicated, having the Court state that the --
13 rule 52(b) applies here is a -- is a --

14 JUSTICE SCALIA: I -- I think it's plain. What
15 about paragraph 9? Are you ignoring paragraph 9?

16 JUSTICE BREYER: You fulfilled paragraph 9,
17 didn't you?

18 MS. SCHERTLER: The -- paragraph 9 indicates
19 that the government agrees to request that Puckett's
20 sentence placed at the lowest end of the guideline level
21 deemed applicable by the court. And there has been no
22 claim, at any point in this proceeding, that that provision
23 has been breached. What happened at the sentencing was
24 that the district court stated on the record: I know that
25 there is an agreement in here that -- that the lowest end

1 of the guideline is appropriate, and I intend to follow
2 that.

3 CHIEF JUSTICE ROBERTS: I think it's -- I think
4 it's very clear that there's been a breach here. And it's
5 not fanciful to say he felt remorse and then he went and
6 did it again. That happens all the time. You know, when I
7 have a rich dessert that I shouldn't have, I feel bad about
8 it afterwards. It doesn't mean I'm not going to do it
9 again. I mean, why isn't that the case here?

10 MS. SCHERTLER: Well, I -- I guess that it's a
11 matter of some disagreement, but -- I mean, we have -- we
12 have taken the position that this was a breach of the --
13 the government's agreement that he qualifies for a three-
14 level reduction in his offense level. That was the --

15 CHIEF JUSTICE ROBERTS: And you can put that
16 before the judge. You're supposed to go there and say,
17 look, we agreed to recommend it and we do recommend it.
18 You can say, and by the way, you should know that he's gone
19 out and done this again. But you will have -- you certainly
20 prejudiced him by not doing what you said you would do.

21 MS. SCHERTLER: Well, we breached the agreement
22 by not doing what we said we would do, and the question we
23 would submit to the Court is whether, given the absence of
24 an objection, Petitioner carried his burden of showing that
25 we did prejudice him. And the --

1 CHIEF JUSTICE ROBERTS: Well, isn't it the fact
2 that we can never know what Judge Sanders would have done
3 if the government had done what it said it would do. And
4 why shouldn't you bear the burden of showing there's no
5 prejudice when you can't tell because you're the one that
6 breached the agreement?

7 MS. SCHERTLER: Because in the plain-error
8 setting, this Court has made clear that the burdens shift
9 and that, under the third component of that standard, it is
10 the -- the defendant's burden, if he did not object, to
11 show an effect on the outcome of the proceeding, that his
12 substantial rights were violated.

13 And here -- and I would note that the court of
14 appeals made findings that the result would have been the
15 same, and Petitioner in this Court has never challenged
16 those findings on this record.

17 JUSTICE BREYER: Can you say just for me,
18 because now I'm changing a little bit here in light of that
19 question, but what is it precisely that the government said
20 it would do that it did not do?

21 MS. SCHERTLER: The -- paragraph 8 of the plea
22 agreement indicates that the government --

23 JUSTICE BREYER: What does it say? What are
24 the words that it says that the government did not do?

25 MS. SCHERTLER: Well, we indicated to the

1 district court that Petitioner did not qualify for
2 acceptance of responsibility. And paragraph 8 was a
3 government agreement that he did qualify for acceptance of
4 responsibility.

5 JUSTICE BREYER: So he did agree. We agree
6 that he does qualify. And then when you got to the court,
7 you said, now we don't agree that he qualifies at this
8 point.

9 MS. SCHERTLER: That's correct. And there --
10 and there was an intervening event, obviously, that
11 affected the judgment, but because the explicit provision
12 of this particular plea agreement, which I agree is
13 atypical, as the government's motion for the third point
14 made clear, did not have a qualification in there. And
15 that -- that is the base -- I mean, I don't mean to be
16 arguing strenuously that the government did something wrong
17 here, because there were -- but the fact is, given the
18 terms of this plea agreement, there -- that is the basis
19 for our concession that there was a breach.

20 JUSTICE GINSBURG: As a matter of practice
21 among U.S. attorneys, we do have 6 and a half years at
22 stake here. Right? That's the difference between the two
23 levels? Why wouldn't it be the appropriate thing for the
24 U.S. attorney -- the assistant U.S. attorney, to say,
25 Judge, I want to call your attention to paragraph 8 of the

1 plea agreement? At the time we entered into it, we made
2 that undertaking. And so then everybody is sure that the
3 judge's mind is focused on that. Wouldn't that be the
4 better practice?

5 MS. SCHERTLER: Absolutely, Justice Ginsburg,
6 and if there had been an objection based on that provision
7 of the plea agreement, that may be -- have been very well
8 what would have happened. The breach could have been
9 cured. And the fact is that, in the absence of the
10 objection, the breach was not cured when it could have
11 been, and that is one reason -- that is -- that is why it
12 makes sense to apply the plain-error standard in this
13 context.

14 JUSTICE SOUTER: Well, could -- could the
15 breach have been cured? I mean, the point -- it seems to
16 me, the point at which the defendant would have known that
17 the government had breached the agreement was when the
18 government stood there before the court and said, in fact,
19 he -- he hasn't accepted responsibility. He went out and
20 -- and committed another crime while he was behind bars.

21 It seems to me that that's the point -- and
22 maybe this phrase occurred somewhere in the record -- that
23 that's a bell that you can't unring. For -- for the
24 defendant to get up and object and said, wait a minute, you
25 were supposed to represent to the court that you agreed

1 that I did accept responsibility -- to -- to require the
2 government to fulfill that undertaking at that point would
3 have been ridiculous. The -- I suppose the U.S. attorney
4 could have said, oh, yes, he's right, Judge. We agreed that
5 -- that he accepted responsibility. But the U.S. attorney
6 has already just said a moment before, he hasn't. We really
7 don't mean that at all.

8 There's -- there's no way, it seems to me, that
9 there could have been a better outcome in a case like this,
10 even if the objection had been contemporary.

11 MS. SCHERTLER: Well, there would be more than
12 one way to cure a breach such as this, if an objection had
13 been raised in the district court. One way would have been
14 by the correction on the record that we've just discussed,
15 but another way --

16 JUSTICE SOUTER: Which would have been silly.

17 MS. SCHERTLER: But if the defendant -- and if
18 the defendant said that, that would be a silly way to
19 correct this. It also could have been sent to another
20 judge for resentencing, just as the Court in Santobello
21 said that a remedy could be accomplished.

22 JUSTICE GINSBURG: If it were sent to another
23 judge, that judge would still have the presentence report.
24 After all, it wasn't the -- the government that initiated
25 renegeing on -- on this bargain, if it was the bargain. It

1 was the presentence report. And before the government said
2 a word, the judge had read and was discussing the
3 presentence report, which said, Judge, earlier, we said you
4 should give credit for acceptance of responsibility. Now
5 we must tell you, you should not.

6 MS. SCHERTLER: The probation officer said
7 that.

8 JUSTICE GINSBURG: Yes.

9 MS. SCHERTLER: Yes. And I don't even -- I
10 don't think Petitioner even contends that he's entitled now
11 -- well, he contends he is entitled to get out of this
12 plea. But taking the more typical remedy that this Court
13 proposed as one possibility in Santobello, I don't think
14 Petitioner would say that a judge should not know that he
15 did -- that he engaged in subsequent criminal conduct.
16 That is information that any judge sentencing him must know
17 about in order to fairly assess what sentence he should
18 receive. If the court --

19 CHIEF JUSTICE ROBERTS: Now, maybe -- maybe
20 Judge Sanders would look at this kind of the way that we've
21 been discussing it, and he would look and say, boy, it's --
22 it's -- he committed subsequent conduct, how can you
23 recommend that I depart? He says, but on the other hand,
24 every plea agreement I've seen you always say if he commits
25 subsequent conduct that's illegal, that all bets are off.

1 You didn't say that here, so I'm going to take the
2 recommendation seriously.

3 I don't think it's -- maybe I am repeating
4 myself, but I don't think it is at all clear that the
5 result wouldn't be different here.

6 MS. SCHERTLER: Well -- and again, I guess I
7 would give the same response, that it -- it is Petitioner's
8 burden to show a likelihood, a reasonable likelihood that
9 it would have been different.

10 JUSTICE SOUTER: With respect, that is not what
11 Olano says, is it? I mean, the -- the basic Olano standard
12 is a -- is a violation of substantial rights standard.

13 MS. SCHERTLER: Yes, Justice Souter.

14 JUSTICE SOUTER: And one way that you could
15 show a violation of substantial rights would be a -- a
16 demonstration that the outcome would have been different.
17 But another possibility of showing that violation is -- is
18 whether -- and I know you don't accept it, but it's -- it's
19 the one that I proposed earlier. There's a violation of
20 substantial rights if somebody is sitting behind bars
21 without having gotten there by -- by the performance of an
22 agreement that -- that he made, or as a result of a -- a
23 trial. And -- and that, too, could satisfy the -- the
24 Olano formulation, could it not?

25 MS. SCHERTLER: It -- it could, Justice Souter.

1 And if the Court were to take that position, we would argue
2 that there is still, under the plain-error standard, the
3 fourth component, the discretionary component of review.

4 JUSTICE BREYER: I know you want this - but can
5 I point out one other thing to you.

6 MS. SCHERTLER: Yes, Justice Breyer.

7 JUSTICE BREYER: I think it's a hard question,
8 burden of proof and these other things. That -- I just
9 turned the page, after -- after the person, Ms. Simms --
10 she's the prosecutor. And she's absolutely clear to me --
11 others can disagree -- that this judge knew just what the
12 government had agreed to, and the prosecutor was saying but
13 now things have changed.

14 And then the judge turns to the probation
15 officer, and the probation officer says, just to reiterate
16 what Ms. Simms said, the new offense, according to the
17 guidelines of the guideline manual, prohibits any
18 acceptance of responsibility. Now, if that turns out to be
19 right, of course, it couldn't matter less whose burden of
20 proof it is.

21 MS. SCHERTLER: Well, it -- it was -- it was
22 not correct, as a matter of fact, and the defense attorney
23 made that correction, and the -- and the judge accepted
24 that.

25 And if I could go back --

1 CHIEF JUSTICE ROBERTS: But he wasn't -- was he
2 convicted of this new crime?

3 MS. SCHERTLER: He -- not at the time of -- of
4 these proceedings.

5 CHIEF JUSTICE ROBERTS: No. Just an
6 allegation. Right?

7 MS. SCHERTLER: That's right. Another --
8 another defendant had pled guilty to this crime, and the
9 factual statements supporting his plea had implicated
10 Petitioner as having instigated the crime, suggested to
11 him, and profited from it.

12 CHIEF JUSTICE ROBERTS: Well, why do we assume
13 he did anything anyway? I assume he denies the
14 allegations.

15 MS. SCHERTLER: He admitted the allegations to
16 the probation officer, and that was what was reflected in
17 the presentence report.

18 And if I can return to Justice Souter's
19 question about if the Court were to take the position that
20 a form of substantial rights is affected in every case of a
21 government breach of a plea agreement, we would
22 respectfully submit that as this Court analyzed a similar
23 type of difficult question in Johnson and Cotton, that the
24 fourth discretionary component of the standard should
25 preclude relief or should at least give the district court

1 -- the court of appeals discretion to not grant relief
2 where, as in this case, there has been no showing that
3 there was an effect on the outcome, and, as the court of
4 appeals found, an affirmative record that the outcome would
5 have been exactly the same.

6 Thank you, Your Honors. We would ask that the
7 judgment be affirmed.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Mr. Isaacson, why don't you take 2 minutes.

10 REBUTTAL ARGUMENT OF LARS R. ISAACSON

11 ON BEHALF OF THE PETITIONER

12 MR. ISAACSON: Thank you, Your Honor.

13 The problem that the Puckett panel had in the
14 third prong of 52(b) -- they focused on whether or not
15 there was prejudice at sentencing. That was the focus of
16 the Puckett panel. That's why they said 52(b) plain error
17 applied and was found in that case.

18 The problem with that is that Santobello
19 clearly points out that prejudice to the trial judge, that
20 the trial judge -- what the trial judge would have done is
21 simply not relevant. That is why 52(b) cannot be applied
22 in this case.

23 Secondly, when the government argues that
24 there's no prejudice -- you have to show prejudice at
25 sentencing, the judge would have done something different,

1 that is virtually an impossible standard. Under 18 U.S.C.
2 3553(a), there are a number of factors a sentencing judge
3 has to take into. The idea -- and they have -- there's
4 many different factors they must look at, all of these
5 different things. The idea that a defendant could somehow
6 show a judge would have come to a different result but for
7 the government breach is an impossibility.

8 The final point I'd make is, the argument the
9 government is making now about prejudice, it would make no
10 difference at all if the defendant had objected at the
11 time. If there's no effect on sentencing, it would not
12 pass muster under the plain-error or the harmless-error
13 standards. So the next case that's going to come before
14 this Court is when you have an objection, and then they're
15 going to say the exact same argument to you.

16 We would ask you to reverse the decision of the
17 Fifth Circuit.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 The case is submitted.

20 (Whereupon, at 11:15 a.m., the case in the
21 above-entitled matter was submitted.)

22

23

24

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