

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   JAMES BENJAMIN PUCKETT,                                 :

4                                 Petitioner                                 :

5                                 v.   :   No. 07-9712

6   UNITED STATES.   :

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8   Washington, D.C.

9   Wednesday, January 14, 2009

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

14   APPEARANCES:

15   LARS R. ISAACSON, ESQ., Lewisville, Tex.; on behalf of  
16   the Petitioner, appointed by this Court.

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

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

2 (10:12 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first today in Case 07-9712, Puckett v. United  
5 States.

6 Mr. Isaacson.

7 ORAL ARGUMENT OF LARS R. ISAACSON

8 ON BEHALF OF THE PETITIONER

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

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

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

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

25 MR. ISAACSON: No, Your Honor. He did not

1 breach the plea agreement by doing that. He --

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

6 Now, the government has conceded the breach  
7 of the plea agreement. I don't -- I can't understand  
8 why they did that, but they apparently have conceded it.  
9 Does that mean that we have to ignore it for purposes of  
10 deciding what the -- what the remedy is? Ignore the  
11 reality that there was a breach? I mean, you know,  
12 if the government said, we will ask the court to  
13 sentence at the lower end because of the -- the remorse  
14 that the defendant has shown, and the defendant then  
15 demonstrates that he has no remorse by -- you know,  
16 suppose he comes and stabs the judge -- is the  
17 government really supposed to have to go before the  
18 judge and say, "Your Honor, this man is really  
19 remorseful and you should sentence him at the lower  
20 end"?

21 It seems to me it's a basic principle of  
22 contract law that a party to a contract cannot take  
23 action which makes it impracticable for the other side  
24 to carry out his part of the bargain, and that's what  
25 your client did. The government couldn't practicably go

1 in and make that argument when he had demonstrated  
2 himself to be an unremorseful criminal.

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

10 JUSTICE SCALIA: Oh.

11 MR. ISAACSON: So it's different than most  
12 plea agreements.

13 JUSTICE KENNEDY: So you want to us make the  
14 inference that the impermissible or criminal activity  
15 was permitted by the absence of this specific clause.  
16 You say there is no implied condition, no implied  
17 covenant?

18 MR. ISAACSON: Well, I'm not -- what we are  
19 saying is the government needs to obey the promise in  
20 the plea agreement. The promise in the plea agreement  
21 is --

22 JUSTICE KENNEDY: Well, the questions so far  
23 indicate that one of the promises was an implied promise  
24 that you will keep the terms of the agreement by lawful  
25 behavior. So that just -- what you say just begs the

1 question.

2 Now, I recognize the government has conceded  
3 a breach, and we will probably move on from that point.  
4 But, as Justice Scalia indicates, it puts the case in a  
5 very artificial posture, it seems to me.

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

12 CHIEF JUSTICE ROBERTS: And there is nothing  
13 theoretically inconsistent with the government -- you  
14 can feel remorse. I mean, you're not going to do it  
15 again. You going to feel remorse every time you do it,  
16 but that doesn't mean he didn't feel remorse from the  
17 crime he was pleading to.

18 MR. ISAACSON: Yes, 3E1.1. There is a  
19 number of different factors that go into whether or not  
20 someone gets the acceptance points. It is the judge's  
21 discretion to give those points and there are a number  
22 of different factors that go into it. Certainly the  
23 termination of criminal activity is one 1 of those  
24 factors the court looks at, but it's not the only one.

25 JUSTICE GINSBURG: But this judge said --

1 and he was open in his thinking. He said: "Unheard to  
2 me that I would give acceptance of responsibility credit  
3 to someone that as soon as he gets sent to jail is out  
4 there committing another crime."

5 MR. ISAACSON: That is what Judge --

6 JUSTICE GINSBURG: The judge did say that.  
7 He said it was unknown to him that judges give  
8 acceptance of responsibility credit to someone who in  
9 the interval between the plea and when he shows up in  
10 court for sentencing commits another crime.

11 MR. ISAACSON: That is what Judge Sanders  
12 did say.

13 JUSTICE SOUTER: Your point is not that he  
14 should have gotten the reduction. Your point is that  
15 the government should have made the recommendation.

16 MR. ISAACSON: Well, the position --

17 JUSTICE SOUTER: Isn't it? Isn't that your  
18 point?

19 MR. ISAACSON: Yes.

20 JUSTICE SOUTER: The agreement called for  
21 them to make a recommendation and they didn't make it.  
22 In fact, they recommended the contrary. And that's your  
23 gripe, right?

24 MR. ISAACSON: The plea agreement did not  
25 say the government had to get up there and make a

1 statement at sentencing that he was supposed to get his  
2 points. They just agreed he was entitled to his  
3 acceptance points.

4           There was two parts of the plea agreement.  
5 The first part that they agreed to was, you know, that  
6 he was entitled to those points; and the second part was  
7 that they would recommend at sentencing that he get the  
8 lower in the guideline range. The first part was not --  
9 did not say they had to get up there and say that. They  
10 chose on their own to get up there and breach the plea  
11 agreement by saying, he's not entitled to those points.

12           JUSTICE SCALIA: Where is that in the  
13 record, do you know offhand? Where the plea agreement  
14 is?

15           MR. ISAACSON: It's page 54a of the Joint  
16 Appendix volume 1, paragraphs 8 and 9.

17           JUSTICE SCALIA: Thank you.

18           CHIEF JUSTICE ROBERTS: I suppose Justice  
19 Ginsburg's point is relevant, though, on the question of  
20 prejudice. If the judge gets up there and says, I don't  
21 care what the government says, I am not going to give  
22 anybody a departure when they have committed another  
23 crime, then you haven't been prejudiced by the  
24 government's breach.

25           MR. ISAACSON: Well -- I believe he has been



1 prejudiced by the government's breach, because once the  
2 government violates the plea agreement on the first  
3 level, as we know under the prior precedents of this  
4 case, it makes the actual plea agreement void. And  
5 secondly, the Santobello case clearly talks about it is  
6 not important the effect on the sentencing judge  
7 what the -- in Santobello the government breached a plea  
8 agreement and the judge said: It doesn't matter the  
9 government breached the plea agreement; I would have  
10 done the same thing anyway; it makes no different. This  
11 Court said specifically that's not relevant.

12 JUSTICE ALITO: Well, the judge would have  
13 known about what happened anyway from -- from the  
14 presentence investigation, wouldn't he?

15 MR. ISAACSON: Correct.

16 I guess the point I am trying to make is the  
17 agreement here was not that Judge Sanders would give him  
18 acceptance points. The fact is the government made the  
19 position -- and I should point out that Mr. Puckett, he  
20 gave up all his rights just for this slim reed of hope.

21 JUSTICE GINSBURG: But he could have, if he  
22 felt that way -- I mean, there they were in the  
23 courtroom; all of them knew about the plea agreement  
24 because there had been the Rule 11 colloquy when it was  
25 taken, right?

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

2 --

3 JUSTICE GINSBURG: When the plea was

4 taken --

5 MR. ISAACSON: Yes.

6 JUSTICE GINSBURG: -- it was the same judge,

7 wasn't it?

8 MR. ISAACSON: Yes, Judge Sanders.

9 JUSTICE GINSBURG: And so they were all

10 there and the defendant was asked all these questions,

11 and the government-- and the judge knew about the

12 government's side of the plea bargain.

13 MR. ISAACSON: Right, yes.

14 JUSTICE GINSBURG: So it was not a secret to

15 anyone that the government said it would ask for the

16 extra acceptance of responsibility credit. And yet the

17 defendant and his lawyer stand there and they don't say

18 a word: Wait a minute, judge. They didn't object at --

19 there was no motion to withdraw the plea, was there?

20 MR. ISAACSON: Mr. Puckett had made a motion

21 prior to the sentencing to withdraw his plea on his own.

22 He basically pro se had done that. But not --

23 JUSTICE GINSBURG: But --

24 MR. ISAACSON: I'm sorry.

25 JUSTICE GINSBURG: Before the judge there

1 was no plea to withdraw the plea.

2 MR. ISAACSON: During the sentencing, no,  
3 there was not.

4 JUSTICE GINSBURG: And so that's why we are  
5 -- if he had asked to withdraw the plea, then we'd have  
6 a different case. But he didn't, so we are here on  
7 plain-error review.

8 MR. ISAACSON: Our point is that we suggest  
9 plain error shouldn't be applied to this case. This  
10 court in Santobello said 35 years ago when the  
11 government breaches a plea agreement it can never stand.

12 JUSTICE GINSBURG: But Santobello was a case  
13 where there was a timely objection.

14 MR. ISAACSON: That is correct, but the  
15 principles of whether or not when the government  
16 breaches a plea agreement that renders the underlying  
17 conviction void raises it to a different level.

18 JUSTICE ALITO: Why should that be the case?  
19 I know plea agreements are not strictly governed by  
20 contract law, but there is an analogy and your whole  
21 argument seems to be that the government's breach  
22 rendered the plea agreement void. But why would that  
23 so? There was a plea agreement, voluntarily entered  
24 into, and then there was a breach. So, why shouldn't  
25 the issue be what is the remedy for the breach? And why

1 shouldn't it be governed by the plain-error rule like  
2 most errors that occur at trial?

3 MR. ISAACSON: I would suggest it goes to  
4 the very heart of whether or not he actually pled.  
5 Justice Ginsburg's raised a great point about what Judge  
6 Sanders did in this case. He was long involved. The  
7 promises in the plea agreement were talked about. Mr.  
8 Puckett had every right to rely upon those promises when  
9 he foreclosed his right to jury trial, his right to  
10 present witnesses on his own behalf. This is a  
11 solemn --

12 JUSTICE ALITO: But you can say that in  
13 every case in which parties enter into a contract and  
14 later there is a breach. The fact that one of the  
15 parties later breaches doesn't mean that there never was  
16 a contract. There was an agreement that he voluntarily  
17 entered into at that time. And then there was a --  
18 subsequently there was a breach, but that doesn't mean  
19 that he involuntarily -- he did not voluntarily enter  
20 into the agreement, does it?

21 MR. ISAACSON: I would suggest this Court's  
22 precedent is that it has to be a knowing waiver of his  
23 rights, that promises that are unfulfilled or  
24 unfulfillable render the plea itself void. The  
25 constitutional due process overtones or overpinnings of

1 a plea agreement as opposed to a normal contract makes  
2 this different.

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

6 MR. ISAACSON: We request -- what relief do  
7 I want?

8 JUSTICE GINSBURG: Right.

9 MR. ISAACSON: Mr. Puckett would like the  
10 plea agreement to be set aside and be allowed to take  
11 this case to trial.

12 JUSTICE GINSBURG: Which would expose him to  
13 a considerably greater penalty.

14 MR. ISAACSON: Potentially, yes.

15 JUSTICE SCALIA: Why wouldn't it suffice to  
16 give your client everything that he was entitled to if  
17 the case were remanded to a different judge and the  
18 government were required to go before that judge and  
19 make the commitment that it undertook in the plea  
20 agreement?

21 MR. ISAACSON: We believe --

22 JUSTICE SCALIA: Why wouldn't that be a  
23 perfectly satisfactory remedy?

24 MR. ISAACSON: We believe that the action of  
25 the government, again, rendered the plea agreement

1     itself void, without value, and he would -- Mr.  
2     Puckett --

3                 JUSTICE SCALIA: Well, you have to say that.  
4     But let's assume I don't agree with that. Let's assume  
5     I agree with Justice Alito that his entry into it was  
6     voluntary and all that's happened is that one of the  
7     commitments on the part of one of the parties has not  
8     been complied with. Why isn't it an adequate remedy for  
9     that problem to send it back to a new judge and have the  
10    government come before that judge and make the same  
11    commitment it was supposed to under the agreement?

12                MR. ISAACSON: Certainly that is a remedy  
13    some circuits have used. Why that is not effective, we  
14    believe the defendant should have the right to be able  
15    to choose. When it reaches this level, the plea  
16    agreement is void.

17                JUSTICE STEVENS: May I ask essentially two  
18    questions. You mentioned the fact that this is not --  
19    this is an unusual agreement, and that some of the  
20    provisions were negotiated and the record shows they  
21    were -- they were deliberately undertaken. It seems to  
22    me that this was probably a scrivener's error. The  
23    normal -- most plea agreements would include a provision  
24    that if the defendant engaged in unlawful conduct, all  
25    bets are off. And my hunch was that somebody just

1 forgot to put the boilerplate language in the agreement.  
2 Is that fair to say? I can't imagine the government  
3 negotiating an agreement that doesn't include that  
4 clause.

5 MR. ISAACSON: I certainly can't put myself  
6 on the sides back then. I think it's fair to say it's  
7 unusual. The government in its breach -- sorry -- in  
8 its brief indicated it could have included it in there.

9 JUSTICE GINSBURG: It did include it in the  
10 motion, didn't they?

11 MR. ISAACSON: It was --

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

13 MR. ISAACSON: Yes.

14 JUSTICE GINSBURG: -- for credit for  
15 acceptance of responsibility, and had as a condition  
16 that the defendant be law-abiding?

17 MR. ISAACSON: Yes, that was included in the  
18 motion filed the next day for the additional point, that  
19 is correct.

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

24 MR. ISAACSON: Well, one is a plea agreement  
25 that is entered in open court with the defendant present

1 with his attorney and the second is a motion filed by  
2 the United States attorney the day after. So they are  
3 different. Certainly they have different, I would  
4 suggest, importance.

5 JUSTICE STEVENS: But going back to my  
6 question, isn't it a likely explanation for the  
7 defendant's lawyer's failure to object that he just  
8 didn't realize this agreement didn't have this normal  
9 provision in it?

10 MR. ISAACSON: I -- I can't. As to  
11 whether -- I would suggest that it is -- this is a --  
12 normally, these are normally included in these  
13 agreements, I would suggest to you.

14 JUSTICE STEVENS: Right.

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

19 JUSTICE STEVENS: No, I understand that.  
20 But the other thing I wanted to ask you: You keep using  
21 the term "void." Do our cases say that any breach of a  
22 plea agreement renders it void rather than subject to  
23 some kind of other remedy?

24 MR. ISAACSON: Well, if it is -- I think the  
25 language of -- of Brady -- certainly a plea must stand



1 unless it is induced by misrepresentation, unfulfilled  
2 or unfulfillable promises. Recently in the Bousley,  
3 case: Statements in there can't go; not good if it's  
4 induced by misrepresentation; Machibroda --

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

9 MR. ISAACSON: Well, again, I am -- citing  
10 from Machibroda: A guilty plea, if induced by promises  
11 or threats which would deprive it of a private or  
12 voluntary act are void.

13 JUSTICE STEVENS: Yes, but those -- that  
14 goes to the integrity of the guilty plea, not to whether  
15 or not the underlying contract became void, I think.  
16 Maybe I'm missing something.

17 MR. ISAACSON: Well, I -- I think what we  
18 are saying is once the government takes its action, it  
19 deprives the plea of its voluntary character.

20 JUSTICE SCALIA: It doesn't -- it doesn't  
21 retroactively render the government's promise a  
22 misrepresentation. Every time a -- a party to a  
23 contract fails to comply with a contract, he hasn't been  
24 guilty of fraud. "Misrepresentation" would mean the  
25 government had no intention of complying with it when --

1    when it entered into it, and you -- you don't assert  
2    that was the case, do you?

3                   MR. ISAACSON:  No, but I would suggest that  
4    Santobello again talks about the intent, whether or not  
5    -- in that case there were two prosecutors who didn't  
6    know what one -- the other one was doing, and this Court  
7    said that's not important; it is the integrity of the  
8    plea that's important and the government's breach  
9    thereof.

10                   JUSTICE KENNEDY:  Under the law of contracts  
11   I assume -- I haven't looked it up yet -- that you can't  
12   rescind for a nonmaterial breach.  A trivial breach  
13   doesn't always allow rescision.  And isn't it trivial if  
14   the district court said:  You know, I don't care if the  
15   Attorney General of the United States and the Solicitor  
16   General himself both came into the court on their hands  
17   and knees begging me to do this.  I wouldn't do this.  I  
18   wouldn't give you an increase.

19                   MR. ISAACSON:  Well --

20                   JUSTICE KENNEDY:  So it seems to me an  
21   immaterial breach, other than as to one level -- and  
22   correct me if I am wrong.  I take it as to level one --  
23   or as to the third level, they need the recommendation  
24   before they have the authority to reduce.  Am I right  
25   about that?

1                   MR. ISAACSON: I'm sorry -- I am missing --  
2   what are you talking about?

3                   JUSTICE KENNEDY: There are some instances  
4   in which the -- the prosecution must make the  
5   recommendation before the district judge has the  
6   authority to depart downward, am I correct?

7                   MR. ISAACSON: I -- I -- I am sorry. For  
8   the downward departure and acceptance of responsibility,  
9   they are different. For the first two points, it can be  
10  done in the plea agreement. The third has to be done by  
11  the prosecution.

12                  JUSTICE KENNEDY: That's right. So -- so  
13  this -- this district judge, I take it, did not have the  
14  authority to go down by -- by a third without the  
15  recommendation?

16                  MR. ISAACSON: Well, the government filed a  
17  motion. I don't know if they officially had withdrawn  
18  it or not. I know at sentencing they argued against it,  
19  so -- I am not sure if the judge had the power to or  
20  not. The motion was already on file. The government  
21  had already asked for that. Now, they changed their  
22  mind.

23                  JUSTICE KENNEDY: Even as to the third  
24  level, the district judge said, you know, I will assume  
25  that they have made the argument. I will assume they

1 have made the argument. I wouldn't hear the -- I -- I  
2 wouldn't grant -- I wouldn't follow the recommendation.  
3 I am not going to depart downward even assuming the  
4 government -- it seems to me that there is -- the  
5 government's breach is immaterial.

6 MR. ISAACSON: Well, in terms of materiality  
7 of the breach, in Santobello there are those exact  
8 words: The government is in a very poor position to  
9 talk materiality after they've breached the agreement.

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

13 JUSTICE GINSBURG: There was part of this  
14 agreement that was honored. In fact, the judge after  
15 having said that, I never heard of giving credit for  
16 responsibility to somebody who commits a crime in the  
17 interim, but he said: I understand there was an  
18 agreement to sentence at the low end, and that's what  
19 I'm going to do.

20 MR. ISAACSON: That's correct.

21 JUSTICE GINSBURG: So if you say what you  
22 want is a trial, the defendant would be exposed to not  
23 just the upper level; plus weren't there add-ones in  
24 this case that the judge ordered to be served  
25 concurrently rather than consecutively?

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

5                   JUSTICE ALITO: What would counsel say about  
6 a case in which it's unclear whether there is a breach?  
7 There is a factual dispute as to whether there was a  
8 breach. Let's say the government agrees that it will  
9 reserve the right to call all relevant facts to the  
10 attention of the sentencing judge, but won't take a  
11 position on sentencing. And the prosecutor in  
12 sentencing makes certain remarks that might be  
13 interpreted as taking a position or might be interpreted  
14 as simply calling facts to the judge's attention.

15                   Would it be your position that when a  
16 defendant hears that, the defendant can sit back and  
17 wait and see whether he or she is satisfied with the  
18 sentence and then after this sentence is imposed raise  
19 the issue of breach on appeal and not be subject to  
20 plain error, rather than calling it to the attention of  
21 the sentencing judge at the time when the -- the  
22 potential breach could be adjudicated?

23                   MR. ISAACSON: I think there are two parts  
24 to your question, Your Honor, if I could address them.  
25 In regard to a de minimus breach of the plea agreement,

1 we recognize that technical defects in a plea agreement  
2 may not always require automatic reversal. However, the  
3 government must always fulfill completely the promises  
4 they have made in the agreement. And that goes to the  
5 difference between a -- a plea agreement is being  
6 different than a normal contract.

7 In a normal contract, you think of a -- an  
8 Exxon merging with Mobil, things of that nature. This  
9 is a situation where the government's -- the obligations  
10 in the plea agreement for the vast majority are on the  
11 defendant, what he has to do. He gives up his rights.  
12 He must cooperate, things of that nature. As on page  
13 51a shows, the government's agreements are extremely  
14 small. There's only two paragraphs. And that's  
15 normally how it is. Our position is if the government  
16 breaches its promises, that's when it must be reversed.

17 JUSTICE ALITO: I'm not sure that really  
18 answers my question.

19 MR. ISAACSON: Well --

20 JUSTICE ALITO: Are you saying as to some  
21 errors there is a plain-error rule, in some breaches  
22 there is a plain-error rule, but not as to all breaches?

23 MR. ISAACSON: No. I'm -- what I'm saying  
24 is the threshold of whether there is a breach or not --  
25 the question has been posed of whether or not every

1 single breach is automatic reversal.

2 We -- we recognize that there may be some  
3 that have absolutely no basis or do not really imply or  
4 go into what the government promised to do. Because the  
5 government's promises as a part of the plea agreement,  
6 again, are just two paragraphs of this case. Our  
7 suggestion is when the government breaches what they  
8 promised to do, that's when the automatic reversal --

9 JUSTICE SCALIA: So you are saying, if -- if  
10 I understand you correctly, that even if at the trial  
11 your client's lawyer had objected and had -- and had  
12 said, Your Honor, the government promised to recommend,  
13 you know, a lower thing, what the trial judge would have  
14 to have said was, the plea agreement is invalid. And  
15 the trial judge could not say, oh, yes, the government  
16 has to make that recommendation.

17 You are -- you are saying it is invalidated  
18 by the mere fact of the government's not having done it,  
19 right?

20 MR. ISAACSON: Yes.

21 JUSTICE SCALIA: So no objection need to be  
22 made or can be made, right?

23 MR. ISAACSON: Well, certainly, we -- we'd  
24 never suggest --

25 JUSTICE SCALIA: Wow.

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

4 JUSTICE KENNEDY: Well, but I take it -- you  
5 never really answered Justice Alito's question. I take  
6 it that the defendant and his counsel can knowingly  
7 recognize that an error is being committed, say nothing,  
8 listen to the sentence, and then object later. That's  
9 your position, yes or no?

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

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

13 MR. ISAACSON: I'm sorry.

14 JUSTICE SCALIA: The answer you gave me is  
15 that automatically the guilty plea is washed out --  
16 automatically.

17 MR. ISAACSON: We -- if the government  
18 breaches the plea agreement, yes.

19 JUSTICE SCALIA: It is automatically washed  
20 out?

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

22 JUSTICE SCALIA: And, therefore, he  
23 cannot -- he cannot sit around and wait to see what  
24 happens. What happens is -- whatever happens, it's  
25 invalid. The plea agreement is no good. You have to



1 have a new trial.

2 MR. ISAACSON: I would suggest that the word  
3 "void" may also be "voidable."

4 JUSTICE SCALIA: Voidable -- then your  
5 answer to me would be different. It's -- it's not void.  
6 It's voidable, so that he can play dog in the manger and  
7 wait and see what happens, and then if it's in interest  
8 that -- in his interest to void it, he does. If it's in  
9 his interest not to void it, he doesn't.

10 MR. ISAACSON: Your Honor, these are not  
11 easy issues. Certainly, defense attorneys should not  
12 ever sit on his hands and let these things go. To take  
13 a chance and to just say, oh, we are going to do nothing  
14 and just sandbag, like is suggested by the government,  
15 I'm suggesting that is never going to occur.

16 CHIEF JUSTICE ROBERTS: It would not be  
17 cost-free for you, because if you just sit there and  
18 say, you know, the agreement is void, the government is  
19 going to say, well, fine, I will see you in court; and  
20 we will have a trial; and you are going to get twice as  
21 much as you would have gotten anyway.

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

24 MR. ISAACSON: It's absolutely -- Mr.  
25 Puckett --

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

12 MR. ISAACSON: It has been breached.

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

15 MR. ISAACSON: I would suggest that it would  
16 be at the defendant's option to do so. The point that  
17 I'm trying to make --

18 CHIEF JUSTICE ROBERTS: Well --

19 JUSTICE SOUTER: But why -- why should the  
20 defendant have the option to withdraw from an agreement  
21 when he got everything under the best possible  
22 circumstances that he could have expected?

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

1 JUSTICE SOUTER: No, but we are talking  
2 about the Chief Justice's hypothetical at this point.  
3 And they -- in his hypothetical, the sentencing judge  
4 says, I'm going to give you the three points; you are  
5 going to get everything that on the rosier scenario you  
6 could have hoped for.

7 Why should he be able to withdraw his plea  
8 at that point?

9 MR. ISAACSON: Because the jurisprudence  
10 teaches that the result of the effect on the sentencing  
11 judge is simply irrelevant. If the government breach --

12 JUSTICE SOUTER: In other words, your  
13 position is -- is kind of a theoretical formalistic  
14 position, that -- I'm not sure if this is the wrong  
15 words here -- there is a metaphysical quality to the  
16 plea, and even though things turn out as well to him as  
17 he could possibly have expected had the agreement been  
18 kept punctiliously, if the government simply omits the  
19 words he can walk away from the plea? I mean, that's  
20 your position?

21 MR. ISAACSON: I believe so, yes. But there  
22 is a reason for it. This Court has stated the  
23 government cannot breach the plea agreement. That's all  
24 we're saying. The power the government has in reducing  
25 the plea, the rights the defendants are giving up, it

1 should be at the option of the defendant to decide.

2 JUSTICE SOUTER: Yes, but usually -- I mean,  
3 the theory of relief in contract law depends upon relief  
4 from something. And if, in fact, there is -- there is  
5 no discernible damage that has been suffered, if on the  
6 other hand -- again, taking the Chief's hypothetical --  
7 there is an affirmative demonstration that no damage  
8 occurred, normal principles of contract would say there  
9 is nothing to give him relief from. The law of contract  
10 is -- is not a metaphysical construct. Why should the  
11 law of plea agreements be?

12 MR. ISAACSON: I -- I'm not suggesting it  
13 would be metaphysical. I'm simply suggesting --

14 JUSTICE SOUTER: Well, I think you are. I  
15 mean, you are saying even though he has come out with,  
16 you know, a rose in his mouth, he can still, if he is  
17 crazy enough, throw away the whole plea agreement.

18 MR. ISAACSON: I think that suggests that  
19 the result on the judge has to do with the breach, what  
20 the government does. The concept is, if the government  
21 breaches the plea agreement, the defendants should have  
22 the right to withdraw from the plea even if there is no  
23 effect on the sentence.

24 JUSTICE SOUTER: What I'm getting at -- I  
25 think what we are all trying to get at -- is in order to

1 have a rule, an absolute rule like yours, we usually  
2 look for a good reason to have that rule. And since we  
3 are talking about an agreement, the place to look for  
4 the good reason is in the consequences to the defendant.  
5 And when the consequences are terrific, when they are  
6 the best that he could possibly have hoped for, there  
7 doesn't seem to be a good reason to adopt your very  
8 theoretical construct of agreement.

9 Is there some reason that we are just not  
10 seeing?

11 MR. ISAACSON: Because it doesn't occur. I  
12 mean, the government could not cite a single case in  
13 which this --

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

17 MR. ISAACSON: There is an absolute -- the  
18 good reason is the defendant should get the promises the  
19 government has elicited for his giving up of his  
20 fundamental constitutional rights. 99.9 percent of the  
21 time that's going to be adverse to the defendant, as it  
22 was in this case.

23 A possibly hypothetical situation where the  
24 judge would forego or ignore what the United States  
25 attorney says and give him acceptance points is so rare,

1 as I suggest, to not really be --

2 JUSTICE STEVENS: May I ask this kind of  
3 conceptual question? Is it your view that a breach of a  
4 plea agreement can never be concluded to be harmless  
5 error?

6 MR. ISAACSON: Harmless error? Yes, I -- if  
7 it -- well, harmless error if you are talking about  
8 structural error, I mean it's a little different  
9 analysis.

10 JUSTICE STEVENS: I'm trying to get rid of  
11 the labels like "plain error" and "structural." But if  
12 in fact it's totally harmless and everybody agrees it's  
13 harmless, would the government still have to -- or would  
14 there be an adverse consequence nevertheless?

15 MR. ISAACSON: Yes, I believe so.

16 JUSTICE STEVENS: So, there could never be  
17 harmless error, harmless breach of a plea agreement?

18 MR. ISAACSON: Yes, Your Honor.

19 JUSTICE GINSBURG: Why wouldn't someone read  
20 what happened here as the defendant saying, well, I  
21 didn't get the acceptance credit, but the judge is still  
22 sentencing me at the low end, and he's still making the  
23 sentences run concurrently, so I think -- why, if he  
24 doesn't try to withdraw the plea, why isn't it the  
25 logical assumption that he says I didn't get the whole

1     promise but I got part of it, and I'll take it?

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

4                   JUSTICE GINSBURG: How do we know this one  
5     didn't?

6                   MR. ISAACSON: Well, by certainly the appeal  
7     that we raised. Certainly he stated on the record some  
8     questions or concerns about what overall had happened to  
9     him, and certainly he pursued this appeal.

10                  CHIEF JUSTICE ROBERTS: Thank you, counsel.  
11     We will give you a couple minutes for rebuttal.

12                  MR. ISAACSON: Thank you, Your Honor.

13                  CHIEF JUSTICE ROBERTS: Ms. Schertler.

14                  ORAL ARGUMENT OF LISA H. SCHERTLER

15                  ON BEHALF OF THE RESPONDENT

16                  MS. SCHERTLER: Mr. Chief Justice, and may  
17     it please the Court:

18                  When the government breaches a plea  
19     agreement, an objection made in the district court  
20     serves important purposes that relate to the functioning  
21     of Federal courts. It permits the district court and  
22     the parties to determine whether a breach has occurred,  
23     and it also, in many cases, may permit an immediate cure  
24     of that breach to be administered, obviating the need  
25     for appellate review of the issue altogether.

1           A central purpose of the contemporaneous  
2   objection rule is to ensure that the district court  
3   proceedings are as free of error as possible. And that  
4   purpose is served in this context, the plea breach  
5   context, as it is in others.

6           Rule 52(b) reinforces the contemporaneous  
7   objection rule by placing a heavier burden on the party  
8   who does not object in the district court to win relief  
9   on appeal.

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

19          JUSTICE KENNEDY: Just to explore the issue  
20   of breach for a moment, suppose hypothetically, same  
21   facts here, but it is all vented and discussed and aired  
22   and objected to in the district court.

23          MS. SCHERTLER: Yes, Your Honor.

24          JUSTICE KENNEDY: The defense attorney says,  
25   well, now, if you look at paragraph 8 and so forth, and



1 the government says, well, Your Honor, well, he  
2 committed another crime. And then the judge says -- and  
3 we are not going to move for the recommendation. And  
4 the judge says: I will assume that you made the  
5 recommendation, and I will just tell you right now I  
6 wouldn't take the recommendation anyway. I'm not  
7 going -- I wouldn't give a lowered sentence even if you  
8 made the objection. What result?

9 MS. SCHERTLER: Well, I think the result  
10 there is controlled by Santobello.

11 JUSTICE KENNEDY: Is it? Because in  
12 Santobello there was no reason given for the prosecutor  
13 to violate the plea agreement. Here there's a good  
14 reason. Can you distinguish Santobello on that basis?

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

21 This court -- a court in that situation  
22 would have been aware -- would have sorted through what  
23 the terms of the agreement were. Now -- and -- and, we  
24 don't believe that there is a reason not to apply  
25 harmless error review in this context as there is in any

1 other context.

2 JUSTICE SOUTER: Excuse me, were you --  
3 Justice Kennedy, were you through? I'm sorry, I thought  
4 you started a question again.

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

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

22 MS. SCHERTLER: Well, there -- certainly I  
23 agree, Justice Souter, that -- and although there is  
24 distinguishable facts in Santobello, that that theme is  
25 present in Santobello as well. And the Court there said

1     that it was not -- at the very least, the Court said  
2     when the government has not fulfilled its promise and an  
3     objection is raised and the defendant has suffered an  
4     adverse consequence that was somehow related to the  
5     government's broken promise, that the Court is not going  
6     to find harmlessness simply based on the district  
7     court's statement itself that it didn't rely on what the  
8     government had said.

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

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

23                MS. SCHERTLER:  Yes, Justice Souter.

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

1 MS. SCHERTLER: Yes.

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

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

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

1 of prejudice, despite the fact that he didn't object?  
2 If we place a high value on the liberty interest, we  
3 wouldn't accept your position; isn't that fair?

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

9 JUSTICE SOUTER: You are right, there is no  
10 question about it. If -- we are saying we will take  
11 a -- a less efficient process, a process less efficient  
12 perhaps even for getting at the truth, because we think  
13 the liberty interest is that important. You are  
14 entirely right.

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

22 JUSTICE SOUTER: Will you give me an  
23 example?

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

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

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

10 MS. SCHERTLER: Well --

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

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

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

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

24 JUSTICE STEVENS: And are you taking the  
25 position that -- that every case, that the absence of

1 objection would always be controlling?

2 MS. SCHERTLER: The --

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

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

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

23 MS. SCHERTLER: Well, I think that the  
24 analysis of a breach in each case will differ and it  
25 first and it will in the -- first and foremost depend

1 upon what the standard of appellate review is and  
2 whether an objection has preserved, in which case it  
3 would be the government's burden to show that a breach  
4 is harmless, or in the plain-error sentencings the --  
5 the burdens are reversed; and we think the -- the  
6 ordinary rules codified in rule 52(a) and (b) apply in  
7 this context equally.

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

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

14 CHIEF JUSTICE ROBERTS: So rare -- I thought  
15 he said "rare to unknown," "to be unknown" -- you are  
16 right.

17 MS. SCHERTLER: Yes.

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

25 MS. SCHERTLER: The -- let me respond to



1    that immediate point. Which is -- my response would be,  
2    yes, if the government were to recommend that he  
3    received acceptance of responsibility in this situation,  
4    that may be considered significant; but the district  
5    court judge would also know that it was in fulfillment  
6    of a promise that was made before renewed criminal  
7    activity occurred from jail. And so, given that  
8    circumstance --

9                   CHIEF JUSTICE ROBERTS: Yeah, but none of us  
10   can know what the judge would have done. I mean, we  
11   have had cases here where the government's  
12   recommendation of downward departures has been pretty  
13   surprising to me as well, and it's because they were  
14   informants or whatever and they have engaged in some  
15   pretty bad conduct; and I don't know what Judge Sanders  
16   would have done.

17                  MS. SCHERTLER: And here under the plain  
18   error standard it was the defendant's burden to show a  
19   reasonable probability that something different would  
20   have happened. The court of appeals made findings on  
21   this record that the record showed that nothing  
22   different would have happened, even had the government  
23   complied with its promise.

24                  JUSTICE BREYER: Looking at this, why can't  
25   we say the following? Some circuits have said that they

1 will never recognize plain error, when it's a breach of  
2 a plea agreement. That's wrong. It could be plain  
3 error like any other kind of a case, every other kind of  
4 issue. Sure. But the error here isn't plain. On the  
5 one hand, all they did, the promise was the government  
6 agreed to request that his sentence be placed at the  
7 lowest end, and they followed it. In the other part  
8 they made no promise. They simply agreed that he had  
9 demonstrated acceptance of responsibility. And then  
10 what they did at the trial, they said, "we don't want  
11 him to get acceptance of responsibility at this point."

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

19 So we have two arguments, one of which says  
20 they committed error, and one of which says they didn't  
21 commit error; and the argument turns on two implicit  
22 readings of paragraph 8. Therefore, it is not plain.  
23 End of case. What's wrong with that?

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

1 JUSTICE BREYER: Well, I mean, the  
2 government would like a whole lot of questions answered.  
3 So what I don't see is how the government can come here  
4 because they want a lot of questions answered, and get  
5 us to take the case, which I'm not sure was a wonderful  
6 idea; maybe it was. But then we take the case, and now  
7 they want us to say, no, no, don't take the obvious  
8 response to it because we would like you to answer five  
9 other questions.

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

12 MS. SCHERTLER: That is a possible outcome,  
13 Justice Breyer, and clarification for -- from this Court  
14 that the plain-error standard does apply to this type of  
15 error as it does to others would certainly help to  
16 resolve the conflict that does exist out there in the  
17 courts of appeal.

18 CHIEF JUSTICE ROBERTS: I may have gotten  
19 lost in the dialogue. As you understand it,  
20 Justice Breyer's suggestion was that you win, right?  
21 You get plain error, and then sometimes you apply it and  
22 it comes out one way, and sometimes you apply it the  
23 other.

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

25 CHIEF JUSTICE ROBERTS: So you are happy to

1 go along that.

2 MS. SCHERTLER: Yes. The -- it does not  
3 give the courts all of the guidance that would be  
4 helpful as to how to apply other components of the  
5 plain-error standard in this context.

6 CHIEF JUSTICE ROBERTS: But that's a big  
7 difference, right? As you said earlier, harmless error,  
8 the government has the burden; plain error, the  
9 defendant has the burden. That's certainly going to  
10 change how you approach however many different factual  
11 contexts.

12 MS. SCHERTLER: Well, yes, Mr. Chief  
13 Justice. I mean, what -- the reason that this case  
14 seemed to us a good vehicle to address these questions  
15 is that they was agreement throughout the appellate  
16 process that there was an error that was plain and,  
17 therefore, it provides an opportunity to address -- if  
18 the Court chooses, which it need not, but if the Court  
19 chooses -- to address how the substantial rights aspect  
20 of the plain-error standard and discretionary aspect --

21 JUSTICE STEVENS: It seems to me that the  
22 government has tried to pick a case in which it has the  
23 strongest opportunity to win on the merits in order to  
24 have us decide a rule that really isn't important in a  
25 lot of other cases, but it is totally unimportant in

1     this case.

2                   MS. SCHERTLER:   Well, Justice Stevens, what  
3     one finds when one looks through a lot of these -- when  
4     these cases are brought, there often is a dispute and a  
5     real -- and a genuine dispute as to whether a breach has  
6     occurred or not.   And those cases, of course, do not  
7     allow exposition -- explanation about the other  
8     components.

9                   JUSTICE STEVENS:   But don't you think it  
10    would have been open to the government to make the  
11    argument that Justice Breyer has made and said there  
12    really wasn't a breach here, at least an insignificant  
13    breach that should be ignored?

14                  MS. SCHERTLER:   As we acknowledge in our  
15    brief, there might be arguments out there that there  
16    were implicit terms to this plea agreement that were  
17    breached by the defendant.   Those arguments were never  
18    made in the court of appeals in this case, and so we are  
19    accepting that record as a way --

20                  JUSTICE BREYER:   They can only get -- they  
21    can only get your breach if they find an implicit  
22    agreement.   The implicit agreement is that you will not  
23    tell the court that, in light of changes, paragraph 8 no  
24    longer describes the situation.   You didn't breach  
25    paragraph 8, as taken literally.   You agree he had shown

1     that acceptance of responsibility.  What you told the  
2     court was, now we don't think he should have this  
3     acceptance of responsibility, which previously he had  
4     shown, because he's committed another crime.  Those are  
5     the exact words you said to the court.

6                 Now, he may have made an implicit not to do  
7     that.  On the other hand, that implicit promise may be  
8     negative by, you know, the other implicit acceptance of  
9     the fact that this applies only where we don't commit  
10    another crime.

11                So I'm just saying this -- I'm not saying  
12    you are even right.  I'm just saying, having those two  
13    arguments, it seems that you aren't plainly wrong.  You  
14    aren't plainly wrong.  So how do I get to the other  
15    questions if I believe that?  Do I say, "Hypothetically  
16    if the error here were plain, which I think it isn't,  
17    then I'd like to tell you where the burden of proof  
18    lies."?  By the way, if I happened to think that that's  
19    whatever it is, then I will go into a few other things.  
20    That's really what I feel you are asking me to do  
21    because I don't think it's plain.  Maybe the other  
22    people think it's plain.

23                MS. SCHERTLER:  Well, I mean -- as I've --  
24    as I've already indicated, having the Court state that  
25    the -- Rule 52(b) applies here is a -- is a -- I think,

1 a helpful --

2 JUSTICE SCALIA: I think it's plain. What  
3 about paragraph 9? Are you ignoring paragraph 9?

4 JUSTICE BREYER: You fulfilled paragraph 9,  
5 didn't you?

6 MS. SCHERTLER: The -- paragraph 9 indicates  
7 that the government agrees to request that Puckett's  
8 sentence placed at the lowest end of the guideline  
9 levels deemed applicable by the court. And there has  
10 been no claim, at any point in this proceeding, that  
11 that provision has been breached. What happened at the  
12 sentencing was that the district court stated on the  
13 record: I know that there is an agreement in here that  
14 that the lowest end of the guideline is appropriate, and  
15 I intend to follow that.

16 CHIEF JUSTICE ROBERTS: I think it's very  
17 clear that there has been a breach here. And it's not  
18 fanciful to say he felt remorse and then he went and did  
19 it again. That happens all the time.

20 You know, when I have a rich dessert I  
21 shouldn't have, I feel bad about it afterwards. It  
22 doesn't mean I will not do it again. I mean, why isn't  
23 that the case here?

24 MS. SCHERTLER: Well, I -- I guess that it's  
25 a matter of some disagreement, but -- I mean, we have --

1 we have taken the position that this was a breach of the  
2 government's agreement that he qualified for a  
3 three-level reduction in his offense level. That was  
4 the --

5 CHIEF JUSTICE ROBERTS: And you can put that  
6 before the judge. You are supposed to go there and say,  
7 "Look, we agreed to recommend it and we do recommend  
8 it." You could say, "And by the way, you should know  
9 that he's gone out and done this again." But you most  
10 -- you certainly prejudiced him by not doing what you  
11 said you would do.

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

17 CHIEF JUSTICE ROBERTS: No, but isn't it the  
18 fact that we can never know what Judge Sanders would  
19 have done if the government had what it said it would  
20 do. And because -- why shouldn't you bear the burden of  
21 showing there is no prejudice when you can't tell  
22 because you're the one that breached the agreement?

23 MS. SCHERTLER: Because in the plain-error  
24 setting, this Court has made clear that the burdens  
25 shift and that, under the third component of that



1 standard, it is the defendant's burden, if he did not  
2 object, to show an effect on the outcome of the  
3 proceeding, that his substantial rights were violated.

4 And here -- and I would note that the court  
5 of appeals made findings that the result would have been  
6 the same, and Petitioner in this Court has never  
7 challenged those findings on this record.

8 JUSTICE BREYER: Can you say just for me,  
9 because I am changing a little bit here in light of that  
10 question, but what is it precisely that the government  
11 said it would do that it did not do?

12 MS. SCHERTLER: The -- paragraph 8 of the  
13 plea agreement indicates that the government --

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

16 MS. SCHERTLER: Well, we indicated to the  
17 district court that Petitioner did not qualify for  
18 acceptance of responsibility. And paragraph 8 was a  
19 government agreement that he did qualify for acceptance  
20 of responsibility.

21 JUSTICE BREYER: So he did agree. "We  
22 agreed that he does qualify." And then when you got to  
23 the court, you said, now we don't agree that he  
24 qualifies at this point.

25 MS. SCHERTLER: That's correct. And there

1 was -- and there an intervening event, obviously, that  
2 affected the judgment, but because the explicit  
3 provision of this particular plea agreement, which I  
4 agree is atypical, as the government's motion for the  
5 third point made clear, did not have a qualification in  
6 there. And that -- that is the base -- I mean, I don't  
7 mean to be arguing strenuously that the government did  
8 something wrong here, because there were -- but the fact  
9 is, given the terms of this plea agreement, there --  
10 that is the basis for our concession that there was a  
11 breach.

12 JUSTICE GINSBURG: As a matter of practice  
13 among U.S. attorneys, we do have six and a half years at  
14 stake here, right? That's the difference between the  
15 two levels? Why wouldn't it be the appropriate thing  
16 for the U.S. attorney, the assistant U.S. attorney, to  
17 say, "Judge, I want to call your attention to paragraph  
18 8 of the plea agreement. At the time we entered into  
19 it, we made that undertaking." And so then everybody is  
20 sure that the judge's mind is focused on that. Wouldn't  
21 that be the better practice?

22 MS. SCHERTLER: Absolutely,  
23 Justice Ginsburg, and if there had been an objection  
24 based on that provision of the plea agreement, that may  
25 have been very well what would have happened. The

1 breach could have been cured. And the fact is that, in  
2 the absence of that objection, the breach was not cured  
3 when it could have been, and that is one reason -- that  
4 is why it makes sense to apply the plain-error standard  
5 in this context.

6 JUSTICE SOUTER: Well, could the breach have  
7 been cured? I mean, the point -- it seems to me, the  
8 point at which the defendant would have known that the  
9 government had breached the agreement was when the  
10 government stood there before the court and said, "In  
11 fact, he hasn't accepted responsibility. He went out  
12 and committed another crime while he was behind bars."

13 It seems to me that that's the point -- and  
14 maybe this phrase occurred somewhere in the record --  
15 that that's a bell that you can't unring. For the  
16 defendant to get up and object and said, "Wait a minute,  
17 were you supposed to represent to the court that you  
18 agreed that I did accept responsibility" -- to require  
19 the government to fulfill that undertaking at that point  
20 would have been ridiculous. I suppose the U.S. attorney  
21 could have said, "Oh, yes, he's right, Judge. We agreed  
22 that he accepted responsibility." But the U.S. attorney  
23 has already just said a moment before, "He hasn't. We  
24 really don't mean that at all."

25 There's no way, it seems to me, that there

1     could have been a better outcome in a case like this,  
2     even if the objection had been contemporary.

3                 MS. SCHERTLER:   Well, there would be more  
4     than one way to cure a breach such as this, if an  
5     objection had been raised in the district court.  One  
6     way would have been by the correction on the record that  
7     we have just discussed, but another way --

8                 JUSTICE SOUTER:   Which would have been  
9     silly.

10                MS. SCHERTLER:   But if the defendant -- and  
11     if the defendant said that, that would be a silly way to  
12     correct it.  It also could have been sent to another  
13     judge for resentencing, just as the Court in Santobello  
14     said, that a remedy could be accomplished.

15                JUSTICE GINSBURG:  It was sent to another  
16     judge, that judge would still have the presentence  
17     report.  After all, it wasn't the government that  
18     initiated reneging on the -- if it was the -- it was the  
19     presentence report.  And before the government said a  
20     word, the judge had read and was discussing the  
21     presentence report, which said, judge, earlier, we said  
22     you should give credit for acceptance of  
23     responsibilities, now we must tell you, you should not.

24                MS. SCHERTLER:   The probation officer said  
25     that.

1 JUSTICE GINSBURG: Yes.

2 MS. SCHERTLER: Yes. And I don't think  
3 Petitioner -- Petitioner even contends that he is  
4 entitled now -- or he contends he is entitled to get out  
5 of this plea. But taking the more typical remedies that  
6 this Court proposed as one possibility in Santobello, I  
7 don't think Petitioner would say that a judge should not  
8 know that he did -- that he engaged in subsequent  
9 criminal conduct. That is information that any judge  
10 sentencing him must know about in order to fairly assess  
11 what sentence he should receive.

12 CHIEF JUSTICE ROBERTS: Maybe Judge Sanders  
13 would look at this kind of the way that we have been  
14 discussing it, and he would look and say, boy, it's --  
15 it's -- he committed subsequent conduct, how can you  
16 recommend that I depart? He says, but on the other  
17 hand, every plea agreement I have seen you always say if  
18 he commits subsequent conduct that is illegal, that all  
19 bets are the off. You didn't say that here, so I'm  
20 going to take the recommendation seriously.

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

24 MS. SCHERTLER: Well -- and again, I guess I  
25 would give the same response, that it -- it is

1     Petitioner's burden to show a likelihood, a reasonable  
2     likelihood that it would have been different.

3                 JUSTICE SOUTER: With respect, that is not  
4     what Olano says, is it? The -- the -- the basic Olano  
5     standard is a -- is a violation of substantial rights  
6     standard.

7                 MS. SCHERTLER: Yes, Justice Souter.

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

19                MS. SCHERTLER: It could, Justice Souter.  
20    And if the Court were to take that position, we would  
21    argue that there is still, under the plain-error  
22    standard, the fourth component, the discretionary  
23    component --

24                JUSTICE BREYER: I know you want to -- as I  
25    point out one other thing to you. I think it's a hard

1 question, burden of proof and these other things, that I  
2 just turned the page, after the person, Ms. Simms, she's  
3 the prosecutor, and she's absolutely clear to me, others  
4 can disagree, that this judge knew just what the  
5 government had agreed to, and the prosecutor was saying  
6 that now things have changed.

7                   And then the judge turns to the probation  
8 officer, and the probation officer says, just to  
9 reiterate what Ms. Simms said, the new offense,  
10 according to the guidelines of the guideline manual,  
11 prohibits any acceptance of responsibility. Now, if  
12 that turns out to be right, of course, it couldn't  
13 matter less whose burden of proof it is.

14                   MS. SCHERTLER: It was not correct, as a  
15 matter of fact, and the defense attorney made that  
16 correction, and the -- and the judge accepted that. And  
17 if I could go back --

18                   CHIEF JUSTICE ROBERTS: He wasn't -- was he  
19 convicted of this new crime?

20                   MS. SCHERTLER: He -- not at the time of  
21 these proceedings.

22                   CHIEF JUSTICE ROBERTS: It was just an  
23 allegation, right?

24                   MS. SCHERTLER: That's right. Another --  
25 another defendant had pled guilty to this crime, and the

1 factual statement supporting his plea had implicated  
2 Petitioner as having instigated the crime, suggested  
3 to --

4 CHIEF JUSTICE ROBERTS: Why did we assume  
5 anything anyway? I assume he denies the allegations.

6 MS. SCHERTLER: He admitted the allegations  
7 to the probation officer, and that is what was reflected  
8 in the presentence report.

9 And if I could return to Justice Souter's  
10 question about if the Court were to take the position  
11 that a form of substantial rights is affected in every  
12 case of a government breach of plea agreement, we would  
13 respectfully submit that as this Court analyzed a  
14 similar type of difficult question in Johnson and  
15 Cotton, that the fourth discretionary component of the  
16 standard should preclude relief or should at least give  
17 the district court, the court of appeals discretion to  
18 not grant relief where, as in this case, there has been  
19 no showing that there was an effect on the outcome, and,  
20 as the Court of Appeals found, an affirmative record  
21 that the outcome would have been exactly the same.

22 Thank you, Your Honors. We would ask that  
23 the judgment be affirmed.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Isaacson, why don't you take two



1 minutes.

2 REBUTTAL ARGUMENT OF LARS R. ISAACSON

3 ON BEHALF OF THE PETITIONER

4 MR. ISAACSON: Thank you, Your Honor.

5 The problem that the Puckett panel had in  
6 the third prong of 52(b) they focused on whether or not  
7 there is prejudice at sentencing. That was the focus of  
8 the Puckett panel. That is why they said 52(b) plain  
9 error applied and was found in that case.

10 The problem with that is that Santobello  
11 clearly points out that prejudice to the trial judge,  
12 that the trial judge -- what the trial judge would have  
13 done is simply not relevant. That is why 52(b) cannot  
14 be applied in this case.

15 Secondly, when the government argues that  
16 there is no prejudice -- you have to show prejudice at  
17 sentencing, the judge would have done something  
18 different, that is virtually an impossible standard.  
19 Under 18 U.S.C. 355 -- there are a number of factors a  
20 sentencing judge has to take into. The idea -- and  
21 there is many different factors they must look at, all  
22 of these different things.

23 The idea that a defendant can somehow show a  
24 judge would have come to a different result but for the  
25 government breach is an impossibility.

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

10           We would ask you to reverse the decision of  
11   the Fifth Circuit.

12           CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13   The case is submitted.

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

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