

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

FLORENCIO ROSALES-MIRELES,)
)
Petitioner,)
)
v.) No. 16-9493
)
UNITED STATES,)
)
Respondent.)

Pages: 1 through 57
Place: Washington, D.C.
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4 Petitioner,)

5 v.) No. 16-9493

6 UNITED STATES,)

7 Respondent.)

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9 Washington, D.C.

10 Wednesday, February 21, 2018

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United
14 States at 10:18 a.m.

15

16 APPEARANCES:

17 KRISTIN L. DAVIDSON, ESQ., Assistant Federal Public
18 Defender for Western District of Texas,

19 San Antonio, Texas; on behalf of the Petitioner.

20 JONATHAN ELLIS, ESQ., Assistant to the Solicitor

21 General, Department of Justice, Washington, D.C.;

22 on behalf of the Respondent.

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

2 (10:18 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 16-9493,
5 Rosales-Mireles versus the United States.

6 Ms. Davidson.

7 ORAL ARGUMENT OF KRISTIN L. DAVIDSON

8 ON BEHALF OF THE PETITIONER

9 MS. DAVIDSON: Mr. Chief Justice, and
10 may it please the Court:

11 The government concedes that the Fifth
12 Circuit's shocks-the-conscience standard is the
13 wrong approach for a court of appeals to apply
14 under the fourth prong of plain error review.
15 The question remains: How should a court of
16 appeals exercise its discretion when confronted
17 with an obvious guidelines error that probably
18 results in a defendant serving a longer prison
19 sentence?

20 We ask the Court to recognize what
21 every circuit but the Fifth already has; that
22 is, in the ordinary case, such an error
23 seriously affects the fairness, integrity, and
24 public reputation of the judicial proceedings
25 and warrants correction.

1 CHIEF JUSTICE ROBERTS: One -- one
2 day? I mean, if your -- if the person is in
3 prison one extra day, that people -- will cause
4 people to look at judicial proceedings as
5 lacking fairness and integrity?

6 MS. DAVIDSON: I believe so under the
7 -- under the analysis of the fourth prong.
8 Certainly, a sentence of an extra 20 years,
9 versus a day, 20 years is worse, but, under the
10 analysis of the fourth prong, the question
11 really is, does the nature of the error
12 frustrate the purposes served by the rule at
13 issue?

14 And in the context of the guidelines,
15 a guidelines error directly frustrates the very
16 purposes served by the sentencing guidelines
17 scheme: the congressional goals to promote
18 uniformity and proportionality and to avoid
19 unwarranted disparity; to achieve parsimony,
20 meaning that a defendant is sentenced to the
21 least amount of time necessary to effectuate
22 the statutory goals; and to have respect for
23 the district court --

24 CHIEF JUSTICE ROBERTS: No, and these
25 are all reasons that you would consider when

1 the question is -- when there's an objection
2 and the question is raised. Here, we're
3 dealing with a situation was -- when there was
4 no objection, so we're in the context of plain
5 error. So it seems to me that you have to
6 argue more than just: This was wrong and it
7 ought to be fixed.

8 MS. DAVIDSON: Agreed. This Court has
9 always said something more is required, but at
10 -- at this point, a defendant has met his
11 burden to show a plain error that affects
12 substantial rights.

13 JUSTICE GINSBURG: We have said many
14 times that correction under the plain error
15 doctrine should be exercised sparingly, but I
16 take it your argument is, in the context of a
17 guidelines error, the discretion should not be
18 exercised sparingly; it should be exercised
19 routinely.

20 MS. DAVIDSON: Well, Your Honor, I
21 think the context is that 52(b) applies to the
22 grand universe of errors. And so guideline
23 errors remain a narrow type of error that can
24 arise. And statistically speaking, in the last
25 fiscal year, of the thousands of sentencing

1 appeals that were raised, less than 6 percent
2 got remanded because they raise a guideline
3 calculation error.

4 So we have the empirical evidence,
5 which is cited on page 12 of the yellow reply
6 brief, that, in fact, it doesn't happen very
7 often.

8 JUSTICE KAGAN: Why are guideline
9 error --

10 JUSTICE GINSBURG: But then you are
11 saying -- you are saying that guidelines errors
12 are -- are exceptions to the general rule that
13 plain error review should yield corrections
14 sparingly? You are saying that this is a
15 category where it should be exercised
16 routinely?

17 MS. DAVIDSON: I think a guideline
18 error presents a -- the nature of the guideline
19 error is such that it ordinarily will have that
20 effect, but it won't always.

21 JUSTICE KAGAN: And -- and why is
22 that? Why are guideline errors a category in
23 which we should kind of flip what usually
24 happens; it goes from sparingly to most of the
25 time?

1 MS. DAVIDSON: As the Court has
2 recognized in *Peugh* and *Molina-Martinez*, the
3 sentencing guidelines provide the essential
4 framework for federal sentencing, and there is
5 a well-documented anchoring effect so that when
6 there is an erroneously high guidelines range,
7 there's a significant risk that the defendant
8 was sentenced to a longer prison time than he
9 otherwise would have had the district court not
10 been influenced by the error itself.

11 JUSTICE KAGAN: That seems more a
12 prong 3 question, isn't it? The question --
13 you know, that -- that most guideline
14 calculation errors are going to have an effect
15 on the -- on -- on -- on the sentence, but then
16 there's also prong 4. Why shouldn't that do
17 something different?

18 MS. DAVIDSON: It's our position that
19 prong 3 and prong 4 do have distinct inquiries,
20 but because there's such a direct nexus between
21 the sentencing guideline error and the effect,
22 the separate inquiries will also -- will often
23 be examining the same or similar type of
24 information on the record before it.

25 And while it is true that

1 Molina-Martinez looks at the anchoring effect
2 of the guideline to show that the guideline
3 error itself can be evidence of an effect on
4 substantial rights, the resulting harm of that
5 is a longer prison sentence. And an excess
6 amount of prison is a serious harm that run --
7 that has consequences both for society and the
8 administration of justice.

9 JUSTICE ALITO: I mean, if we said
10 that an error is plain if it creates a risk
11 that the defendant will serve a longer sentence
12 than the defendant would have otherwise served,
13 I don't know what's left of the plain error
14 rule in criminal cases.

15 You -- you seem to be equating -- you
16 seem to -- your argument seems to be that an
17 error is plain unless it's harmless -- unless
18 it is not harmless, isn't that right?

19 MS. DAVIDSON: No. And there's
20 actually quite a lot left of the plain error
21 analysis.

22 JUSTICE ALITO: Well, what is left of
23 it in this context? I mean, you cite three
24 examples in your brief. One is when the
25 defendant has waived an objection to the

1 guideline -- to the sentence in -- in a plea
2 agreement. The other is when the defendant has
3 already completed the sentence, in which case I
4 think the case would be -- would be moot.
5 There would be no opportunity to get relief in
6 a direct appeal. And the other is when the --
7 the defendant is serving a concurrently running
8 sentence.

9 Do you have others?

10 MS. DAVIDSON: Yes. We -- we cite the
11 Tyson case on page 8 in the yellow brief, and
12 that's a -- a good example of where we have two
13 different inquiries that are informed by the
14 same sort of information, the effect of the
15 guideline.

16 In that case, the court of appeals
17 assumed that the third prong was met but denied
18 relief under the fourth prong because it found
19 that the ultimate purposes of sentence were not
20 frustrated by the guideline error because the
21 guideline error didn't serve the basis for the
22 sentence in the first place.

23 JUSTICE ALITO: Okay. So, if there's
24 any chance that the guideline error affected
25 the sentence, then the error is plain? That's

1 your argument?

2 MS. DAVIDSON: Well, yes, it would
3 rise to a level of seriousness to warrant
4 correction.

5 JUSTICE ALITO: Okay. Now, if we were
6 to apply that in other contexts, what would be
7 left of the plain error rule in criminal cases?

8 MS. DAVIDSON: Well, every error is
9 different. And a factor for a court of appeals
10 to consider under the fourth prong is the
11 nature of the error.

12 And I think that can be broken down
13 into two factors: First, for the court to look
14 at what purposes are served by the rule in
15 question, and then to examine the record to see
16 if it demonstrates that those purposes are
17 actually frustrated by the error.

18 So I think that's a type of inquiry
19 that's at least implicit in Cotton and Johnson.
20 In cases like that, errors like that would
21 certainly --

22 JUSTICE ALITO: Okay. Error --
23 evidence is erroneously admitted at trial.
24 It's hear -- it's hearsay and it's -- it's
25 inadmissible hearsay. It's admitted. So

1 there's an error. But the reviewing court says
2 that the -- the harmless error standard for
3 non-constitutional errors is met. But there is
4 a chance that it had an effect on this -- on
5 conviction.

6 So why wouldn't that be a plain error?

7 MS. DAVIDSON: Well, it likely could
8 be a plain -- I mean, no, it -- it -- the --
9 let me back up.

10 The evidentiary standard that has to
11 be met under the third prong of the plain error
12 is a -- is a low evidentiary standards: A
13 reasonable probability. That's less than
14 preponderance of the evidence.

15 So it's entirely possible that a court
16 could look at the record and see that the third
17 prong was met but then, looking at the record
18 in total, find overwhelming and essentially
19 uncontroverted evidence that the outcome was
20 right, notwithstanding the error.

21 JUSTICE ALITO: But you're changing
22 the standard. You're changing the harmless
23 error standard when you say that, aren't you?

24 MS. DAVIDSON: Harmless -- excuse me.
25 Are we talking about harmless error standard or

1 the plain error standard?

2 JUSTICE ALITO: Well, my inquiry is
3 what is the difference between the plain error
4 rule and the harmless error rule as you
5 understand them? And you just told me, as I --
6 what I think you just told me was that the
7 court would have to say it's uncontroverted,
8 that this had no effect, otherwise it would be
9 plain error?

10 MS. DAVIDSON: If I understand the
11 question correctly as distinguishing between
12 harmless error and plain error, the -- the --
13 one of the primary differences is that the
14 burden remains on the defendant the entire time
15 during the plain error analysis.

16 The burden never shifts like it does
17 under a harmless error standard.

18 JUSTICE ALITO: Yeah, well, that ought
19 to cut in the opposite direction, shouldn't it?

20 MS. DAVIDSON: I'm not sure I
21 understand the question.

22 JUSTICE ALITO: The defendant has the
23 burden under plain error, right, so it should
24 be harder there. I -- I still don't -- I just
25 don't understand what is left of the plain

1 error rule. There doesn't seem to be very much
2 left, if the only question is, is there any
3 chance that it caused the defendant to serve a
4 longer sentence than the defendant would have
5 otherwise served?

6 MS. DAVIDSON: I think the approach
7 that's applied by the majority of circuits
8 actually gives vitality to the plain error
9 standard, as the Court expressed it in Olano.
10 And it turns on the seriousness of the error.

11 So it's going to be contextualized by
12 the error and its effect on --

13 JUSTICE GINSBURG: I thought you had
14 just said that the guidelines miscalculation is
15 an exception to the normal way that plain error
16 operates. You -- you have agreed with me that
17 in guidelines miscalculations, the error should
18 be corrected routinely, not sparingly. I
19 thought you were cordoning off guidelines
20 miscalculations from all other errors.

21 MS. DAVIDSON: No. Let me clarify.

22 The majority approach that circuits
23 apply don't change the formula that is in place
24 under the plain error standard. It still
25 remains that the defendant prove all four

1 prongs.

2 What is different about a guidelines
3 error is the nature of that error. There's a
4 particularly close nexus between the error and
5 the outcome and how that outcome frustrates the
6 purposes served by the sentencing guidelines
7 scheme.

8 JUSTICE KENNEDY: Well, then your
9 answer to Justice Ginsburg should be yes, and
10 it should have been yes at the outset. You
11 said sentencing is different.

12 We have separate rules for sentencing,
13 in part because the costs of remand are much
14 less than the cost of a new trial, there can be
15 some complexities, and it seems to me that you
16 have to confront the consequences of that
17 choice to say that, in the sentencing case, an
18 ordinary error is very close to plain error.
19 But you seem to resist -- resist that.

20 MS. DAVIDSON: No, I -- let me
21 clarify. I think that's the correct
22 formulation, Justice Kennedy.

23 JUSTICE ALITO: Well, if that's the
24 correct formulation, then why? Why is a
25 sentencing guidelines error more serious than

1 any other type of error, more serious than a
2 constitutional error, more serious than a
3 violation of a statutory command?

4 Here, we're not even talking about
5 something that's mandatory. These guidelines
6 exist in some kind of a middle universe that I
7 -- I don't understand, but that's another --
8 that's another question.

9 Why -- why -- why is this different?

10 MS. DAVIDSON: Well, the analysis
11 doesn't turn on whether or not it's a
12 constitutional or non-constitutional error or
13 that the sentencing guidelines are mandatory
14 versus advisory.

15 It's looking at how close of a nexus
16 exists between the error and how it affects the
17 outcome. And because the sentencing guidelines
18 are the starting point for every sentence and
19 are in the real basis the -- what a sentence
20 becomes anchored to, we have empirical data
21 which reflects their anchoring effect, that
22 when there's an erroneously high guideline
23 range, there's a serious risk that -- a
24 significant risk that the defendant's sentence
25 was also higher than it would have been had the

1 district court not been improperly influenced
2 by it.

3 CHIEF JUSTICE ROBERTS: I -- I think
4 the basis for your -- or perhaps a basis for
5 your exception is that the error is so precise,
6 you know, a typographical error has caused the
7 person to stay in jail for -- to have to stay
8 in jail for another six months. A
9 typographical error and exactly six months.

10 So I think one of the considerations
11 we take into account is the reputation for the
12 judicial system, justice system. And if you
13 tell somebody, well, because of a typo, the guy
14 is going to stay in jail for six more months,
15 people will say, well, that's not -- that's not
16 fair.

17 On the other hand, I don't think that
18 takes into account there is cost associated
19 with that, which is the -- the remedy is you
20 send it back for another sentencing hearing,
21 who knows how long, how much time has passed.
22 The judge has to reconstruct the whole
23 operation. And that's caused by your client's
24 failure to object when he should have objected.

25 So why doesn't it make sense to say

1 that it kind of makes a difference, if you're
2 talking about a relatively insignificant amount
3 of time -- any day in jail is not
4 insignificant -- but there's a difference
5 between an error that results in an additional
6 six months and an error that results in an
7 additional five years.

8 Is that something that the court can
9 consider, or is it -- I guess it's the first
10 question I asked. Is your position one day and
11 it's plain error?

12 MS. DAVIDSON: I don't think the
13 amount of excess is the -- is the right marker
14 for a court of appeals to determine because it
15 would run contrary to the congressional goal of
16 parsimony.

17 And as the Court stated in Williams,
18 it's the district court's prerogative to
19 determine the appropriateness of a particular
20 sentence to begin with.

21 As to relative cost, certainly,
22 there's always some cost involved to
23 resentencing, but the fact is it is a lower
24 cost than having a new trial, for example.

25 The Court recognized that resentencing

1 doesn't present the same amount of costs in
2 Molina-Martinez. And --

3 JUSTICE SOTOMAYOR: Mrs. Davidson --
4 Ms. Davidson, I think of the three prongs, the
5 third and the fourth prong, the third prong as
6 being fairness of process: Were you given the
7 process that you were entitled to
8 constitutionally or statutorily?

9 And so, on the third prong, we've had
10 many cases where elements were not given to a
11 jury. This is neither case. We've had Cotton,
12 where a drug amount wasn't given to a jury. We
13 look at that third prong as a substantial
14 deprivation of some form of constitutional or
15 state right.

16 I think of the fourth prong as
17 fairness of the ultimate outcome, which is very
18 different because often, like in Cotton, where
19 an element like drug amount wasn't given to a
20 jury, we look at the quantum of evidence and
21 say: Would the outcome have been different?
22 And that's most of our cases. Was the area --
23 error so substantial that the outcome was
24 actually unfair?

25 And so, for me, that fourth prong does

1 serve even in sentencing guidelines a different
2 function. It talks -- our third-prong finding
3 is that the fairness of a judge's process of
4 considering your sentence from a correct
5 guideline was frustrated. The third -- fourth
6 prong goes to, is there a substantial
7 possibility that the outcome was affected, that
8 you would have received a lesser sentence?

9 Is there an error in the way I'm
10 looking at this?

11 MS. DAVIDSON: No, I don't believe so.
12 And in Cotton, it's not just what the court
13 examined of what the outcome would have been
14 but -- but based on what that record
15 demonstrated.

16 And I think that analysis would apply
17 in this case because we don't have a record
18 that demonstrates what a district court would
19 have done by overwhelming and uncontroverted
20 evidence, especially when it's not just a
21 mathematical error of the guideline, but it's
22 premised on a factual error in the criminal
23 history.

24 JUSTICE SOTOMAYOR: Well, I think your
25 -- your point in your brief was he got, at the

1 low end of the guidelines, 78 months, despite
2 all of the negative factors that the government
3 points to in its brief, his serious criminal
4 history, et cetera, et cetera.

5 The judge still sentenced him at the
6 low end of the guideline. And so that
7 demonstrates that it is possible, not just
8 substantially possible, but that the judge will
9 in fairness and upholding the integrity of the
10 judiciary give him a lesser sentence, correct?

11 MS. DAVIDSON: Yes.

12 JUSTICE SOTOMAYOR: It's a
13 possibility -- a strong possibility?

14 MS. DAVIDSON: Yes.

15 JUSTICE GORSUCH: Ms. Davidson, I was
16 wondering about our -- our standard in Olano
17 and the fourth prong, talking about fairness,
18 reputation, integrity of judicial proceedings,
19 and where it came from.

20 And I traced it back to Atkinson, a
21 1936 opinion. I know you've cited that. And I
22 wanted your thoughts about that, because in
23 Atkinson, it said district courts should be
24 guided by the following test in when to
25 exercise their discretion to correct a plain

1 error and suggested that they should correct a
2 plain error whenever it's obvious or when it
3 affects the fairness, integrity, or public
4 reputation of judicial proceedings.

5 And Olano turned that "or" into an
6 "and." What do we make of that?

7 MS. DAVIDSON: Well, I'm aware of that
8 history, but I also can't ignore how often
9 cited the Court has restated Olano's
10 formulation, so I don't have a position in --
11 in going back to a pure disjunctive, but I
12 would like to point out that in articulating
13 that -- what became the fourth-prong standard
14 in Atkinson, Atkinson cites Brasfield, and in
15 Brasfield, it's an example where the Court
16 recognized a type of error that, by virtue of
17 inquiring into the numerical division among the
18 jurors, that inquiry itself impugned the
19 system.

20 And so I think there is recognition
21 that -- that different errors have a different
22 degree of seriousness and have a different
23 level of effect compared to --

24 JUSTICE GORSUCH: Well, if that's true
25 on the fourth prong, public reputation, let's

1 say, how are we supposed to determine that
2 normatively, right? Or as an empirical matter.
3 We're supposed to take a poll? I think if we
4 took a poll, we'd find that a lot of people may
5 not care about how long your client spends in
6 prison. Right? Whether it's an extra six
7 months or not.

8 Should that matter? Should public
9 reputation in a -- in a -- in an institution
10 that's designed to check majoritarian impulses
11 like the judiciary's supposed to, should --
12 should those majoritarian influences even
13 matter in our consideration of the fourth
14 prong?

15 MS. DAVIDSON: Well, I think it's
16 difficult -- difficult because there's not
17 going to be that type of evidence on a record
18 of what the public thinks. But I think the
19 formulation of the fourth prong, public
20 reputation of the judicial proceedings, is --
21 is less of an -- it's not public reputation of
22 the defendant. It's of the judicial
23 proceedings.

24 And so I do think that --

25 JUSTICE GORSUCH: So it's a normative

1 inquiry rather than an empirical one, I think
2 is what you're suggesting, in which case,
3 should -- should the fact that a person spends
4 a day in prison longer than the law permits be
5 something we should care about?

6 MS. DAVIDSON: Yes, especially when it
7 results from an obvious and easily correctable
8 error.

9 JUSTICE GORSUCH: That we've made
10 ourselves?

11 MS. DAVIDSON: Correct.

12 If there are no further questions, I'd
13 like to reserve my time for rebuttal.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Ellis.

17 ORAL ARGUMENT OF JONATHAN ELLIS
18 ON BEHALF OF THE RESPONDENT

19 MR. ELLIS: Mr. Chief Justice, and may
20 it please the Court:

21 The plain error rule is designed to
22 capture a narrow set of errors that we as a
23 society are not willing to subject to the
24 ordinary rules of party presentation and
25 forfeiture that govern federal proceedings.

1 The question here is whether clear
2 guidelines errors -- errors as a class will
3 almost always meet that test. We think the
4 answer is no, and the Petitioner's argument to
5 the contrary ignores fundamental aspects of the
6 federal sentencing regime is inconsistent with
7 the federal rules and this Court's precedent.

8 JUSTICE GINSBURG: Isn't it so that
9 most circuits, if not all, that have addressed
10 the question do take the position that
11 guidelines miscalculations, if they're clear,
12 call for correction on plain error review?

13 MR. ELLIS: So I think Petitioner
14 overstates the consensus in the lower courts.
15 Only two courts of appeals have adopted --

16 JUSTICE GINSBURG: Did the Ten -- did
17 the Tenth Circuit?

18 MR. ELLIS: I'm sorry?

19 JUSTICE GINSBURG: Did the Tenth
20 Circuit in, what is it, Sabillon-Umana
21 overstate it when the Tenth Circuit said that
22 the third and fourth prongs of the plain error
23 test align in these guidelines miscalculations?

24 MR. ELLIS: So I think -- I think what
25 the Tenth Circuit said is that courts of

1 appeals often exercise authority -- their
2 authority under the fourth prong when the first
3 three are met and that some have adopted a
4 presumption. That's correct.

5 Two courts of appeals have adopted
6 presumptions, but even those courts have
7 recognized that that presumption may be
8 rebutted in case -- based on the factors that
9 we've identified in our brief as grounds not to
10 exercise the -- the court of appeals'
11 authority.

12 And, in fact, the Third Circuit, one
13 of those two circuits, since Molina-Martinez,
14 has announced -- has made clear that the fourth
15 prong should be applied on a case-specific
16 basis and that it -- even in a case where the
17 first three prongs are met, even in a
18 guidelines case where the first three prongs
19 are met, it imposes a considerable barrier to
20 relief.

21 JUSTICE KAGAN: Mr. Ellis, can -- can
22 I just -- Justice Gorsuch, when he was a judge,
23 wrote this opinion which I'm sure you've read
24 many times, and I just want to quote one
25 sentence from it and then ask you what you

1 think about it because he basically, you know,
2 suggests why you maybe lose.

3 (Laughter.)

4 JUSTICE KAGAN: But this is what he
5 said. He might not agree with this anymore,
6 who knows, but --

7 (Laughter.)

8 JUSTICE KAGAN: -- he says, "what
9 reasonable citizen wouldn't bear a rightly
10 diminished view of the judicial process and its
11 integrity if courts refused to correct obvious
12 errors of their own devise that threaten to
13 require individuals to linger longer in federal
14 prison than the law demands? Especially when
15 the cost of correction is so small?"

16 And I take that to be combining three
17 things. First, you have a deprivation of
18 liberty. Second, you have a -- an error, as he
19 says, of your own devise; in other words, the
20 court has something to do with it. The -- the
21 probation officer has messed up, and then the
22 court hasn't caught the error. And -- and,
23 third, that the cost of correction is small,
24 certainly relatively smaller.

25 And you package those three things

1 together and you get a -- you know, a rule that
2 treats these kinds of errors differently, that
3 does mean that they're routinely, as opposed to
4 sparingly, corrected.

5 MR. ELLIS: Sure.

6 JUSTICE KAGAN: Why isn't that right?

7 MR. ELLIS: So there's a lot packed
8 into that. So I -- I think just sort of
9 starting with sort of the man on the street and
10 what -- what -- the view of the judiciary, I
11 think if you went on to explain that -- that
12 ours is a system of party presentation that's
13 been designed so that the -- the parties have
14 an opportunity to raise errors and they are --
15 they're expected to do so, that any complicated
16 system like a system of justice has to have
17 rules and those rules have to have meaning.
18 But I think it's -- I don't know that they
19 would conclude or look less upon the judiciary
20 if -- in a -- in an ordinary --

21 JUSTICE GORSUCH: Isn't it --

22 JUSTICE KAGAN: Well, I think what
23 they're --

24 JUSTICE GORSUCH: I'm sorry. No,
25 please.

1 (Laughter.)

2 JUSTICE KAGAN: I -- I mean, he can
3 probably do it better than I can.

4 JUSTICE GORSUCH: You're doing a much
5 better job than I.

6 (Laughter.)

7 JUSTICE KAGAN: I think what this is
8 saying is, yes, the reasonable citizen,
9 assuming this great reasonable citizen exists,
10 you know, would think all of those things, but
11 he would say here's this particular kind of
12 error, and -- and it's rare that all of these
13 three things come together.

14 Deprivation of liberties, that's
15 pretty common. But low costs, that's not so
16 common. And the fact that the error is of the
17 court's own making, that's really uncommon.

18 And you put all those three things
19 together, there's just one result that's
20 screaming out at you.

21 MR. ELLIS: So -- so you're -- you're
22 exactly right that the deprivation of liberty
23 is not so uncommon. I mean, this is the rule
24 of criminal procedure. So anytime that this
25 rule comes into play, deprivation of liberty is

1 at stake. So then we're talking about the
2 costs.

3 And we think the cost might come in,
4 in two different ways. One way might be in
5 setting the standard as for when you might
6 apply plain error, but we think the Court did
7 that in Olano, that it was correct.

8 That standard was ratified in the 2002
9 amendments to the Federal Rules, indeed where
10 it conformed to Olano, and that this Court
11 has -- doesn't have the authority to change
12 that standard outside of the Rules Enabling Act
13 and the procedures identified there.

14 And then you move on to whether the
15 court -- was one of the court's own making, and
16 I just don't think that's quite right. The
17 probation office is, of course, a part of the
18 court, but the responsibility for raising
19 errors, it still lies with the defendant.

20 And the defendant has ample
21 opportunity in most cases and, indeed, in this
22 case, to review the PSR and bring to the
23 court's attention any errors.

24 And the error in this case was one,
25 and in many cases will be one, in which the

1 defendant is uniquely competent to identify and
2 bring to the court's attention.

3 So you put all that together and you
4 -- I don't think it follows.

5 JUSTICE GINSBURG: Would it -- would
6 it -- would it be ineffective assistance of
7 counsel for counsel not to notice a glaring
8 error in calculating the guidelines?

9 MR. ELLIS: I think it's -- there are
10 some -- there may be some cases, perhaps. We
11 don't think that there's been any claim in this
12 case. We don't think every failure to spot an
13 obvious error in the -- in the PSR would amount
14 to deficient performance or -- or necessarily
15 amount to prejudice under this -- under
16 Strickland.

17 And we think this case is about the
18 category of errors that don't amount to -- to
19 ineffective assistance of counsel and what the
20 court -- a court of appeals should do when
21 they're raised for the first time on appeal.

22 JUSTICE KENNEDY: I still am not sure,
23 when I -- when I leave here and write -- write
24 down what your position is, what is your
25 definition of the fourth prong as it applies to

1 this case?

2 MR. ELLIS: Sure. So our definition
3 is -- is what the -- is the Court's definition.
4 Unfortunately, this is a -- not an area much
5 like sentencing itself that lends itself to
6 bright-line rules.

7 JUSTICE KENNEDY: What is your -- what
8 is your best guidance as to how to apply it in
9 this case using neutral principles?

10 MR. ELLIS: So I --

11 JUSTICE KENNEDY: General principles.

12 MR. ELLIS: Yeah, sure. So I think
13 the test is the one from Olano, whether the
14 error is one that seriously affects the
15 fairness and integrity --

16 JUSTICE KENNEDY: Yes.

17 MR. ELLIS: -- of the judicial
18 proceedings.

19 I think the nature of the guideline --
20 of the error here should inform that analysis.
21 The Petitioner has argued that we deny that
22 it's relevant, but that's not true.

23 We don't think it's grounds to create
24 an exception to the rule. And we don't think
25 it's grounds to -- to change that standard, but

1 we do think it's highly relevant to how it
2 would apply.

3 JUSTICE KENNEDY: So what -- I'm --
4 I'm waiting to write something down.

5 MR. ELLIS: Sure.

6 (Laughter.)

7 MR. ELLIS: We think that in -- in a
8 guidelines case, in the ordinary guidelines
9 case, where -- where the sentence that was
10 imposed is one that is lawful and one that is
11 -- that would be reasonable even if the guide
12 -- error had been brought to the attention of
13 the court and -- and corrected, it's going to
14 be an unlikely case, an unusual case, where
15 that is the type of error that seriously
16 affects the fairness, integrity, and public
17 reputation of judicial proceedings.

18 JUSTICE BREYER: Why?

19 CHIEF JUSTICE ROBERTS: But there may
20 be -- there may be a case where it does, right?
21 I mean, we're talking about whatever the length
22 of time is here.

23 But let's say the guideline says you
24 should get somewhere between 2 and 5 and, in
25 fact -- between 8 and 10, and, in fact, the

1 right guideline was 2 and 5.

2 Would that be a situation where you
3 say the balance worked out so that it would be
4 plain error?

5 MR. ELLIS: I think it's hard to give
6 a concrete answer based on, you know, facts
7 like that. We do think that it is a much more
8 often -- more often will be met in cases where
9 the sentence doesn't fall within the correct
10 range. And we do think, as you noted before,
11 that the magnitude of the error is -- is
12 relevant to the analysis.

13 We also think that what's relevant is
14 that the court could have, even if you couldn't
15 say would have, departed from the -- the range
16 that it's calculated up to the range that was
17 the correct one.

18 JUSTICE BREYER: All right. So is
19 that -- is that -- because I have -- I'm -- I'm
20 -- I'm drawing on what the Chief Justice said
21 now and before, in my mind. And the question
22 in my mind is, should we proceed by category?

23 And people have been focusing, which I
24 agree with, about the -- what Justice Kagan
25 said in drawing on what was written by Justice

1 Gorsuch, what people would think of this, but
2 I'm not thinking of what people would think of
3 this. I'm thinking of what the guidelines are
4 about.

5 And we have, one, there was an error.
6 Two, it's clear and obvious. Three, it did
7 affect the party's rights. He went to jail at
8 least one day more. Okay? So we got those
9 three things.

10 And given those three things, it's
11 probably an arithmetical error, probably, but
12 not definitely. And then we ask, four, did the
13 error affect -- now there are three things here
14 -- fairness, and the second one is what I focus
15 on, I'm not focusing on fairness, I'm not
16 focusing on public reputation of judicial
17 proceedings, I am focusing on the integrity of
18 the judicial proceeding.

19 And the reason I'm focusing on it is
20 because the guidelines have a special purpose
21 and they have a special procedure. The special
22 purpose is to create a kind of uniformity among
23 people who do the same thing in respect to
24 their punishment.

25 And the special procedure is that the

1 Commission and the courts cooperate in
2 gathering statistical information so that the
3 Commission can see how that's working.

4 Now, as soon as you have people who
5 depart for incorrect reasons from what they're
6 supposed to put, you muck up that statistical
7 information.

8 And although you could say with just
9 one or two it doesn't matter, there is no way
10 to distinguish between one or two and 51 or 52,
11 and maybe one across the country but maybe one
12 in a single district does matter.

13 And so all those kinds of technical
14 mistakes that do affect the party, that are
15 clear, do interfere significantly with the
16 congressionally legislated purpose of the
17 guidelines and the effort to implement them.

18 Therefore, considered as a class,
19 because of the difficulty of distinguishing
20 among them, we don't want to go case by case,
21 distinguishing as a class, where 1, 2, and 3
22 are met, so is 4. To the least, there is a
23 presumption to that effect.

24 All right. That's how I would look at
25 it. And what's the answer to that?

1 MR. ELLIS: So a couple responses to
2 that, Justice Breyer. Number 1, in Pepper,
3 this Court recognized that the sort of
4 disparity that Congress is -- was worried about
5 in the guidelines context is not the sort of
6 disparity that's caused by the ordinary rules
7 of appellate procedure.

8 And so we don't think there's any
9 indication here that the kind of disparity that
10 the Congress was -- was concerned about is the
11 type that -- that flows from the ordinary
12 application of the plain error rule.

13 As for the nature of the -- of the
14 guidelines and how they work, we actually think
15 that cuts the other way. As I say, we do think
16 it's relevant. But the difference in a
17 sentencing case is that, unlike in a trial, the
18 outcome isn't binary.

19 So, when you're talking about an error
20 that meets the first three prongs, you're not
21 talking about an error that makes -- creates a
22 reasonable probability of a -- of a different
23 outcome in the trial, that is, a conviction or
24 acquittal. You're talking about an error that
25 creates a reasonable probability of some

1 movement in the sentence.

2 But a defendant in the federal system
3 isn't entitled in most cases to one particular
4 sentence after a duly -- duly being -- been
5 duly convicted. Rather, they're entitled to
6 one of a range of lawful sentences.

7 And the sentencing commission has
8 established a framework in which there is, for
9 any given defendant with a given criminal
10 history and a given offense conduct, there is
11 actually a range of reasonable sentences within
12 that lawful one.

13 And so, when you're talking about an
14 error that may have created reasonable
15 probability of moving within that range, but
16 the sentence that was imposed still falls
17 within the right range.

18 JUSTICE BREYER: Correct. But if you
19 will read, as I hope you would someday, the
20 introduction to the initial version of the
21 guidelines, which happens still to be there,
22 you will see that the purpose of the Commission
23 is first to create a set of guidelines and
24 then, through the procedures I'm talking about,
25 to see what judges actually do in administering

1 the guidelines so that those can be improved
2 and changed over time.

3 Now, if we are looking at not what the
4 judge did under the guideline but what the
5 judge thinks he did under the guideline, but he
6 got the guideline all wrong, then, all right,
7 we can't do it, we can't carry that out.

8 MR. ELLIS: So --

9 JUSTICE BREYER: As I say, we might be
10 able to live with one mistake in one district,
11 but then we have to distinguish which ones, and
12 there's no way to do that.

13 So you might end up with 50 -- the
14 same point I'm making before.

15 MR. ELLIS: Sure.

16 JUSTICE BREYER: So I'm saying what
17 the integrity is that is interfered with is the
18 integrity of the congressionally-mandated
19 purpose and method through which the guidelines
20 are to be implemented.

21 MR. ELLIS: So I don't think there's a
22 record for -- to -- to conclude that the --
23 that the ordinary application of the plain
24 error rule is going to so muck up the system as
25 you say. And if there were, I think that would

1 be maybe perhaps grounds for there -- for
2 someone to consider a change to the standard.

3 JUSTICE GORSUCH: Well, Mr. Ellis, if
4 -- if -- along those lines, though, Congress
5 did speak to this question, the feedback loop
6 problem that Justice Breyer has been alluding
7 to, in 3742(f)(1), where it said if there's an
8 error in calculating the sentencing guideline,
9 the case shall be remanded.

10 JUSTICE BREYER: Yeah, that's true.

11 JUSTICE GORSUCH: Not -- not "may." I
12 take it you'd have us read "shall" to mean
13 "may."

14 MR. ELLIS: So I think that -- that
15 provision, 3742(f)(1), was written to -- to
16 deal with preserved errors in a mandatory
17 system.

18 JUSTICE GORSUCH: So -- well, you
19 haven't -- you haven't suggested that the
20 statute's ineffectual, have you?

21 MR. ELLIS: I'm -- I'm sorry?

22 JUSTICE GORSUCH: You'd have us just
23 ignore the statute then?

24 MR. ELLIS: So I think there's
25 actually a debate.

1 JUSTICE GORSUCH: I think those are
2 your choices, right?

3 MR. ELLIS: But now --

4 JUSTICE GORSUCH: We either ignore the
5 statute or we read "shall" to mean "may."

6 MR. ELLIS: I -- I guess,
7 respectfully, I --

8 JUSTICE GORSUCH: Have you got a third
9 option?

10 MR. ELLIS: -- I -- I think there is.

11 JUSTICE GORSUCH: Okay.

12 MR. ELLIS: Number one, I think in --

13 JUSTICE GORSUCH: So what's the third
14 option?

15 MR. ELLIS: So the third option is to
16 read that to discuss -- to -- to refer to
17 preserved errors and to incorporate the
18 established rules. That's what the Court said
19 in Williams, that that -- that that "may" still
20 is subject to the harmless error rule. We see
21 no reason why it wouldn't be subject to the
22 plain error rule.

23 JUSTICE ALITO: Well, that "shall" is
24 part of the mandatory regime. I thought that
25 was declared unconstitutional in Booker.

1 MR. ELLIS: So that's the first option
2 that he gave me, and I think that's still open
3 to the Court. In -- in Footnote 7 of Greenlaw,
4 this Court specifically flagged that the
5 discussion there is not meant to settle the
6 question as to whether 3742(f)(1) --

7 JUSTICE ALITO: I mean, suppose a
8 district judge said, all right, you know,
9 there's a dispute about which -- what the
10 guidelines range is, and one of the guidelines
11 that's possible here has a range that includes
12 the sentence of 60 months, and I have
13 considered the statutory factors that I am
14 supposed to consider in identifying a just and
15 appropriate sentence and I think 60 months hits
16 it right on the -- the head, and that's the
17 sentence that I'm going to impose and I would
18 impose that sentence no matter what the
19 guidelines said.

20 Would there be a problem there?

21 MR. ELLIS: There would not. That
22 would not -- I think that would not meet the
23 third prong of plain error. I'd say that's not
24 so far off from what happened here. So the --
25 I think we've talked about the factors in our

1 brief.

2 JUSTICE ALITO: But that would be --
3 if -- if "shall" is taken literally, there
4 would still -- that -- that would still be
5 subject to reversal, wouldn't it?

6 MR. ELLIS: I think that's right. I
7 think the Court dealt with that in Williams
8 when it said that the -- the "shall" still is
9 subject to the harmless error rule, and I think
10 in that case it certainly would be harmless.

11 It may be worth going through why we
12 think this particular error is not one that
13 seriously affects the fairness and integrity.
14 So we've numbered out -- laid out a number of
15 factors in our brief from pages 36 to 39, but
16 we think maybe three are the most important
17 here. And the first is that --

18 JUSTICE GORSUCH: Before you -- before
19 we leave that, I'd just like to nail this down
20 --

21 MR. ELLIS: Sure.

22 JUSTICE GORSUCH: -- because the
23 harmless error rule makes sense to me in
24 Williams in light -- in light of the language,
25 yet because the court has to determine that the

1 sentence was imposed as a result of an
2 incorrect application of the sentencing
3 guideline, and if it's harmless, it wasn't
4 imposed as a result of.

5 But how do you -- how -- how do you
6 get plain error in -- into this rule? How do
7 you get, you know, that problem solved?

8 MR. ELLIS: Sure.

9 JUSTICE GORSUCH: Without turning
10 "shall" into "may" or ignoring the statute all
11 together?

12 MR. ELLIS: So, I think you -- you --
13 you get it by -- by recognizing that that
14 provision was passed in the backdrop of plain
15 error, that it was talking about preserved
16 errors, and that there's no reason to think
17 that the Congress meant to overturn it there.
18 And you get it by saying that -- by recognizing
19 that that provision was enacted as part of the
20 mandatory guideline system, that what it was
21 doing was implementing 3742(e), which this
22 Court said was unconstitutional in Booker and
23 therefore struck it.

24 And so I think there's a decent -- a
25 very good argument that, in fact, with it goes

1 the -- the subsequent provision that says when
2 you violate a provision, an unconstitutional
3 provision in 3742(e), here's what you do.

4 And so, in this case, as I say, there
5 are three principal reasons why we think this
6 -- the error does not seriously affect the
7 fairness, integrity, or public reputation of
8 judicial proceedings.

9 Number 1, the sentence that was
10 imposed fell within the corrected range. So we
11 know from that, that in the Sentencing
12 Commission's expert judgment, this is a
13 reasonable sentence for a defendant with
14 Petitioner's criminal history and offense
15 conduct, for a typical defendant in that
16 position.

17 Number 2, the district court imposed a
18 sentence within the range it thought was
19 appropriate. And so we know from that, or can
20 infer, that the district court concluded that
21 the Petitioner was, in fact, a fairly typical
22 defendant with this criminal history and
23 offense conduct.

24 JUSTICE BREYER: Wait just a second.
25 Just in case you know this, I mean, I should

1 know it, but -- I wrote it.

2 MR. ELLIS: I probably should too.

3 JUSTICE BREYER: But I don't
4 necessarily. Did we declare this -- this
5 section unconstitutional in Booker? I mean, we
6 tried to save as much as we could, and I don't
7 know why we wouldn't have saved this one.

8 MR. ELLIS: No, the Court didn't.
9 There was a -- there was a dispute about
10 whether (f) would go down with (e).

11 JUSTICE BREYER: Yeah.

12 MR. ELLIS: It was subsequently --
13 Justice Scalia subsequently wrote about it in a
14 concurrence in Rita, and then the Court wrote
15 about it in Footnote 7 of the majority opinion
16 in Greenlaw.

17 JUSTICE BREYER: My goodness, that's
18 very good. That's very good. And so what --
19 and so we kept it or we didn't?

20 MR. ELLIS: It's an open question, I
21 think.

22 JUSTICE BREYER: It's an open
23 question, okay. Thank you.

24 (Laughter.)

25 MR. ELLIS: We don't think it needs to

1 be resolved in this case because we do think
2 it's talking about preserved errors and the
3 plain error rule would apply.

4 Number 3 -- the number 3 reason is the
5 district court imposed not just a sentence
6 pegged to the bottom or top of what it thought
7 was the correct range but somewhere in the
8 middle, albeit in the bottom half.

9 JUSTICE KAGAN: Well, pretty -- pretty
10 low, you know, just over the bottom. But I
11 think it -- it seems to me all these, 1, 2, and
12 3, run smack into Molina-Martinez, which, you
13 know, basically rejected all of these arguments
14 and said it doesn't matter if your sentence
15 ends up in the middle because the -- the range
16 does something. It anchors people's sentencing
17 determinations, and it anchors them
18 sufficiently so that even if you could have
19 reached that sentence regardless of the range
20 being wrong, we think the error in the range
21 matters and is likely to matter in the great
22 majority of cases.

23 And you're suggesting that we ignore
24 everything we said about that now.

25 MR. ELLIS: Not at all, Your Honor. I

1 think the Court was dealing very clearly with
2 that third prong in Molina-Martinez. And the
3 question under that third prong, as we see it,
4 is whether that creates, as the Court said, a
5 reasonable probability of a different outcome.
6 That's a predictive judgment that can be based
7 on empirics, and the Court reasonably did so in
8 Molina-Martinez. And it doesn't matter for
9 that as to whether the change was a day or 10
10 years. It just doesn't. The question is
11 whether there's a reasonable probability of a
12 different outcome. And there is.

13 The question under the fourth prong is
14 whether that's the sort of error that's so
15 egregious we won't submit it to the ordinary
16 rules of party presentation and forfeiture.
17 And that's a broader inquiry, we think, and one
18 in which it matters that it's a day or 10 years
19 and one in which it matters that this is the
20 sort of error that the defendant had every
21 opportunity to raise and, in fact, was uniquely
22 competent to raise.

23 And it matters that the district
24 court, even if we can't say definitely would
25 have, although there's some indication that it

1 might -- that he could have, and that sentence
2 would have been reviewed very deferentially on
3 appeal, and it would have been a reasonable
4 one.

5 JUSTICE SOTOMAYOR: I'm sorry --

6 MR. ELLIS: All those things weigh in,
7 we think.

8 JUSTICE SOTOMAYOR: -- when -- when
9 you're talking about reasonableness, it seems
10 like you're doing substantive reasonableness,
11 which is what the Fifth Circuit was doing with
12 its standard. It borrowed a substantive due
13 process right or standard,
14 shock-the-conscience, and applied it to this
15 sentence.

16 And it sounds like, with all your
17 three reasons and your argument, which is the
18 only thing that matters is that it doesn't --
19 that this is a reasonable sentence no matter if
20 it's not the sentence the district court would
21 have given. That's basically your argument,
22 isn't it?

23 MR. ELLIS: We think that matters.

24 JUSTICE SOTOMAYOR: All right. But
25 why? When the three prongs of the fourth --

1 the three arms of the fourth prong say
2 fairness, integrity, or -- I've forgotten the
3 fourth, but it's in --

4 MR. ELLIS: Public reputation.

5 JUSTICE SOTOMAYOR: Public reputation.
6 "Or" is disjunctive, not conjunctive.

7 MR. ELLIS: That's right.

8 JUSTICE SOTOMAYOR: So why isn't it
9 unfair?

10 MR. ELLIS: We think it's not unfair
11 because --

12 JUSTICE SOTOMAYOR: But that's a
13 procedural right. That's not a substantive
14 right.

15 MR. ELLIS: So a couple responses to
16 that, Your Honor.

17 We think it's not unfair because the
18 contemporaneous objection rule is the ordinary
19 rule, and we think in the ordinary case, that
20 applying that rule and the consequences of that
21 rule is fair.

22 We think it's -- it's reasonable to
23 look at the substantive result --

24 JUSTICE SOTOMAYOR: That's not what
25 this fourth prong says. What this fourth prong

1 appears to say is the fairness, integrity, or
2 public reputation of our judicial system.
3 What's fair about an error that the judge, in
4 part, was a part of that could be easily
5 corrected and that might very well result in a
6 lower sentence to a defendant? What's fair
7 about not correcting that error?

8 MR. ELLIS: I think what's fair is
9 that -- I think it -- a system has to have
10 rules and those rules have to have
11 consequences. And I think that -- that people
12 would understand that, and in the ordinary
13 case, that it does -- just the fact that the
14 defendant didn't raise this error in a timely
15 manner is sufficient reason to say that we're
16 not going to correct it on appeal.

17 You noted the cost, and that's come up
18 several times in this colloquy, in our -- in
19 our discussion, and I think that the cost may
20 be a reason to change the standard, but we
21 don't think it's -- it's a reason to -- that
22 the Court should -- should consider in applying
23 the standard.

24 We don't think, for example, that two
25 otherwise identical trial errors should be

1 subjected to a different standard because one
2 came from a two-day trial and the other a
3 two-month trial and, therefore, would be more
4 expensive to correct.

5 JUSTICE KAGAN: Well, but there again
6 Molina-Martinez is against you, right, because,
7 in that case, we talked about the fact that a
8 remand for resentencing -- I'm quoting now --
9 "while not costless, does not involve the same
10 difficulties as a remand for retrial."

11 And we talked about the government had
12 this concern over judicial resources, and we
13 specifically rejected that. And we said, you
14 know, that the resources are not sufficient for
15 us to take that seriously here.

16 MR. ELLIS: So what the Court said is
17 that it's not the same as a retrial. What the
18 Court also said is that it doesn't really
19 matter because it's not relevant to the
20 standard under the third prong, and we agree
21 it's the same under the fourth prong, that the
22 costs of resentencing aren't relevant to the
23 application of whether the error itself is one
24 that significantly affects the fairness,
25 integrity, and public reputation of judicial

1 proceedings.

2 JUSTICE GORSUCH: If we're going to
3 compare the -- the cost empirically of the two
4 systems, wouldn't we have to account for the
5 fact that under the regime you propose there
6 are a lot more appeals than the courts of
7 appeals have to resolve?

8 In the circuits where this rule exists
9 or this presumption exists, the government
10 frequently confesses error to mathematical
11 mistakes in the guidelines applications and it
12 automatically goes back for resentencing
13 without the need of -- of appellate resources
14 being involved.

15 Should that be a cost that we should
16 consider or -- or is that one you would have us
17 ignore?

18 MR. ELLIS: So, to be clear, it's my
19 position that cost is not relevant to applying
20 the standard. It might be --

21 JUSTICE GORSUCH: Are you including
22 the fourth prong as well? It's irrelevant
23 there too?

24 MR. ELLIS: Yes. And I also think
25 that it's not clear empirically that that would

1 be true.

2 I think the -- the point of the plain
3 error rule and the narrowness, the reason it's
4 strictly circumscribed, is to maintain the
5 incentives in the first instance to raise those
6 errors, so you never get to the point where
7 someone's filing an appeal about an error they
8 didn't raise.

9 JUSTICE GORSUCH: That's -- that's
10 just an argument against the plain error rule
11 all together, isn't it?

12 MR. ELLIS: No, I don't think it is.
13 It's an error for -- for keeping the plain
14 error rule to be a narrow one, to be strictly
15 circumscribed, to maintain the balance between
16 Rule 51 and Rule 52 and maintain the
17 incentives. That's what the Court has always
18 said about what it's concerned about in
19 applying the plain error rule.

20 JUSTICE KENNEDY: Are there --

21 JUSTICE ALITO: If the plain error --

22 JUSTICE KENNEDY: -- are there some
23 courts -- and I -- I don't mean to be facetious
24 because I think I remember that -- are there
25 some courts of appeals that just write the

1 district judge a letter and say would it make a
2 difference?

3 MR. ELLIS: So there is this limited
4 remand procedure that the Court identified --

5 JUSTICE KENNEDY: Limited remand?

6 MR. ELLIS: Yes. So the Court
7 identified that in Molina-Martinez as a way to
8 mitigate the costs. It's really about the
9 third prong because the third prong is, is
10 there a reasonable probability of a different
11 sentence?

12 And so you can answer that. Ask the
13 judge. But if the judge says yes, there's
14 still the fourth prong and there's still the
15 full resentencing that follows.

16 Post-Molina-Martinez, we haven't found
17 any examples of courts utilizing that for a
18 guidelines range error. In fact, the Seventh
19 Circuit has said that's not about guideline
20 range errors. That's about the Booker errors
21 and whether they treated the guidelines as
22 advisory or mandatory.

23 If there are no further questions,
24 we'd ask the Court to affirm the judgment
25 below.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Ms. Davidson, seven minutes.

4 REBUTTAL ARGUMENT OF KRISTIN L. DAVIDSON
5 ON BEHALF OF THE PETITIONER

6 MS. DAVIDSON: I'd like to start with
7 what Justice Breyer said about the guidelines
8 as being a specialized body of guidance that
9 has specialized proceedings.

10 And we can't ignore the context and
11 the essential framework of the guidelines and
12 the Court's decisions regarding how those
13 guidelines function just because we're under
14 the fourth prong.

15 And so we disagree that the -- that
16 the factors that the government considers are
17 even appropriate because they're directly at
18 odds with the clear guidance the Court has
19 provided.

20 I also want to address the discussion
21 about 3742. I agree that whether or not it's
22 still viable doesn't have to be decided today,
23 but I do think it provides clear congressional
24 judgment that at the point at which substantive
25 rights are affected, it -- it's at least

1 Congress's intention that the error is serious
2 enough that it warrants remand.

3 In conclusion, prongs 1, 2, and 3 have
4 been met. The Fifth Circuit applied the wrong
5 legal standard under the fourth prong. The
6 government presents factors that are
7 appropriate for a district court to consider.

8 And that's why we ask this Court to
9 reverse the judgment and remand, with
10 instructions that the sentence be vacated and
11 that this case be remanded to the district
12 court for resentencing.

13 JUSTICE ALITO: Would you draw a
14 distinction between guidelines errors and other
15 sentencing errors?

16 MS. DAVIDSON: Yes.

17 JUSTICE ALITO: And what would be the
18 ground for that?

19 MS. DAVIDSON: It would depend on the
20 direct effect the particular sentencing error
21 would have on the outcome, and whether or not
22 the error frustrated the purposes served by the
23 rule in question. And that could be different
24 than how the guidelines function.

25 JUSTICE ALITO: Suppose there was a

1 question about whether a defendant was properly
2 treated as a recidivist.

3 MS. DAVIDSON: That would -- if I
4 understand the question correctly, it would be
5 a district court's evaluation of the conduct as
6 -- as opposed to the guideline. If it's purely
7 conduct --

8 JUSTICE ALITO: No, I'm talking about
9 a non-guidelines issue, a statutory issue where
10 there's a heavier sentence imposed based on
11 prior criminal conduct.

12 MS. DAVIDSON: If it were erroneous
13 and that's what the -- if it were erroneous and
14 the district -- and the record demonstrated
15 that the district court was influenced in -- in
16 choosing its sentence because of that error,
17 then I think that it would reflect an error
18 that improperly influences the discretion of
19 the district court and could be serious enough
20 to meet all four prongs.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted.

24 (Whereupon, at 11:11 a.m., the case
25 was submitted.)

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