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

2 (10:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 14-8913, Molina-Martinez v.  
5 United States.

6 Mr. Crooks.

7 ORAL ARGUMENT OF TIMOTHY CROOKS

8 ON BEHALF OF THE PETITIONER

9 MR. CROOKS: Mr. Chief Justice, and may it  
10 please the Court:

11 As this Court recognized in Peugh v.  
12 United States, the United States Sentencing Guidelines  
13 remain uniquely central to Federal sentencing even where  
14 the district court ultimately chooses to sentence  
15 outside the Guidelines.

16 Because of the strong anchoring effect of  
17 the Guidelines, as also recognized in Peugh, the natural  
18 effect of an erroneously high Guideline range is to skew  
19 a defendant's sentence higher than it would have been  
20 under the correct range. Yet when the district court  
21 has elected to sentence within what it believes to be  
22 the correct range, it is typically very difficult to  
23 determine what the district court would have done had it  
24 been presented with the correct lower range.

25 JUSTICE GINSBURG: Mr. Crooks, you didn't

1 cite 18 U.S.C. 3742(f), and I wondered why, because it  
 2 reads: "If the court of appeals determines that the  
 3 sentence was imposed as a result of an incorrect  
 4 application of the Sentencing Guidelines, the court  
 5 shall remand the case for further sentencing proceedings  
 6 with such instructions as the court considers  
 7 appropriate."

8 So this seems to say that, if the  
 9 incorrect -- there was an incorrect application of the  
 10 Guidelines, then a remand is mandatory.

11 MR. CROOKS: It -- it does appear to say  
 12 that, Justice Ginsburg; however, I believe in this  
 13 Court's decision in Williams v. United States, the Court  
 14 said that Guideline errors are nonetheless subject to  
 15 the normal doctrines of harmless and plain-error review  
 16 and not subject to automatic reversal.

17 JUSTICE KENNEDY: And -- and so it's not  
 18 clear that there was a Guidelines violation here. The  
 19 Guidelines were incorrectly calculated, but it's not  
 20 clear that at the end of the day there was a violation.

21 I mean, is that really your response to  
 22 Justice Ginsburg, or am I oversimplifying?

23 MR. CROOKS: There was a misapplication of  
 24 the Guidelines, but harmless and plain-error doctrines  
 25 apply to determine the remedy for that violation or

1 misapplication.

2 JUSTICE KENNEDY: Well, there was a  
3 miscalculation. I'm not sure if there was a  
4 misapplication. That's -- I -- I suppose that's the  
5 issue in the case. Or -- or is this --

6 MR. CROOKS: We believe --

7 JUSTICE KENNEDY: -- is this quibble wrong?

8 MR. CROOKS: We believe that there was a  
9 misapplication because the Guidelines were incorrectly  
10 calculated with respect to the defendant's criminal  
11 history. And that is the type of thing that the statute  
12 Justice Ginsburg was referring to says you should remand  
13 for, subject, of course, as this Court says in Williams,  
14 to the normal doctrines of harmless and plain error.

15 And we're here today, of course, on a  
16 plain-error case because we have a Guideline  
17 misapplication that unfortunately was not discovered by  
18 anyone below.

19 JUSTICE ALITO: Well, you say that when  
20 there is a -- excuse me -- a miscalculation of the  
21 Guidelines range, that should give rise to a rebuttable  
22 presumption that the miscalculation affected the  
23 sentence that the judge imposed.

24 MR. CROOKS: That's correct, Justice Alito.

25 JUSTICE ALITO: And what does that mean?

1 Does that mean that the -- the burden of persuasion  
2 shifts to the prosecution?

3 MR. CROOKS: We believe that the Court's  
4 opinion in Olano actually supports a conceptualization  
5 that it simply gives the defendant an alternative way to  
6 satisfy his burden of persuasion, which is done in a  
7 generalized rather than a case-specific way.

8 JUSTICE ALITO: Well, suppose there's no  
9 evidence, as -- as will -- may very often be the case.  
10 Suppose the judge says -- imposes a sentence within what  
11 the judge believes to be the Guideline range but says  
12 nothing whatsoever beyond that, and it turns out that  
13 that is not the correct Guidelines range, so that  
14 there's no evidence one way or the other about what the  
15 judge would have done had the judge understood the  
16 correct Guidelines range.

17 What outcome in that situation?

18 MR. CROOKS: In that situation, typically  
19 the result would be that the third prong of plain-error  
20 review would be satisfied and the defendant would have  
21 shown an effect on his substantial right.

22 JUSTICE ALITO: So that means that the  
23 burden of persuasion in that situation is on the  
24 prosecution.

25 MR. CROOKS: Again, we may be quibbling

1 about terms, but we believe that the defendant satisfies  
2 his burden of persuasion with generalized evidence  
3 tending to show the -- that the natural effect of a  
4 Guideline error is to affect the sentence.

5 JUSTICE SOTOMAYOR: I -- I don't think I  
6 understand the difference between general and specific.  
7 Evidence is evidence. And you draw inferences from all  
8 sorts of circumstances. So I don't know why you call  
9 this general. It's evidence. Okay?

10 Let's assume the Guideline was 70 to 100.  
11 The erroneous Guideline was 80 to 100, and the right  
12 Guideline was 70 to 100.

13 Would we -- you draw a general inference  
14 that the corrected Guideline would have made any  
15 difference on that sentence?

16 MR. CROOKS: We would, Your Honor. Our  
17 position is that anytime the range is not the correct  
18 range, there should be a presumption that it affected --

19 JUSTICE SOTOMAYOR: So what changed the  
20 judge's mind in terms of the facts? He gave you the max  
21 when it was 80 to 100. What's going to change his mind  
22 about 70 to 100?

23 MR. CROOKS: Because the fact that the  
24 Sentencing Commission gave a different range in its  
25 expert advice and its expertise is something that this

1 Court has recognized factors heavily into district  
2 courts' decisions.

3 JUSTICE SOTOMAYOR: Let's assume I don't  
4 believe there's a presumption, okay? It's very hard for  
5 me to understand what difference between 70 and 100 and  
6 80 and 100 could make. In this case, I have a  
7 difficulty understanding what difference the -- the  
8 Criminal History Category would make.

9 But I'll give you another example of  
10 overlapping Guidelines: a defendant who's never  
11 committed a crime and a defendant who has committed a  
12 crime. I would be more inclined to say that an  
13 inference from the facts is that a defendant who's never  
14 been committed of a crime, that the judge might take  
15 that into consideration, even in an overlapping  
16 Guideline case, and send it back. Because we don't know  
17 how much mercy that judge might have shown. But if a  
18 defendant like yours has many criminal convictions, I'd  
19 be pretty close to saying I don't think he's going to  
20 make much of a different choice.

21 MR. CROOKS: But on the other hand, Your  
22 Honor, in this case, despite Mr. Molina-Martinez's  
23 criminal history, the district judge imposed the bottom  
24 of what he believed the Guidelines to be, despite the  
25 government's request for a sentence at the top end of



1 the Guideline range. And our position is that the  
2 natural pull of the Guidelines is so strong, so  
3 influential, that it is going to pull the judge toward  
4 the erroneous range, and therefore --

5 JUSTICE SCALIA: Mr. Crooks, let -- let me  
6 ask you this: You fail to object to the erroneous use  
7 of the -- of the Guidelines. If you had objected, what  
8 would the situation be? You would have to establish  
9 that the error was not harmless, or the -- the  
10 government would have to establish that it was harmless,  
11 right? Would there be a presumption of nonharmlessness?

12 MR. CROOKS: I believe under Rule 52(a)  
13 there is in effect a presumption of nonharmlessness that  
14 the government must rebut. The government must show  
15 that the error was harmless.

16 JUSTICE SCALIA: To show that the error was  
17 harmless is the same as saying there is a presumption  
18 that it wasn't harmless.

19 MR. CROOKS: I believe --

20 JUSTICE SCALIA: That's -- that's not the --

21 MR. CROOKS: -- the facts --

22 JUSTICE SCALIA: -- not the way I normally  
23 talk. I would normally say the burden -- the burden of  
24 establishing it is on the government, but I wouldn't say  
25 there's a presumption.

1 MR. CROOKS: But --

2 JUSTICE SCALIA: The government is wrong.

3 MR. CROOKS: But if the government makes no  
4 effort to do anything with respect to harmlessness, then  
5 the case will be reversed, or there will be --

6 JUSTICE GINSBURG: The -- the government --  
7 the government says that you are, in effect, making this  
8 standard harmless. That you -- you admit that this is a  
9 plain-error case, and yet, your presumption, effectively  
10 the burden is on the government, is making this into a  
11 harmless-error situation.

12 MR. CROOKS: It is, but -- in a way, but  
13 only for the limited class of errors that are Guideline  
14 range errors. Under Rule 52(a), the government must  
15 show harmlessness for every type of error.

16 CHIEF JUSTICE ROBERTS: I --

17 JUSTICE KENNEDY: Under Justice Alito's  
18 questioning, he asked if -- isn't it true that you have  
19 the burden of persuasion at the outset to show that  
20 there was a miscalculation? Once you meet that, his  
21 question was does the government then -- I believe his  
22 question was -- does the government then have the burden  
23 of persuasion to show no error. He was careful not to  
24 use the word "presumption," or at least he did not use  
25 the word "presumption."

1           Is that the proper way to think of this case  
2   in your view? Another way of asking the question is --  
3   continues with what Justice Alito was inquiring: Do we  
4   need to use the word "presumption" here?

5           MR. CROOKS:           I don't think the word  
6   "presumption" is absolutely necessary. It is the word  
7   that the Court used in Olano, but I think it -- it's  
8   really viewed more as who bears the risk of  
9   nonpersuasion. And what we're asking is that in the  
10   very limited context of a Guideline-range error, the  
11   defendant should be deemed to have carried his burden by  
12   the generalized evidence that this Court recognized in  
13   Peugh v. United States, that the Guidelines do affect  
14   sentences and that Guideline ranges do affect what the  
15   district court does.

16          JUSTICE SCALIA:       Where have we done that  
17   before? I mean, we had dictum in United States v.  
18   Olano, which said that there may be a special category.  
19   There may be a special category of forfeited errors that  
20   can be corrected, regardless of their effect on the  
21   outcome. But this issue need not be -- be addressed.  
22   And you're saying -- and we have not found any such  
23   category in the past. You're saying you -- we have  
24   finally -- finally discovered one category that meets  
25   that dictum in Olano.

1           MR. CROOKS:           Well, the lower courts -- this  
2     Court has not found a presumption since Olano, but the  
3     Court did give careful consideration to whether a  
4     presumption should apply to the particular type of error  
5     at issue in Olano.

6           But more importantly, the lower courts have  
7     looked to what this Court said in Olano, and in a tiny  
8     handful of -- of errors, they have adopted just such a  
9     rebuttal.

10          JUSTICE SCALIA:       That's more important?  
11     That the lower courts have established the law for us?

12          MR. CROOKS:           It's not --

13          JUSTICE SCALIA:       It seems to me we establish  
14     the law, and we have never found anything to come within  
15     that language in Olano. And it's dictum, and maybe it's  
16     wrong.

17          MR. CROOKS:           We believe that it's not wrong,  
18     and that the lower courts' decisions, of course, do not  
19     bind the Court, but they are expressive of the  
20     experience of the lower courts.

21          JUSTICE KAGAN:        But, Mr. Crooks, if I could  
22     take you back to your answer to Justice Kennedy. I take  
23     it that you don't need to use the word "presumption,"  
24     right? You're -- you're -- the burden that you have to  
25     carry in -- in a -- in plain-error review is you have to

1 show a reasonable probability. And your argument would  
 2 work just fine if you dropped the word "presumption";  
 3 isn't that right? And you just said that the anchoring  
 4 effect of the Guidelines creates a reasonable  
 5 probability that the outcome would be different in a  
 6 case in which the Court initially thought that the range  
 7 was different from what it turned out to be. Sort of  
 8 the end. Who needs the word "presumption"?

9 MR. CROOKS: We agree, Justice Kagan.  
 10 Unfortunately, the Fifth Circuit did not, so.

11 But we do believe that -- that however you  
 12 conceptualize it, the draw, the pull of the Guidelines  
 13 is because of the unique centrality of the Guidelines  
 14 sufficient to establish the reasonable probability of a  
 15 different result.

16 JUSTICE SCALIA: What good does it do to say  
 17 that the Guidelines are advisory, which is what we have  
 18 held, if, when you mistake them or when you don't apply  
 19 them properly, you automatically get a reversal, which  
 20 is what you're arguing here? Does that sound like an  
 21 advisory Guideline?

22 MR. CROOKS: Well, Justice Scalia, we  
 23 disagree. It's an automatic reversal. Besides the  
 24 third prong of plain-error review, there are two other  
 25 very stringent prongs, the second and the fourth that

1 must be met before there can be a reversal on plain  
 2 error. But with respect to the question of whether it  
 3 makes the Guidelines any less advisory, we don't believe  
 4 that it does. It simply recognizes the fact that even  
 5 though they're now advisory, district court judges still  
 6 find them influential and persuasive as this Court  
 7 indicated they should do in Rita.

8 JUSTICE GINSBURG: How did this -- how did  
 9 this error come to light? Everybody missed it in the  
 10 district court. It started with the probation officer,  
 11 the judge, and the defendant. How did -- how was it  
 12 found out?

13 MR. CROOKS: Well, actually, it was missed  
 14 initially, even on appeal, because I wrote an Anders  
 15 brief, and the defendant wrote a response and pointed  
 16 out that one of my factual premises was incorrect.

17 JUSTICE GINSBURG: So the defendant -- the  
 18 defendant brought -- detected the error.

19 MR. CROOKS: Correct. And when I saw it, I  
 20 realized immediately I had made a mistake, and I filed a  
 21 merits brief with the Fifth Circuit instead of an Anders  
 22 brief. And it proceeded to oral argument in the  
 23 Fifth Circuit. The government conceded that there was  
 24 an error that was plain, but they disputed that it  
 25 affected substantial rights because of the overlap of

1 the Guidelines.

2 JUSTICE ALITO: Your argument has some  
3 appeal on the facts of this case because the judge  
4 sentenced the defendant to a sentence at the bottom of  
5 what the judge understood to be the Guideline range.  
6 But would your argument apply to any sentence that was  
7 within both the original and the correct Guideline  
8 range?

9 Suppose the judge here had sentenced your  
10 client to 87 months, which I -- I think is the top of  
11 the correct Guideline range. Would the same -- would  
12 you -- can you infer from that that the judge would not  
13 have imposed that sentence had the judge understood  
14 that -- the judge thought that the top was 96, judge  
15 chose 87, that happens to fall within the correct  
16 Guideline range. On those facts, would you infer that  
17 the judge would have imposed a lesser sentence?

18 MR. CROOKS: Our answer is that whenever the  
19 range changes in the absence of any other indication,  
20 you should infer that the sentence -- there was at least  
21 a reasonable probability that the sentence would change.

22 There may be other contextual factors  
23 besides the high end of the Guidelines that would allow  
24 the government to show that in fact it wouldn't have  
25 made a difference. But if I understand Your Honor's

1 question correctly, with only the difference in the  
2 range, we believe that that is a situation where you  
3 should assume there's a reasonable probability.

4 JUSTICE ALITO: Why would you --

5 CHIEF JUSTICE ROBERTS: I was -- I was just  
6 going to say under that -- I suppose the defendant  
7 really wouldn't insist on a resentencing if that were  
8 the -- those were the facts, would he?

9 In other words, it was incorrectly a maximum  
10 of 87 and he got the maximum, you say, oh, well the  
11 correct one could give you up to 96. If I understand  
12 it, the defendant is not going to raise that objection,  
13 is he?

14 MR. CROOKS: If he believes that he could  
15 get more -- but if -- for example, in this case the  
16 incorrect range was 77 to 96. If he got 96, he might  
17 well insist upon appealing because he might think the  
18 judge would give me the high end of the correct range.

19 JUSTICE ALITO: How about -- I mean, the  
20 question is, if the judge -- the judge thinks it's 77 to  
21 96 and chooses 87, which is within that range, and it  
22 turns out the correct range is 70 to 87, so the 87 is  
23 within the correct range as well -- it's the top of the  
24 correct range -- what -- what reason would there be to  
25 infer -- why would there be a natural probability that



1 the judge would have given a lesser sentence if the  
2 judge thought that the top was 87 as opposed to 96? The  
3 judge obviously thought in that situation the correct  
4 sentence is -- is 87.

5 MR. CROOKS: With respect, I have to  
6 disagree with your premise because I don't believe  
7 judges just pick numbers. I believe they look at the  
8 Guideline range and typically determine whether the  
9 defendant should be low, middle, or high. So the  
10 Guideline range does make a difference. And it --

11 JUSTICE BREYER: Here's an example: Suppose  
12 a person -- everybody -- presentence report, government,  
13 defense lawyer, prosecutor, everybody -- thought he's in  
14 column 2. Okay? He's not a first-timer. And now it  
15 turns out they made a mistake. He is a first-timer.  
16 And so being a recidivist, the presentence report says  
17 put him at the top of the range. Now it's a lower  
18 range, but they know he's not a recidivist.

19 Depending on the circumstance they might  
20 say, Hey, no, put him in the middle of the first-timers.  
21 I don't know. You don't know. They don't know. Nobody  
22 knows. And so the question is, we don't know, really,  
23 what the judge will do upon remand. Common sense  
24 suggests ask him. That's what it suggests. And so  
25 you're worried about whether you can work the language

1 around to let you do that, what is common sense.

2 I'll have some questions for the other side,  
3 which I suspect you can, but nonetheless, isn't that the  
4 issue?

5 MR. CROOKS: That -- that is the issue. And  
6 we --

7 JUSTICE SCALIA: Let's factor in the fact  
8 that you did not object. Surely -- surely there ought  
9 to be a penalty for that. We don't treat cases where  
10 there has been an objection the same as we treat cases  
11 where -- where there has not been. Sending it back  
12 makes total sense when there is an objection that's --  
13 that's wrongfully denied.

14 JUSTICE BREYER: Yes.

15 JUSTICE SCALIA: But -- but where you or  
16 defense counsel has, in effect, assisted the Court's  
17 error, it seems to me we demand more.

18 MR. CROOKS: And the Court does demand more.  
19 It is much more difficult to secure relief on  
20 plain-error review because of the other prongs of the  
21 rule.

22 JUSTICE BREYER: But anyway, we've got  
23 progress, because it does make sense. And if we've got  
24 progress, it is not a punishment to the lawyer for not  
25 having raised it. It is a set of circumstances where

1 the result will make sense without unnecessary  
2 administrative problems.

3 JUSTICE SCALIA: It's not a matter of  
4 punishing the lawyer, is it? It's a matter of  
5 establishing a system --

6 JUSTICE BREYER: Yes, that's right.

7 JUSTICE SCALIA: -- that induces lawyers to  
8 make objections when objections are proper and -- and  
9 not to mousetrap the -- the Court into -- into error  
10 by -- by not -- by not objecting.

11 MR. CROOKS: But we have --

12 JUSTICE SCALIA: What are the other two  
13 elements that you think serve that purpose?

14 MR. CROOKS: Well, first, the second and the  
15 fourth prong is the answer to your question. But first  
16 I have to say --

17 JUSTICE SCALIA: But what are the second and  
18 fourth prongs?

19 MR. CROOKS: The second prong is that the  
20 error must be plain, which means it's not subject to  
21 reasonable dispute.

22 JUSTICE SCALIA: Well, that's no big deal.  
23 It -- that doesn't satisfy my problem.

24 MR. CROOKS: Well, many Guideline errors are  
25 not. We have had plain-error relief denied repeatedly

1 on the second prong.

2 The fourth prong, that it must seriously  
3 affect the fairness, integrity, and public reputation of  
4 judicial proceedings, is another hurdle that the  
5 defendant must meet on plain-error review.

6 A person is not in a better position by not  
7 objecting. A person would be foolish not to make an  
8 objection that would lower the range because it's always  
9 better in a sentencing proceeding to start out with a  
10 lower range, even if you're going to ask for something  
11 below the Guidelines.

12 JUSTICE GINSBURG: It's not disputed here.  
13 Everybody missed it. You missed it, and you -- you were  
14 candid in saying even on appeal you were ready to file  
15 an Anders brief until the defendant himself.

16 MR. CROOKS: Yes, Your Honor. In fact I did  
17 file an Anders brief.

18 JUSTICE SCALIA: It's -- it's not enough  
19 that the lawyer did not intentionally do it. We -- we  
20 demand of lawyers that they do it. They're supposed to  
21 assist the Court. And where the objection has not been  
22 made, it's -- it's an entirely different case when it  
23 comes up here.

24 MR. CROOKS: But I would suggest,  
25 Justice Scalia, that it is still far more difficult to

1 secure relief on plain-error review, even with the tweak  
2 to the third prong that we're suggesting, than it is to  
3 just make the objection in the first place.

4 JUSTICE ALITO: Well, can you give us an  
5 example of a Guidelines error that would qualify for --  
6 qualify as a plain-error except for its failure to  
7 satisfy the fourth prong of Olano?

8 MR. CROOKS: Yes. In our reply brief on  
9 page 22, we cited the Fifth Circuit's decision in  
10 United States v. Duque-Hernandez. And in that case, the  
11 Fifth Circuit actually pretermitted the first three  
12 prongs of plain-error review and said even if you meet  
13 these, you lose on the fourth prong for three different  
14 reasons.

15 First, the Court said that the defendant had  
16 in fact admitted the criminal conduct that underlay the  
17 controverted Sentencing Guideline enhancement.

18 Second, there was an issue of quasi dirty  
19 hands because the defense attorney had failed to make an  
20 objection that the same defense attorney had made in a  
21 previous illegal reentry case.

22 And third, the defendant had an  
23 extraordinarily serious criminal history involving drugs  
24 and guns. And that is an example, one example -- there  
25 are others -- where the Fifth Circuit has applied the

1 fourth prong very stringently.

2 JUSTICE GINSBURG: Who would apply --

3 JUSTICE KENNEDY: Well, in that case would  
4 you still send it back to the district judge to ask him  
5 in the case you just put?

6 MR. CROOKS: The --

7 JUSTICE KENNEDY: We're trying to -- let's  
8 assume that we're going to give you some relief -- that  
9 was far from clear, but let's assume that. We're trying  
10 to find out what the rule ought to be, what the standard  
11 ought to be. In the case you just explained to us, in  
12 your view, should that case go back to the district  
13 court?

14 MR. CROOKS: The case that I just described?

15 JUSTICE KENNEDY: Yes.

16 MR. CROOKS: I -- I don't know whether I  
17 necessarily agree with that application of the fourth  
18 prong of plain-error --

19 JUSTICE GINSBURG: Who applies the first  
20 prong in the first instance? Is it --

21 MR. CROOKS: The court of appeals.

22 JUSTICE GINSBURG: So you're saying that  
23 even if the court of appeals gets through the first  
24 three, it doesn't remand for the district court to -- to  
25 apply the fourth test. It -- the court of appeals does

1     that itself?

2           MR. CROOKS:           Correct.   And if the defendant  
3     cannot satisfy the fourth prong of plain-error review,  
4     there is no reversal and no resentencing.

5           JUSTICE KAGAN:        So I would think that the  
6     answer to Justice Kennedy's question is if the court of  
7     appeals really thinks it's not going to give relief  
8     because of the fourth prong, why would you bother  
9     remanding it?

10          MR. CROOKS:           Why -- why would the court --

11          JUSTICE KAGAN:        Why would -- why would the  
12     court of appeals bother remanding it?  They could  
13     legitimately say it doesn't matter.  We're not going to  
14     remand it because whatever happens on remand, we're not  
15     going to give relief based on the fourth prong.  And if  
16     that's the case, why would the court of appeals remand  
17     it at all?

18          MR. CROOKS:           The court of -- if the  
19     defendant does not -- if the court of appeals is not  
20     satisfied that the defendant has met his burden on the  
21     fourth prong, it will not be remanded; the judgment will  
22     be affirmed.

23           And I would like to save the remainder of my  
24     time for rebuttal.

25          JUSTICE GINSBURG:       And may I just ask you to

1 answer the government's position that if there's no  
2 presumption, it's not in your question presented so --  
3 so that you will lock into the way you phrased the --  
4 the question, that "should an appellate court presume"?

5 MR. CROOKS: Just very briefly, our answer  
6 is that the Court in the cases we cited in the reply  
7 brief has gone on to consider the merits of a case after  
8 deciding a legal question presented by the Petitioner.  
9 And certainly, the Court always has the power and the  
10 discretion to address a question, even that was not in  
11 the question presented or addressed in the court below.

12 And here, the court below undisputably  
13 addressed it, and even if the Court does not endorse the  
14 presumption we ask for, it would be useful guidance to  
15 the lower courts on the application of the third prong.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
17 Mr. Meisler.

18 ORAL ARGUMENT OF SCOTT A.C. MEISLER

19 ON BEHALF OF THE RESPONDENT

20 MR. MEISLER: Mr. Chief Justice, and may it  
21 please the Court:

22 This Court should not adopt the presumption  
23 that all misapplications of the Sentencing Guidelines  
24 are presumptively prejudicial, for three main reasons:

25 First, a presumption is not supported by



1 this Court's plain-error precedence or general  
2 principles of appellate review for harmlessness.

3 Second, presumption is unnecessary, because  
4 courts of appeal are capable of discerning prejudice on  
5 a case-specific basis.

6 And third, a presumption ill-serves the  
7 policies -- policies that underlie Rule 52(b); in  
8 particular, they need to induce timely objections in the  
9 district court.

10 CHIEF JUSTICE ROBERTS: I -- I am concerned  
11 about getting hung up on the labels. Okay? If you --  
12 so don't say it's a presumption. We still have, don't  
13 we, the question of what happens if nobody -- and who  
14 loses if there's no evidence to move one way or another  
15 in a tie?

16 It doesn't matter if you call it a  
17 "presumption" or not. Who bears the burden of at least  
18 moving forward, and certainly the burden of proof, if  
19 one of these errors is on the record?

20 MR. MEISLER: I think, Your Honor, this  
21 Court's decisions in Olano and United States v. Vaughn  
22 resolve that question, and makes it clear the burden is  
23 on the defendant under plain-error review. That is what  
24 the Court has said is the main difference on prong three  
25 on the substantial-rights prong between plain-error and

1 harmless-error review.

2 JUSTICE KAGAN: But let's say that's right:

3 Yes, the burden is on the defendant. But does the  
4 defendant meet that burden by saying, look, there was a  
5 mistake in the Guidelines; we know that there's an  
6 anchoring effect. That's what the Court said in Peugh.  
7 That anchoring effect creates a reasonable probability  
8 that the Court would have done something differently.

9 MR. MEISLER: And so our -- our answer, Your  
10 Honor, is that the -- there's no -- I guess what  
11 Mr. Crooks calls a "generalized showing." I think it  
12 has to be done on a fact-specific basis.

13 JUSTICE BREYER: That is fact-specific. I  
14 mean, I have exactly the same question as Justice Kagan  
15 had. Forget all the jargon. You're a -- a lawyer. You  
16 want to prove that it rained at noon on the 5th of  
17 February.

18 Your witness says, I heard pitter-patter on  
19 the roof. I looked outside. Water was going by the  
20 window.

21 Anything else?

22 No.

23 Well, it might have been the window washer,  
24 but there is no jury that couldn't find that it was  
25 raining.

1           Same thing here.           Case after case, this  
2 Court has said: We assume, we presume -- or they don't  
3 even use those words -- the Guidelines influence the  
4 sentence. That's what they meant by the word "anchor."

5           If you look at the reality, whether they  
6 depart or don't -- whatever you call it now. There's  
7 some special word -- you can find evidence after -- of  
8 course, the Guidelines affect the sentence. Maybe  
9 there's an unusual case, and they don't.

10           The reason the judge doesn't say anything is  
11 because in Rita we said that if you say nothing, Judge,  
12 then the appellate courts are to assume it was  
13 reasonable. And therefore, the judge now says nothing.  
14 He just applies the Guideline.

15           So we'd have to overcome about five cases in  
16 terms of what we said if we are going to rebut the  
17 common sense notion that of course using the wrong  
18 Guideline had an effect on the sentence. If it's an  
19 unusual case, i.e. if it's the window washer, let the  
20 government show it was the window washer. But the  
21 normal case, pitter-patter means rain, and the normal  
22 case is that the judge, when he uses the Guidelines, or  
23 even when he uses them as a basis and says I'm  
24 departing, that that made a difference.

25           MR. MEISLER:           Well, I think -- I think, Your

1 Honor, there's a -- there's a number of points in there,  
2 and to my mind that's a question of how much weight to  
3 give the bare facts of the error.

4 Of course the error in this case is you used  
5 the wrong range. And so I think you're -- I -- from  
6 what I understand Your Honor's position to be is that  
7 the bare fact of the error, the difference in the range,  
8 itself establishes an effect and substantial rights.

9 That's not usually how we do it. We say you  
10 have to look at the particular facts and circumstances  
11 in the case. And I think Your Honor --

12 JUSTICE GINSBURG: Can you -- can you give a  
13 concrete example of what you mean? I mean, in my -- my  
14 intuition is the same as Justice Breyer and  
15 Justice Kagan, that if you -- if you apply the wrong  
16 Guidelines, then there's a reasonable probability that  
17 he would have received a lower sentence.

18 But you say he has to show -- what would he  
19 have to show, concretely? Give me an example of what is  
20 a reasonable probability that he would have received a  
21 lower sentence.

22 MR. MEISLER: Right. Well, I think there's  
23 just two points to that, Justice Ginsburg.

24 One is what the -- what the appellate court  
25 is going to have before them in every Guidelines-error

1 case, which is the nature and the magnitude of the  
2 error. The courts then know is this a career-offender  
3 bump that changes the defendant's offense level and  
4 criminal history and could double his range? Or is it,  
5 as in this case, a one-level movement on -- because of a  
6 criminal history scoring error that the Sentencing  
7 Guidelines, themselves, say you can offset with a  
8 departure because it leads to under representation of --  
9 of the defendant's recidivist potential.

10 So the court's going to know nature and  
11 magnitude. And by "magnitude" I mean, are we talking  
12 one level? Are we talking 16? Are we talking nine?

13 So there are going to be many cases. I  
14 don't dispute that.

15 JUSTICE BREYER: There will be many. And  
16 there are many cases involving rain. Many. I mean, I  
17 don't know how many thousands, but there are many common  
18 facts in thousands of cases where the government itself  
19 uses very similar kinds of evidence in order to show  
20 that it was really raining.

21 And here, what we're doing is we're using  
22 very similar kinds of evidence, namely, that he used the  
23 wrong Guideline in order to show that, in fact,  
24 better -- more probable than not, or pretty probable, or  
25 whatever reasonable probability, that it made a

1 difference.

2 MR. MEISLER: Well --

3 JUSTICE BREYER: Say -- I mean, it's -- I --  
4 I don't see this as special.

5 MR. MEISLER: Well -- well, I think it is --  
6 it was -- it is special, because, of course, it would be  
7 the first-ever presumption of prejudice that this Court  
8 recognizes in --

9 JUSTICE KENNEDY: Well, that's because  
10 you're using --

11 JUSTICE BREYER: The range --

12 JUSTICE KENNEDY: -- that's because you're  
13 using the term "presumption." You don't have to use the  
14 term "presumption." You can say that this defendant has  
15 met his burden of persuasion.

16 We make the assumption here, we -- a few of  
17 us have practiced under the Guidelines -- maybe none of  
18 us -- that the Guidelines are the beginning point in  
19 almost every sentence. That's the beginning point, not  
20 the ending point, but the beginning point.

21 And the question is: Once this is shown,  
22 like, at a minimum, can't you just ask the district  
23 judge? Now, if you want to say that there is sentencing  
24 miscalculations in 20 percent of the cases, that they  
25 happen all the time, that this is going to burden the

1 courts, I suppose you can make that argument.

2 But many circuits, or some circuits at  
3 least, have the rule; they just remand it, ask the  
4 district judge.

5 MR. MEISLER: I'm not sure that's how  
6 plain-error review has ever been conceived of,  
7 Justice Kennedy. I -- I mean, Your Honor asked before,  
8 what's our rule? You know, what is the rule the Court  
9 had announced in this case without calling it  
10 presumption? And if the Court wants to opine in this  
11 case about what the standard should be, we think the  
12 Court could say something such as that a difference in  
13 the range, the use of the wrong range, creates some  
14 likelihood in every case that the sentence will be  
15 different. But whether that likelihood arises to the  
16 required level of a reasonable probability is going to  
17 depend on the factors and circumstances.

18 JUSTICE KAGAN: Well, haven't we already  
19 answered that question in Peugh? In Peugh, the question  
20 was whether the likelihood was going to rise to the  
21 level of a significant risk. And we said yes. If  
22 you're using the wrong range, there is a significant  
23 risk that you would have made a different decision.

24 So significant risk actually seems higher to  
25 me than reasonable probability. At least it's not

1 demonstrably lower.

2           So I would think that we've already said, if  
3 you're using the wrong range because of the anchoring  
4 effect of the range -- an anchoring effect that is kind  
5 of mandatory. It's -- you know, we say that these  
6 Guidelines are advisory, but we insist that a judge  
7 begin with them.

8           So if you're using the wrong range, there is  
9 a significant risk. I would think so too, a  
10 reasonable -- of reasonable probability.

11           Why -- why -- why is there a difference?

12           MR. MEISLER:           I -- this -- I think there's  
13 two points on Peugh, Your Honor.

14           The first one is that Peugh itself, in  
15 footnote 8, says that this is a -- this is an ex post  
16 facto error that implicates constitutional concerns.  
17 And the Court said, in their regular Chapman v.  
18 California harmless-error analysis, Petitioner concedes  
19 that when it's a nonconstitutional Guidelines error,  
20 under Williams v. The United States in Rule 52(a), you  
21 do the regular harmless-error standard.

22           We think it follows from that, that when the  
23 error has been forfeited, not preserved, and there's no  
24 constitutional concerns, do the regular plain-error  
25 analysis.



1           And I think it --

2           JUSTICE KENNEDY:           In regard to -- are you  
3   telling us that even if there's a significant risk that  
4   this sentence was too high, in this case there can be no  
5   relief?

6           MR. MEISLER:           Not at all, Your Honor.

7           JUSTICE KENNEDY:           Is that the government's  
8   position?

9           MR. MEISLER:           Not at all, Your Honor.

10          If -- if the defendant makes a case-specific  
11   showing of a significant risk or a reasonable  
12   probability, then the defendant would clear prong three  
13   of the --

14          JUSTICE SCALIA:           What the -- you think the  
15   two are equivalent? A risk and a probability are -- are  
16   interchangeable?

17          We're -- we're -- we're going to change  
18   our -- our law now, so that plain error is overcome by  
19   just a significant risk?

20          MR. MEISLER:           I -- I don't -- I don't think  
21   so, Your Honor.

22          And if I could just --

23          JUSTICE SCALIA:           No, but -- but -- but  
24   you've accepted it.

25          MR. MEISLER:           Well --

1 JUSTICE SCALIA: You seem to say that  
2 significant risk and reasonable probability are one and  
3 the same. I don't think they're one and the same at  
4 all.

5 MR. MEISLER: This was going to be the  
6 second part of my answer to Justice Kagan, which I  
7 actually think that the -- framing it in terms of risk,  
8 looking at how Peugh analyzed the issue actually lines  
9 up almost exactly with how this Court handled the error  
10 at issue in *Marcus*, *Marcus* in 2010. *Marcus* was about  
11 whether a defendant had been improperly convicted in  
12 violation of the due process clause based on  
13 pre-enactment conduct.

14 And this Court said the risk that's going to  
15 happen can be ameliorated by certain things that a judge  
16 does, but that risk is going to vary by case. And the  
17 Court said in that situation where there's a risk and it  
18 varies, we're going to hold -- require a regular -- the  
19 regular individual showing of prejudice. Now --

20 CHIEF JUSTICE ROBERTS: Now, does that  
21 individual showing, can it be made on the basis purely  
22 of the mistake in the Guidelines, there is no extraneous  
23 evidence? If you have a case where the erroneous range  
24 is 20 to 40 and the judge gives 20, and the correct  
25 range is zero to 20, is that a case in which the

1 defendant has established plain error?

2 MR. MEISLER: With the caveat that we'd want  
3 to know a little bit more about the -- the facts and  
4 circumstances.

5 CHIEF JUSTICE ROBERTS: I don't want to know  
6 anything more about it because if the judge is within  
7 the Guidelines, he doesn't have to say anything more  
8 about it.

9 MR. MEISLER: I think, Your Honor, if that's  
10 all you knew, if it was truly -- it's all you knew, I  
11 would say that the defendant probably has -- has met his  
12 burden in that case.

13 CHIEF JUSTICE ROBERTS: Okay. So now let's  
14 say -- I mean, this is why the problem is -- is --  
15 whether you want to call it a presumption or whatever,  
16 is so difficult. What if the Guideline was 20 to -- to  
17 40 and the judge said 30, and the correct Guideline was  
18 zero to 30? In other words, he's half in the middle of  
19 the wrong one. Do you say, well, maybe it's an error,  
20 maybe it's not? What -- what in that case?

21 MR. MEISLER: I think I can give you a  
22 concrete answer without knowing more about the facts and  
23 circumstances. And that's not -- that's not --

24 CHIEF JUSTICE ROBERTS: That's -- that's why  
25 I don't understand why it's one answer, zero to 20 and

1 20 to 40, and another answer when it's zero to 30 and 20  
2 to -- when it's halfway as opposed to just at the  
3 bottom.

4 MR. MEISLER: Right. Well, I think, Your  
5 Honor, the Court was faced with a similar situation in  
6 the Davila case from a couple terms ago, where the  
7 Respondent in that case had argued that -- and that  
8 was -- that involved judicial participation and plea  
9 discussions. And the respondent in that case argued,  
10 well, the courts of appeals are just finding all these  
11 prejudicial and reversing them anyway. Don't bother  
12 doing cases if they're prejudiced. Let's come up with  
13 an automatic reversal rule.

14 And this Court said no. It said serious  
15 errors are going to be corrected on plain- and  
16 harmless-error review, but do a full record assessment  
17 in each case. And that's really all we're asking the  
18 Court to -- to say here is full-record assessment like  
19 in Davila --

20 JUSTICE GINSBURG: But in -- in most  
21 Sentencing Guidelines cases, certainly in this case, the  
22 judge says nothing. He's told the probation office said  
23 these are the Guidelines, and the judge says, okay. I  
24 sentence him at the bottom, period. Doesn't explain  
25 why. And there's got to be many, many Guidelines cases

1 where that's exactly what happens. The judge doesn't  
2 explain it. We have told the judge he doesn't need to  
3 explain it if he sentences within the Guidelines.

4 So what do you do with what I think must be  
5 the bulk of the cases where the judge just sentences  
6 within the Guidelines and says nothing one way or  
7 another to explain it?

8 MR. MEISLER: Well, I'm not sure, Your  
9 Honor, that's the bulk of the cases. If --

10 JUSTICE GINSBURG: But you would agree that  
11 at least there are many cases where the judge just  
12 sentences within the Guidelines.

13 MR. MEISLER: There are many cases, but I  
14 think you run into the same problem as in Davila. You'd  
15 run into a problem of categorization. Are we going  
16 to -- are we going to change the entire framework,  
17 change the rules that we use in plain- and  
18 harmless-error cases --

19 JUSTICE BREYER: We're not changing -- well,  
20 you've heard the argument. But I suspect -- and you --  
21 you may know this empirical point better -- I think  
22 there probably are a lot of cases where the issue is the  
23 sentence. And the appeal will be -- include something  
24 like this. In some subset, there will be a plain-error  
25 question. And all you'll really have is what the judge

1 did.

2 Now, of course, if the government has more,  
3 all you would be saying is that this, in and of itself,  
4 shows a risk in this circumstance, the reasonable  
5 probability, whatever standard you're using. Of course  
6 the government's free to show that there is something  
7 different about this. It wasn't harmful. It might have  
8 been the window washer, you know? And the government is  
9 free to show that.

10 MR. MEISLER: But --

11 JUSTICE BREYER: So why is this so  
12 difficult?

13 MR. MEISLER: It's important, Justice  
14 Breyer, to recognize -- as I understand your -- your --  
15 what you've posited, that is a shift in the risk,  
16 whether you call it the risk of nonpersuasion.

17 JUSTICE BREYER: Well, you know, you --

18 MR. MEISLER: Absent the government coming  
19 forward with something else, the defendant wins. That's  
20 the exact opposite of what usually happens in the  
21 prong --

22 JUSTICE BREYER: Well, you're saying it's a  
23 shift in the risk. The government has the burden of  
24 proving that it was raining. It's not a shift in the  
25 risk to say that the evidence that I've mentioned proves

1 rain, and it's not a shift in the risk to say that the  
2 defendant can come in and show it was the window washer.  
3 The question is whether the burden, which lies with the  
4 defendant, is satisfied if all there is is that the  
5 judge applied the wrong Guideline.

6 And given the continuous statement in case  
7 after case in this Court, that, of course, judges,  
8 whether they apply the Guideline or depart, the  
9 Guidelines play a significant part in the -- in the  
10 sentence that occurs. If all you have is that, you've  
11 satisfied the substantial -- whatever it is, you know.  
12 What is it called? The substantial --

13 MR. MEISLER: I think it does matter what it  
14 is, Justice Breyer.

15 JUSTICE BREYER: Of course it matters what  
16 it is.

17 MR. MEISLER: It matters what it is. It's  
18 reasonable probability -- it's reasonable probability of  
19 a lower sentence.

20 JUSTICE BREYER: Well, it doesn't say that  
21 in Olano. It says -- it says in Olano --

22 MR. MEISLER: But --

23 JUSTICE BREYER: -- in Rule 52(b) --

24 MR. MEISLER: Yeah, substantial -- that the  
25 substantial --

1 JUSTICE BREYER: It says "a plain error that  
2 affects substantial rights." And if it is the case,  
3 factually, as this Court has said it is, that applying  
4 the Guideline that you apply makes a difference to the  
5 sentence, that does affect substantial rights. He's  
6 just borne the burden of proof by showing that. That --  
7 I don't see why that's different than any other problem  
8 of proof.

9 MR. MEISLER: I think it's quite different,  
10 Your Honor. And if I could use the example of this  
11 Court's decision in Puckett v. United States, this Court  
12 has already spoken to how plain error works in one very  
13 serious sentencing error, the government's breach of a  
14 Guidelines-related plea promise at sentencing in  
15 Puckett. And the Court said, not just, you do plain  
16 error; it works in the usual way. Because procedural  
17 errors at sentencing -- and the Court cited as an  
18 example, a misapplication of the career offender  
19 Guideline -- because procedural error at sentencing is  
20 amenable to harmlessness-error review. And so we're  
21 going to hold the defendant to his usual burden because  
22 it's Rule 52(b), not 52(a).

23 CHIEF JUSTICE ROBERTS: Don't you usually --  
24 don't you usually have a plea colloquy or something in  
25 the record in those types of cases?



1           MR. MEISLER:           You do. It's just that you  
2   have a sentencing --

3           CHIEF JUSTICE ROBERTS:           Well, no. If it's  
4   -- the sentence is within the Guidelines, the judge  
5   doesn't have to say anything at all. So it's very  
6   difficult for the defendant to go back and say, here's  
7   what the error was even though there's also a clear  
8   error, a plain error in what the original calculation  
9   was.

10          MR. MEISLER:           I do want to dispute one other  
11   -- I think the key factual premise there. It's not that  
12   the judge said nothing at all. Depending on the spread  
13   of the range, by statute, the judge is required, this  
14   Court's decision in Rita requires that if the defendant  
15   makes a nonfrivolous request for a variance and the  
16   judge is choosing the Guidelines range, agreeing with  
17   the Commission's recommendation, instead of giving that  
18   non-Guideline sentence, the judge has to explain that as  
19   well.

20          JUSTICE ALITO:           If we -- if we accept the --  
21   the proposition that in every case in which there is an  
22   incorrect identification of the Guidelines at the time  
23   of sentencing there has to be a remand, unless the  
24   government can prove with some sort of evidence that it  
25   was harmless, would there be any difference between the

1 standard in a case where there was an objection and a  
2 case where there was no objection?

3 MR. MEISLER: Not on prong three, Your  
4 Honor, as far as I can tell. The Petitioner's briefs  
5 have been a little bit less than clear on what exactly  
6 he thinks the government's burden is, but I heard him  
7 say today and I believe the citations at page 47 of his  
8 brief also indicate that the standard would be the  
9 Williams v. United States harmless-error standard. The  
10 government would have to show no effect on the sentence.  
11 It has to persuade the court of appeals the sentence  
12 would have been the same absent the error.

13 JUSTICE SOTOMAYOR: But these --

14 CHIEF JUSTICE ROBERTS: Well, but there are  
15 the other factors under the Olano test.

16 MR. MEISLER: There are, Your Honor. I -- I  
17 would agree that -- that prong two does some work in  
18 these cases, not as much in other settings because  
19 courts of appeals look at the plain language of the  
20 Guidelines and the application notes and believe that  
21 this follows from those -- that language.

22 And more importantly on prong four, which  
23 Mr. Crooks mentioned earlier, he -- he would not embrace  
24 the Fifth Circuit's application of kind of a  
25 fact-intensive, case-specific prong four analysis. And

1 the two courts of appeals that have adopted presumptions  
2 of prejudice on the Guidelines issue have both either --  
3 well, the Tenth Circuit explicitly, it says, we presume  
4 at prong four as well. So I think it's very unclear  
5 whether prong four will do any work in these cases.

6 One other thing I want to mention about  
7 these court --

8 JUSTICE KENNEDY: To the extent that our  
9 decision is influenced by our considerations of what  
10 kind of a burden, say the Petitioner's proposed rule  
11 would put on the resources of the Court, is there  
12 anything we can look to or can you or your co-counsel or  
13 your colleague for the Petitioner tell us how often  
14 Sentencing Guidelines occur in 20 percent of the cases,  
15 5 percent of the cases? And when they do, is it that  
16 disruptive to ask the district court, what would you do?  
17 Remand.

18 MR. MEISLER: A couple points. On the  
19 statistics, I believe they're collected in footnote 14  
20 of Petitioner's brief, and there are something like  
21 4,500 procedural sentencing appeals; about 2,400 of  
22 those are Sentencing Guidelines appeals, and about 20  
23 percent of those, or about 480, are reversed.

24 We haven't been able to ascertain how many  
25 of those are plain-error cases versus harmless-error

1 cases, but it's a substantial number across the judicial  
2 districts every year.

3 In terms of the cost, Petitioner's position  
4 is that it's less costly than remand for a retrial. We  
5 don't dispute that, but we do think it's not costless.  
6 The en banc Third Circuit, in a recent procedural  
7 sentencing error case, it reached -- explained it's not  
8 costless at all. You have to reconvene the parties, the  
9 judge, and a very busy -- especially in -- in Texas, a  
10 very busy district court calendar has to find a spot,  
11 reconvene the parties, transport a defendant from a  
12 distant location.

13 And then, of course, we've collected in the  
14 appendix to our brief, situations where the remand for  
15 resentencing generates another round of appeals.

16 JUSTICE BREYER: What you have not put in  
17 your brief, I don't think, is that they have, in several  
18 circuits, created a system where there is a limited  
19 remand for purposes of finding out just what the judge  
20 thought about it. That's not perfect, but it seems to  
21 be workable and not quite as expensive.

22 But I think the real difference between us,  
23 in -- and you can -- I'm raising this because I haven't  
24 seen a reason you shouldn't address it squarely -- is I  
25 don't think this is a Rule 52(b) case. You see?

1           It's not about how to interpret Rule 52(b),  
2   or 52(a), or Olano. It's a case about Guidelines. It  
3   is a case about what the Guidelines are and how they  
4   affect a sentence. And once we work that out, the  
5   answer will be obvious, because I'm not going to  
6   disagree with your interpretation of Olano or 52. But I  
7   am going to disagree about what you think the effect of  
8   failing to apply the right Guideline is in the mine run  
9   of cases.

10           And once -- if you agreed with me about  
11   that, this case would be over; or if I agreed with you.  
12   Between us, we'd end it. But that -- that's -- so  
13   that's -- that -- that's where the -- I mean, the -- the  
14   others might have some views, too.

15           (Laughter).

16           But -- but do you see -- do -- do you see --  
17   do you see why I'm -- do you see why I keep pushing you  
18   in that direction?

19           MR. MEISLER:           I -- I do, Your Honor. And I  
20   -- and I understand the point. I guess the -- the way  
21   I'd try to breach the gap between, perhaps, our  
22   positions is -- is to recognize and to argue Rule 52(b)  
23   is a capacious entire record, full-record inquiry. And  
24   I think it leaves room; it accommodates judges'  
25   intuitions about how likely given errors are to have an

1 effect in certain cases.

2 And so our -- our basic position here, most  
3 fundamental position is don't blow up the Rule 52(b)  
4 framework. Don't blow up the Rule 52 framework this  
5 Court has applied in a number of cases and create, I  
6 think, two major problems.

7 One is the anomaly I mentioned with Puckett,  
8 earlier. You're going to have courts saying, Well, the  
9 Supreme Court in Puckett said one kind of sentencing  
10 error doesn't get a presumption to the usual one, but  
11 it's a different kind of sentencing error in  
12 Molina-Martinez, gets a different kind of treatment.  
13 That's a problem.

14 JUSTICE SOTOMAYOR: I see -- I see --

15 JUSTICE GINSBURG: Does it matter -- does it  
16 matter that this kind of error is never strategic? This  
17 is not an objection that a lawyer would deliberately  
18 hold back. This is a -- a lawyer making a mistake by  
19 relying on what the probation officer said. I mean,  
20 there is practically heavy reliance on that presentence  
21 report.

22 MR. MEISLER: I think the issue,  
23 Justice Ginsburg, is really incentives at the margins,  
24 right, that in these kind of cases it's one -- and  
25 that's what both Dominguez Benitez and Puckett say. We

1 want to incentivize lawyers to make these.

2 And if, indeed, the prong three inquiry ends  
3 up being no different, the defendant's burden ends up  
4 being no different in this cost of cases under plain  
5 error than harmless error, it is marginally reducing the  
6 incentives --

7 JUSTICE SOTOMAYOR: You know, so much of  
8 this is the use of that word "assumptions,"  
9 "presumptions"; but both sides are doing it. This case  
10 came up because the Third Circuit has a presumption that  
11 if a corrected -- it -- it says it: We assume that if  
12 Guidelines overlap, the wrong Guideline and the right  
13 Guideline overlap, that there is no way -- we assume  
14 there's no way you can prove error, or that it affected  
15 substantial rights. And there are a number of circuits  
16 who have said that. Overlapping Guidelines, you can  
17 never prove.

18 That -- that seems that that's an assumption  
19 that's wrong, under your articulation of plain-error  
20 review.

21 MR. MEISLER: If that's what the Fifth  
22 Circuit were doing, I -- I would agree with Your Honor.  
23 We don't think there should be a presumption either way.

24 I think the Fifth Circuit has -- as other  
25 have -- circuits have -- have treated overlapping-range

1 cases a bit differently and have suggested that in those  
2 cases, because the judge's sentence still aligns with  
3 the Commission's recommendation, we're just going to  
4 require a bit more. I think what the Fifth Circuit has  
5 looked for is something more concrete that moves the  
6 dial from --

7 JUSTICE SOTOMAYOR: So let's go to  
8 Justice Alito's point. The more concrete here is that  
9 the parties were fighting about extremes. Sentence him,  
10 the government said, to the high end. The defendant was  
11 arguing he's entitled to the low end. There is some  
12 additional proof there. The judge picks the low end.

13 If the Guideline is an anchor, which I think  
14 is almost undisputed, isn't that enough to say it  
15 affected substantial rights?

16 MR. MEISLER: We don't think so in this  
17 case. I -- I would make two points: One is we're not  
18 abandoning our position that this fact-specific issue is  
19 not properly before the Court. We would urge the Court  
20 to take a close look at Fry v. Pliler, which involved  
21 very similar circumstances.

22 But on the merits, I think there are really  
23 -- both sides can point to kind of two factors in their  
24 favor on the -- on the plain-error issue. The defendant  
25 can point to the factors that Your Honor mentioned. I



1 think on our side is the overlap in the range and the  
2 nature of the error here.

3 This is an error that can seem kind of  
4 abstruse. It's the -- it's because of the happenstance  
5 of when arrests and sentencing were sequenced. The  
6 defendant has two criminal -- two recent felony  
7 convictions that aren't counted at all, just drop out of  
8 the calculation. And the Commission realized that could  
9 happen in these cases, and so put in, not just a general  
10 departure note, but a -- a specific application note  
11 recommending a departure in this kind of a case when  
12 this kind of underrepresentation --

13 JUSTICE SOTOMAYOR: Except the judge --

14 MR. MEISLER: -- happens.

15 JUSTICE SOTOMAYOR: -- knew that he could  
16 have departed upwards under the old Guideline, because  
17 this criminal history was pretty serious. You argued he  
18 was entitled to the -- to the -- and should sentence at  
19 the upper end, and yet the judge sentenced him at the  
20 low end. So the -- the criminal history has less effect  
21 on the judge than it has on you, or perhaps on me.

22 MR. MEISLER: Right. Well, I think that  
23 maybe that's true, Your Honor. I -- I guess I would  
24 just say that I think these are all factors. And that  
25 if we're looking at case-specific determination here, I

1 think the court of appeals could reasonably conclude,  
2 kind of balancing those four facts I mentioned, that the  
3 defendant had shown a possibility, no doubt, of a low  
4 sentence. I think it's a close case, but not a  
5 reasonable probability.

6 The last point I wanted to make, Your Honor,  
7 was just that we mentioned the courts' of appeals  
8 experience in this point. And I think it's useful to  
9 look at what happened in the Third Circuit in terms of  
10 whether this kind of presumption could be confined to  
11 the Sentencing Guidelines.

12 In 2001, the Third Circuit, a decision  
13 called Adams, first announced it was going to presume  
14 prejudice for the denial of allocution, denial of a  
15 defendant's right to allocute at sentencing. A few  
16 months later, it adopted -- relied on Adams to find a  
17 presumption of prejudice for Sentencing Guidelines  
18 errors. The next year it applied those precedents to  
19 find a presumption of prejudice for constructive  
20 amendments to indictments. And in 2005, when Booker  
21 came down from this Court, it then applied those  
22 precedents to find a presumption of prejudice for Booker  
23 error for sentencing under mandatory Sentencing  
24 Guidelines.

25 I think it's going to be very difficult to

1     confine this. Mr. Crooks makes the point in his reply  
2     brief that the courts of appeals have been relatively  
3     restrained in finding errors. One can debate that, but  
4     I think the point is that this Court endorses the  
5     presumption of prejudice for the first time. I think  
6     it's highly unlikely it's going to stay just in the  
7     Guidelines context, just because of the anchoring effect  
8     that the Court recognized in Peugh.

9             And if there are no questions, we'd ask that  
10    the judgment be affirmed.

11            CHIEF JUSTICE ROBERTS:            Thank you, counsel.

12            Mr. Crooks, you have four minutes remaining.

13            REBUTTAL ARGUMENT OF TIMOTHY CROOKS

14            ON BEHALF OF THE PETITIONER

15            MR. CROOKS:            With respect to Justice  
16    Kennedy's question about the burden on the district  
17    courts of resentencings, we would point out that several  
18    lower courts in opinions we cited in the brief have  
19    pointed out that a resentencing is not all that  
20    burdensome, especially in light of the benefits of  
21    assuring that defendants are not serving more prison  
22    time than the district court wanted them to do.

23            I did also want to address the government's  
24    point about -- the government touched on the issue of  
25    overlapping ranges versus ranges that don't overlap.

1 And we just wanted to point out that the effect of the  
2 Guidelines is the same, regardless of whether the  
3 correct and incorrect ranges overlap or not. It's  
4 simply that the degree of the error, the amount of  
5 excess imprisonment that is produced, will be different.  
6 It will be lower in the case of an overlapping range.  
7 But as this Court said in *Glover v. United States*, any  
8 extra amount of imprisonment affects substantial rights.

9 Finally, I just wanted to say that the  
10 courts of appeals have overwhelmingly recognized,  
11 whether you call it a presumption or not, that it is  
12 warranted to find that a change in the Guideline range  
13 affected a defendant's substantial rights because of the  
14 extreme likelihood that a Guideline-range error will  
15 skew the sentence.

16 And the lower courts have found, in their  
17 experience, that it's necessary to make that inference  
18 because of the great difficulty in the typical case of  
19 showing a case-specific effect of the type that the  
20 government is arguing for here.

21 And these two factors mean that this  
22 inference or presumption, whatever it's termed, is  
23 necessary to avoid, in many cases, the injustice of  
24 excess imprisonment.

25 And it will not blow up Rule 52(b), as the

1 government warns. It's a modest tweak to one prong of  
2 the rule that will help the rule serve its basic purpose  
3 of fairness.

4 And for these reasons, we ask that the Court  
5 reverse the judgment below and remand for further  
6 proceeding.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
8 The case is submitted.

9 (Whereupon, at 11:04 a.m., the case in the  
10 above-entitled matter was submitted.)

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<p><b>A</b></p> <p><b>A.C</b> 1:17 2:6 24:18</p> <p><b>a.m</b> 1:13 3:2 53:9</p> <p><b>abandoning</b> 48:18</p> <p><b>able</b> 43:24</p> <p><b>above-entitled</b> 1:11 53:10</p> <p><b>absence</b> 15:19</p> <p><b>absent</b> 38:18 42:12</p> <p><b>absolutely</b> 11:6</p> <p><b>abstruse</b> 49:4</p> <p><b>accept</b> 41:20</p> <p><b>accepted</b> 33:24</p> <p><b>accommodates</b> 45:24</p> <p><b>Adams</b> 50:13,16</p> <p><b>additional</b> 48:12</p> <p><b>address</b> 24:10 44:24 51:23</p> <p><b>addressed</b> 11:21 24:11,13</p> <p><b>administrative</b> 19:2</p> <p><b>admit</b> 10:8</p> <p><b>admitted</b> 21:16</p> <p><b>adopt</b> 24:22</p> <p><b>adopted</b> 12:8 43:1 50:16</p> <p><b>advice</b> 7:25</p> <p><b>advisory</b> 13:17 13:21 14:3,5 32:6</p> <p><b>affect</b> 7:4 11:13 11:14 20:3 27:8 40:5 45:4</p> <p><b>affirmed</b> 23:22 51:10</p> <p><b>ago</b> 36:6</p> <p><b>agree</b> 13:9 22:17 37:10 42:17 47:22</p> <p><b>agreed</b> 45:10,11</p>	<p><b>agreeing</b> 41:16</p> <p><b>aligns</b> 48:2</p> <p><b>Alito</b> 5:19,24,25 6:8,22 11:3 15:2 16:4,19 21:4 41:20</p> <p><b>Alito's</b> 10:17 48:8</p> <p><b>allocute</b> 50:15</p> <p><b>allocation</b> 50:14</p> <p><b>allow</b> 15:23</p> <p><b>alternative</b> 6:5</p> <p><b>ameliorated</b> 34:15</p> <p><b>amenable</b> 40:20</p> <p><b>amendments</b> 50:20</p> <p><b>amount</b> 52:4,8</p> <p><b>analysis</b> 32:18 32:25 42:25</p> <p><b>analyzed</b> 34:8</p> <p><b>anchor</b> 27:4 48:13</p> <p><b>anchoring</b> 3:16 13:3 26:6,7 32:3,4 51:7</p> <p><b>Anders</b> 14:14,21 20:15,17</p> <p><b>announced</b> 31:9 50:13</p> <p><b>anomaly</b> 46:7</p> <p><b>answer</b> 12:22 15:18 19:15 23:6 24:1,5 26:9 34:6 35:22,25 36:1 45:5</p> <p><b>answered</b> 31:19</p> <p><b>anytime</b> 7:17</p> <p><b>anyway</b> 18:22 36:11</p> <p><b>appeal</b> 14:14 15:3 20:14 25:4 37:23</p> <p><b>appealing</b> 16:17</p> <p><b>appeals</b> 4:2 22:21,23,25</p>	<p>23:7,12,16,19 36:10 42:11,19 43:1,21,22 44:15 50:1,7 51:2 52:10</p> <p><b>appear</b> 4:11</p> <p><b>APPEARAN...</b> 1:14</p> <p><b>appellate</b> 24:4 25:2 27:12 28:24</p> <p><b>appendix</b> 44:14</p> <p><b>application</b> 4:4 4:9 22:17 24:15 42:20,24 49:10</p> <p><b>applied</b> 21:25 39:5 46:5 50:18,21</p> <p><b>applies</b> 22:19 27:14</p> <p><b>apply</b> 4:25 12:4 13:18 15:6 22:2,25 28:15 39:8 40:4 45:8</p> <p><b>applying</b> 40:3</p> <p><b>appropriate</b> 4:7</p> <p><b>argue</b> 45:22</p> <p><b>argued</b> 36:7,9 49:17</p> <p><b>arguing</b> 13:20 48:11 52:20</p> <p><b>argument</b> 1:12 2:2,5,8 3:3,7 13:1 14:22 15:2,6 24:18 31:1 37:20 51:13</p> <p><b>arises</b> 31:15</p> <p><b>arrests</b> 49:5</p> <p><b>articulation</b> 47:19</p> <p><b>ascertain</b> 43:24</p> <p><b>asked</b> 10:18 31:7</p> <p><b>asking</b> 11:2,9 36:17</p>	<p><b>assessment</b> 36:16,18</p> <p><b>assist</b> 20:21</p> <p><b>Assistant</b> 1:15 1:17</p> <p><b>assisted</b> 18:16</p> <p><b>assume</b> 7:10 8:3 16:3 22:8,9 27:2,12 47:11 47:13</p> <p><b>assumption</b> 30:16 47:18</p> <p><b>assumptions</b> 47:8</p> <p><b>assuring</b> 51:21</p> <p><b>attorney</b> 21:19 21:20</p> <p><b>automatic</b> 4:16 13:23 36:13</p> <p><b>automatically</b> 13:19</p> <p><b>avoid</b> 52:23</p> <p><b>B</b></p> <p><b>back</b> 8:16 12:22 18:11 22:4,12 41:6 46:18</p> <p><b>balancing</b> 50:2</p> <p><b>banc</b> 44:6</p> <p><b>bare</b> 28:3,7</p> <p><b>based</b> 23:15 34:12</p> <p><b>basic</b> 46:2 53:2</p> <p><b>basis</b> 25:5 26:12 27:23 34:21</p> <p><b>bears</b> 11:8 25:17</p> <p><b>beginning</b> 30:18 30:19,20</p> <p><b>behalf</b> 1:16,19 2:4,7,10 3:8 24:19 51:14</p> <p><b>believe</b> 4:12 5:6 5:8 6:3 7:1 8:4 9:12,19 10:21 12:17 13:11 14:3 16:2 17:6 17:7 42:7,20</p>	<p>43:19</p> <p><b>believed</b> 8:24</p> <p><b>believes</b> 3:21 6:11 16:14</p> <p><b>benefits</b> 51:20</p> <p><b>Benitez</b> 46:25</p> <p><b>better</b> 20:6,9 29:24 37:21</p> <p><b>beyond</b> 6:12</p> <p><b>big</b> 19:22</p> <p><b>bind</b> 12:19</p> <p><b>bit</b> 35:3 42:5 48:1,4</p> <p><b>blow</b> 46:3,4 52:25</p> <p><b>Booker</b> 50:20,22</p> <p><b>borne</b> 40:6</p> <p><b>bother</b> 23:8,12 36:11</p> <p><b>bottom</b> 8:23 15:4 36:3,24</p> <p><b>breach</b> 40:13</p> <p><b>breech</b> 45:21</p> <p><b>Breyer</b> 17:11 18:14,22 19:6 26:13 28:14 29:15 30:3,11 37:19 38:11,14 38:17,22 39:14 39:15,20,23 40:1 44:16</p> <p><b>brief</b> 14:15,21 14:22 20:15,17 21:8 24:7 42:8 43:20 44:14,17 51:2,18</p> <p><b>briefly</b> 24:5</p> <p><b>briefs</b> 42:4</p> <p><b>brought</b> 14:18</p> <p><b>bulk</b> 37:5,9</p> <p><b>bump</b> 29:3</p> <p><b>burden</b> 6:1,6,23 7:2 9:23,23 10:10,19,22 11:11 12:24 23:20 25:17,18 25:22 26:3,4</p>
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