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UNITED STATES, :

Petitioner : No. 12-167

v. :

ANTHONY DAVILA :

Monday, April 15, 2013

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

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

2 (11:12 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 12-167, United States v. Davila.

5 Mr. Feigin? It is Feigin, right?

6 ORAL ARGUMENT OF ERIC J. FEIGIN

7 ON BEHALF OF THE PETITIONER

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

9 CHIEF JUSTICE ROBERTS: Thank you.

10 MR. FEIGIN: Thank you, Mr. Chief Justice,
11 and may it please the Court:

12 The court of appeals' practice of
13 automatically granting appellate relief for every
14 violation of Rule 11(c)(1), irrespective whether it
15 prejudiced the defendant, is flawed. As this Court
16 recognized in United States v. Vaughn, Rule 11(h) was
17 adopted for the precise purpose of ending the
18 then-common practice of automatically reversing even for
19 non-prejudicial Rule 11 errors.

20 It would be especially inappropriate to
21 apply an automatic reversal rule in a case like this one
22 that comes to the appellate courts in a plain error
23 posture.

24 Erroneous judicial participation --

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

1 question about that? It's plain error because the
2 defendant didn't make an objection in the lower court.
3 But the defendant doesn't know about Rule 11 and doesn't
4 know about 11(c) that says a judge is not supposed to
5 participate in plea bargaining, and his lawyer doesn't
6 tell him the judge is doing something wrong because his
7 lawyer wants him to plea. So he lacks the information
8 necessary to make a prompt objection.

9 So it seems a bit unfair to say that he's
10 subjected to plain error when he hasn't got a clue that
11 the judge -- magistrate wasn't supposed to do what he
12 did.

13 MR. FEIGIN: Well, first of all, Your Honor,
14 I'd respectfully disagree with the notion that just
15 because Respondent's counsel was advising him to plead
16 guilty, that Respondent's counsel had so advocated -- so
17 abdicated his representation that he couldn't be
18 expected to object to an error that the judge made.

19 I'd also point out that if the Court were to
20 create an exception to the plain error doctrine, this
21 would be a particularly inappropriate case in which to
22 do it because not only was there not a contemporaneous
23 objection, there wasn't an objection before the district
24 judge in the months and proceedings that followed.

25 They didn't raise any claim of error on

1 appeal until the court of appeals raised it. And in
2 fact, in this case, Respondent did file a motion in the
3 district court to withdraw his plea. And he didn't
4 mention the magistrate's comments or any pressure he
5 felt from those comments at all.

6 JUSTICE KENNEDY: Well, suppose you just
7 stick with Justice Ginsburg's hypothetical, or perhaps
8 not even a hypothetical, what happened in this case.
9 Just assume that the defense attorney likes this
10 judicial intervention and he -- he wants this to take
11 place. It -- it seems quite unfair to talk about the
12 plain error because he doesn't tell -- as Justice
13 Ginsburg says, what does the defendant know about Rule
14 11(c)? He doesn't know about it.

15 MR. FEIGIN: Well, Your Honor, if Respondent
16 wants to make an ineffective assistance of counsel claim
17 on collateral review, he can make that. But I'm not
18 aware of any court of appeals that has abandoned the
19 plain error doctrine in this kind of case and I don't
20 think there should be any sort of special exception that
21 says when -- that we assume when counsel is advising his
22 client to plead guilty, that we can't expect counsel to
23 make objections to errors that occur based on the
24 judge's comments.

25 JUSTICE SOTOMAYOR: It doesn't really

1 matter --

2 JUSTICE GINSBURG: But this is a lawyer that
3 had filed an Anders brief. So he didn't -- even at that
4 stage, the lawyer, the -- I don't want to absorb your
5 time beyond this, but I think the plain error is
6 questionable when it seems that the judge, the lawyer,
7 they arranged against the -- the defendant, and the
8 defendant doesn't know that he has this route.

9 MR. FEIGIN: Well, Your Honor, let me just
10 say one other word about that. I don't think it's going
11 to be easy for courts of appeals to tell exactly why the
12 lawyer may not have made an objection, and I just don't
13 think it's fair to assume that in every Rule 11(c)(1)
14 case that the lawyer is effectively acting at contrary
15 purposes to his client.

16 I mean, lawyers advise clients to plead
17 guilty all the time and that doesn't mean that they've
18 abandoned the representation to the point where you
19 can't assume they're acting on the client's behalf and
20 will raise objections. But our basic point in this --

21 JUSTICE SOTOMAYOR: Excuse me. Does this
22 issue go -- it doesn't go to whether you should apply
23 the prejudice prong because either under normal harmless
24 error or plain error you have to get to whether it
25 prejudices someone.

1 MR. FEIGIN: That's exactly right, Justice
2 Sotomayor. That was exactly the next sentence that was
3 going to come out of my mouth is that our basic point in
4 this case is that you have to apply prejudice analysis
5 in some form, and whether it's harmless error or plain
6 error, the court of appeals refuses to do it. And we
7 think --

8 JUSTICE SOTOMAYOR: One of the most powerful
9 arguments of your adversary is that in the most common
10 of situations -- and it's how I read the advisory
11 notes -- it's going to be awfully difficult to say that
12 a judge's intervention hasn't influenced a defendant.
13 This is the unusual case where you might actually have a
14 no prejudice argument because of the unique facts.

15 But it -- there is a purpose for keeping
16 judges out of this, and that's because the subtle
17 influence that judges exert is not so subtle. It's very
18 palpable and does influence most decision making, both
19 by lawyers and defendants.

20 So if that's the standard, why isn't it a
21 rebuttable presumption that prejudice exists?

22 MR. FEIGIN: Well --

23 JUSTICE SOTOMAYOR: It has to be an awfully
24 high presumption, otherwise, you make mockery of the
25 rule, in my mind.

1 MR. FEIGIN: Well, first of all, Your Honor,
2 I want to take issue with the notion that all Rule
3 11(c)(1) errors are alike. There's actually a variety
4 of different kinds of Rule 11(c)(1) errors.

5 Rule 11(c)(1) has been held to cover, for
6 example, a judge pressuring the government outside the
7 defendant's presence to offer a plea, a judge
8 discouraging a plea, a judge commenting in a
9 well-intentioned manner about the obvious difference in
10 potential sentencing consequences between a potential
11 plea agreement and a trial, or a judge, having rejected
12 one plea agreement that the parties reached, indicating
13 a bit too strongly what kind of plea agreement the judge
14 might accept.

15 I think adopting some sort of "one size fits
16 all" rule would -- would be inappropriate, and a
17 rebuttable presumption I think would also be
18 inappropriate, for a few reasons.

19 First of all, I don't think courts should
20 have to distinguish between different types of errors to
21 see whether a rebuttable presumption should apply.

22 Second of all --

23 JUSTICE SOTOMAYOR: Well, I don't disagree
24 that one doesn't have to use the word "rebuttable
25 presumption," but there has to be a strong prejudice

1 factor --

2 MR. FEIGIN: Well, Your Honor --

3 JUSTICE SOTOMAYOR: -- whether rebuttable or
4 not, assumed in a judge's intervention.

5 MR. FEIGIN: -- I think that's already built
6 into Rule 52 in a couple of different ways.

7 First of all, Rule 52 places a presumption
8 based on whether or not the defendant objected. If the
9 defendant objected, the burden's on the government. If
10 the defendant didn't object, the burden is on the
11 defendant.

12 But also, I don't -- I want to be clear on
13 this, the type of error -- if there is a very serious
14 error, the nature of the error and the error's
15 seriousness would of course be a factor, and a very
16 important factor, in the prejudice analysis.

17 But, as Your Honor has recognized with this
18 case, there may be other circumstances that indicate
19 the error did not, in this case, have a reasonable
20 probability of affecting the decision of the plea.

21 JUSTICE BREYER: But that's the problem. Is
22 there a way of doing this, which I -- I don't see at the
23 moment? But the judge intervenes in a serious way and
24 says, you go listen to your lawyer and this is a very
25 harsh penalty and, boy, you are in da da da -- okay?

1 Serious problem.

2 And now to track down whether that affected
3 substantial rights, you have to try to track down the
4 state of mind of the defendant and would he have pled
5 guilty anyway. And that's sometimes quite difficult to
6 do, very hard.

7 But if you don't insist on doing it, and you
8 have an absolute rule of structural error or something,
9 then you suddenly discover these minor things. The
10 judge says, go to lunch, or -- or, you know, some really
11 trivial intervention, and you are going to say that --
12 the guilty plea, he can just void his guilty plea.

13 So there should be a way of distinguishing
14 the trivial from the -- from the really important in
15 terms of how serious the intervention was, but I don't
16 see any way to do that. Have -- have you thought about
17 that at all? Do we have to go all the one way or all
18 the other way?

19 MR. FEIGIN: I have thought about that a
20 little bit, Your Honor, and I'd say that trying to break
21 Rule 11(c)(1) into different pieces and adopt different
22 rules based on different kinds of error would be
23 inappropriate, for three main reasons.

24 The first one is I think it would be
25 inconsistent with this Court's approach in *Neder v. the*

1 United States, which makes clear that in deciding
2 whether an error is structural you have to look at the
3 entire class of errors.

4 And Rule 11(c)(1) defines the class of
5 errors as cases in which a judge participates in plea
6 negotiations in some way, and it doesn't define
7 subcategories.

8 Second, I think breaking this up into pieces
9 would essentially be an incomplete and unsatisfactory
10 form of prejudice analysis. That is, reviewing courts
11 would still be looking at errors and differentiating
12 between them in order to decide whether relief is
13 warranted, but they would be narrowly focused only on
14 the binary inquiry of how to categorize the error,
15 they'd be disregarding how serious that particular error
16 was versus other errors in that category, and they would
17 be disregarding all the other facts and circumstances
18 the courts always look at and are well familiar with how
19 to look at in a normal prejudice analysis, to determine
20 whether the error affected the outcome.

21 Third, particularly because the
22 subcategories don't exist in the rule and would be
23 something of judicial invention, I think that approach
24 would be inherently inadministrable and manipulatable
25 and lead to inconsistent results.

1 It could be very difficult to tell whether a
2 particular type of error should fall into one category
3 or another, and under the approach you're suggesting,
4 which I think is the approach Respondent is
5 advocating -- I don't think Respondent is actually
6 advocating the per se rule that the Eleventh Circuit
7 adopted here -- I think under that approach, you know,
8 everything turns on a narrow question of categorization.

9 I think the much better approach, and the
10 approach that Rule 52 adopts, is to look at all the
11 facts and circumstances to attempt to determine the
12 effects on the outcome.

13 JUSTICE GINSBURG: Mr. Feigin, is there any
14 situation in which a -- a judge participating in a plea
15 bargaining, any situation that would be prejudicial --
16 that you recognize would be prejudicial, and if there is
17 can you describe what that would be?

18 MR. FEIGIN: Certainly, Your Honor.

19 We -- the government loses many of these
20 cases even in circuits that have prejudice analysis. In
21 fact, one example the Court might want to look to, there
22 was a certiorari petition I think filed at the end of
23 last term, a case, 11-8966, Rebollo-Andino, which was a
24 case of Rule 11(c)(1) error. The government conceded
25 that even on a plain error analysis that that was

1 prejudicial.

2 I can describe --

3 JUSTICE GINSBURG: What -- what makes it
4 prejudicial and this not?

5 MR. FEIGIN: Well, let me take -- let me
6 take a different example.

7 The Fourth Circuit's decision in United
8 States v. Bradley, the judge essentially told the
9 defendants that he -- it boggled his mind that they were
10 going to trial and kept essentially harassing them about
11 why they were going to trial. And, eventually, they
12 said, all right, Your Honor, we are going to -- we're
13 going to plead guilty. I mean, that kind of thing
14 obviously is going to be prejudicial.

15 But the advantage of a prejudice approach is
16 it allows you to separate that kind of case from kinds
17 of cases when there are less serious errors, or even a
18 case where there is a fairly serious error -- and this
19 case may fall within that category -- but there are
20 facts and circumstances that indicate that the error
21 didn't have a reasonable probability of affecting the
22 defendant's decision to plead.

23 And while we're not asking the Court to
24 resolve the prejudice analysis here in the first
25 instance, we -- we're just asking the Court to remand

1 the case to the court of appeals to do that, I think
2 it's just worth noting that -- a couple of the factors.
3 One is that -- there was a 3-month break between the
4 magistrate judge's comments and the entry of the plea,
5 and a month into that a speedy trial motion was filed,
6 which indicated at least some intent at that point to go
7 to trial.

8 The plea and the sentencing occurred in
9 front of the district judge, not the magistrate judge to
10 -- who made the comments.

11 JUSTICE GINSBURG: On that point, do we
12 know -- do we know if the district judge who did preside
13 at the plea hearing knew about the episode with the
14 magistrate 3 months earlier?

15 MR. FEIGIN: I don't -- I'm not aware of
16 anything in the record that reflects whether he did or
17 did not. There's never been an allegation that -- that
18 he said something about them, or that he was aware of
19 them or --

20 JUSTICE GINSBURG: The same for the
21 prosecutor?

22 MR. FEIGIN: Your Honor, my understanding is
23 the government was not aware of this because it occurred
24 in an ex parte hearing in which the government wasn't in
25 attendance. The government wasn't aware of it until the

1 Eleventh Circuit conducted its own review of the record
2 and asked for further briefing on the issue.

3 JUSTICE ALITO: Suppose there's a case where
4 the -- the defendant would not have pled guilty without
5 this court saying something inappropriate about it's a
6 case where the defendant would be crazy to go to trial
7 because the trial would lead to a much more severe
8 sentence. Would there be prejudice there?

9 MR. FEIGIN: Yes, Your Honor. He has a
10 right to go to trial if he wants to go to trial, even if
11 it would be crazy. So under that circumstance, if he
12 wouldn't have, you know, pleaded guilty without the
13 erroneous comments from the judge, there would be
14 prejudice.

15 JUSTICE KENNEDY: That's -- what happens
16 under -- under the rule if the magistrate asked that the
17 defendant be excused -- I don't know quite how you do
18 that, the defendant has to be present. But can the --
19 can the judge just have the attorneys before him and
20 say, now, I want you to be very, very clear that this is
21 a mandatory minimum, that we should try to avoid if at
22 all possible.

23 Can he do that?

24 MR. FEIGIN: Well, Your Honor, I think
25 that's --

1 JUSTICE KENNEDY: It's awfully hard to have
2 a hypothetical where you exclude the defendant.

3 MR. FEIGIN: Well, Your Honor, this actually
4 happened in a non-hypothetical fashion in a case we cite
5 in our reply brief, called In re United States, in which
6 the judge was apparently unhappy with the government's
7 conduct in that case and had the prosecutor and defense
8 counsel in chambers, or at least in court, without the
9 defendant's presence, and was urging the parties to
10 reach a plea agreement.

11 I think if something like that happened, Your
12 Honor, there'd be some question whether the defendant
13 was made aware of it, and whether it actually influenced
14 the defendant's decision to plead. I don't think there
15 can be a presumption that just because counsel heard it,
16 that it necessarily --

17 JUSTICE ALITO: What -- what if the judge
18 sees what the judge thinks is ineffective assistance of
19 counsel, under our decision in Lafler, taking place? Is
20 there anything that can be done?

21 MR. FEIGIN: So -- Your Honor, I think one
22 of our main concerns in bringing this case before the
23 Court is the interaction of this Court's decisions in
24 Lafler and Frye with Rule 11(c)(1), and Frye suggests
25 that one way a judge can try to guard against a later

1 claim of ineffective assistance of counsel is to conduct
2 a colloquy with the defendant -- not a colloquy, but a
3 discussion with the defendant -- during the initial
4 proceedings to try to establish that he understands the
5 consequences of his plea and that he's receiving
6 effective assistance of counsel.

7 I think that could be done very carefully by
8 asking very general questions, but I think it's very
9 easy to see how a judge might slip up and say, oh,
10 that's an interesting offer. Did you discuss that with
11 your counsel? That seems like something you ought to
12 discuss with your counsel.

13 And I think what the automatic reversal rule
14 the court of appeals has adopted is it really puts
15 judges, and, frankly, the government, in kind of a box.
16 On the one hand, judges have to guard against these
17 later ineffective assistance of counsel claims by
18 discussing plea discussions, and on the other hand, any
19 slipup in that discussion is going to lead to automatic
20 reversal on appeal.

21 Now, I -- I just want to add one -- one more
22 thing, which is, I think, the best evidence that we have
23 that this -- the magistrate judge's comments here did
24 not create a reasonable probability of effecting the
25 defendant's decision to plead is, again, defendant

1 himself moved pro se to withdraw his plea in the
2 district court, and his reasons for withdrawing his
3 plea, which start on page 58 of the Joint Appendix,
4 never mention the magistrate's comments. Instead, in
5 his own words, what he says is, "Your Honor, my decision
6 to enter the plea was a strategic decision.

7 The reason being is that I knew that the
8 prosecutor had a duty with the courts to disclose the
9 information relevant for this court's determination of
10 the acceptance or rejection of the plea."

11 And what he means by that is that he took
12 issue with some aspects of the allegations in the
13 indictment, although he's quite clear, both in that
14 proceeding and at his guilty plea proceeding, that he
15 did commit the conspiracy offense, and he just believed
16 that those allegations in the record would be cleaned up
17 or have to be withdrawn by the prosecutor if he pleaded
18 guilty.

19 Now, he was wrong about that. But what we
20 have in this case is a clear unvarnished explanation by
21 the defendant, in his own words, about why he pleaded
22 that doesn't mention the magistrate's comments.

23 The Court of Appeals erred in disregarding
24 that.

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

1 reserve the balance of my time.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Yablon?

4 ORAL ARGUMENT OF ROBERT M. YABLON

5 ON BEHALF OF THE RESPONDENT

6 MR. YABLON: Mr. Chief Justice, and may it
7 please the Court:

8 By imploring Anthony Davila to forego his
9 trial rights, confess his alleged crimes, and accept a
10 plea deal, the magistrate judge abandoned his role as
11 neutral arbiter and fundamentally distorted the pretrial
12 process.

13 JUSTICE KENNEDY: I -- I don't want to
14 interrupt your opening because I think -- I just didn't
15 hear your first -- "by foregoing"?

16 MR. YABLON: By foregoing --

17 JUSTICE KENNEDY: By foregoing.

18 MR. YABLON: -- his trial rights.

19 This -- the right at issue in this case is
20 not one that should be subject to post hoc speculation.
21 Judges, when an error of this kind occurs --

22 JUSTICE SOTOMAYOR: You're creating a sui
23 generis structural error analysis. You're basically --
24 because even with respect to constitutional violations
25 that we have found structural error in, we've created

1 the plain error rule that still requires a proof of --
2 of prejudice. So you're asking us to create something
3 that's really sui generis in saying it's always a
4 structural error.

5 MR. YABLON: That's -- that's not correct,
6 Your Honor. First, let's put to one side the fact that
7 we do argue that we should not be in a plain error
8 framework at all in this case because of the
9 circumstances in which the judge's improper intervention
10 occurred.

11 JUSTICE SOTOMAYOR: Assume I accept that
12 argument.

13 MR. YABLON: So this Court has --

14 JUSTICE SOTOMAYOR: You're -- you're saying
15 this is a structural error always.

16 MR. YABLON: And this Court has, at the very
17 least, strongly suggested that substantial rights, when
18 you're dealing with a structural error, are affected,
19 per se, where they've left the door open to some
20 additional analysis is the fourth prong of the plain
21 error standard where the Court is called upon to
22 consider whether the error affects the fairness,
23 integrity, or public reputation of the proceedings.

24 And the government has never, in this case,
25 invoked that fourth prong. They've never claimed that

1 the error here is one that -- that does not affect the
2 fairness, integrity, or public reputation.

3 So when you're only dealing with the third
4 prong of the plain error standard, does the error affect
5 substantial rights? That language is the same in Rule
6 52(b), the plain error standard, as it is in Rule 52(a),
7 affects substantial rights. And if it means in Rule
8 52(a) that this is the sort of error for which an
9 individualized prejudice inquiry is not appropriate,
10 then the same analysis necessarily carries over to Rule
11 52(b).

12 So I would not say that this is at all the
13 kind of sui generis example that -- that you're
14 indicating.

15 And I do want to -- to -- and try to show
16 that this error is quite similar, both to constitutional
17 and nonconstitutional violations in with -- which this
18 Court has said that an error should be said to affect
19 substantial rights without the sort of specific showing
20 of prejudice that the government is demanding.

21 When you have a judge that, as in this case,
22 is stepping out of his proper role, is acting contrary
23 to his duties to guard against ill-considered and
24 involuntary waivers of the defendant's basic trial
25 rights, is actually ratcheting up the already tremendous

1 pressure on the defendant to plead guilty, that is a
2 systematic distortion of the process. That is not
3 unlike the kind of error that occurs when a defendant is
4 denied an impartial adjudicator, is not unlike the
5 kind of error that occurs when a defendant is denied
6 counsel or is forced to --

7 CHIEF JUSTICE ROBERTS: What -- what if you
8 have the situation where the judge is conveying purely
9 factual information? There's a -- a plea bargain on the
10 table for one year and the judge says, you should know
11 that I -- I have these cases a lot. The last ten cases
12 that went to trial where the defendant was found guilty,
13 I sentenced them to a minimum of 12 years. Pure facts.

14 The facts might have the effect of pushing
15 the defendant one way or another, but it's also factual
16 information of which he ought to be aware.

17 MR. YABLON: That's right, Your Honor, and
18 this raises a question about what the scope of the
19 participation prohibition actually is.

20 And we're in a strange posture in this case
21 because the government has conceded that we're dealing
22 with a conceded plain violation of the rule, and yet
23 their analysis, instead of proceeding from that
24 violation, it goes out to the periphery and tries to
25 figure out where are the boundaries of Rule 11.

1 Now -- and they cite some appellate cases
2 that arguably have applied too broad a construction of
3 the rule and have reversed where maybe there was just a
4 one-off comment or a purely informational comment, but
5 it's not clear that that is actually what the text of
6 Rule 11 forbids, particularly when you consider the
7 context of the rule and its underlying purposes. So --

8 CHIEF JUSTICE ROBERTS: Well, we do need to
9 have a good sense of how far your -- your per se
10 structural argument is going to reach before we
11 decide -- in deciding whether it's appropriate or not.

12 MR. YABLON: That's right, Your Honor, and
13 there are -- there are two ways to break it down. One
14 is we do argue that the remedy that we seek should apply
15 for all cases of judicial participation. And the
16 question then is: Are judicial participation violations
17 as expansive a category as the government suggests that
18 they are?

19 Our second argument is that --

20 JUSTICE KAGAN: Well, on that, what's the
21 most minor thing that the government could do that would
22 still count as a Rule 11(c)(1) violation?

23 MR. YABLON: The most minor thing that the
24 government could do or a judge could do?

25 JUSTICE KAGAN: That the judge could do.

1 I'm sorry.

2 MR. YABLON: Well, the most minor -- we
3 think that Rule 11 is concerned with judicial pressure
4 to plead guilty. And so the most -- I mean, a judge
5 might make a comment that, viewed from the transcript,
6 would suggest that the evidence against the defendant is
7 overwhelming or that the defendant is likely to get a
8 much lower sentence if he pleads guilty than if he goes
9 to trial. Those we think are --

10 CHIEF JUSTICE ROBERTS: What -- what about
11 the hypothetical that I posed?

12 MR. YABLON: So that hypothetical, if -- if
13 we were talking about a purely informational statement
14 like that, then, actually, we don't think that that is
15 likely to be a violation of Rule 11(c)(1). And the
16 reason is, if you look at 11(b), the rule expects that
17 judges are, in fact, going to be offering a lot of
18 advice to defendants before the defendant pleads guilty.

19 And so if a judge is making the kinds of
20 comments that Rule 11(b) is contemplating, informing the
21 defendant about the nature of the charges against him,
22 attempting to make sure that the defendant understands
23 that his trial right is a real one, telling the
24 defendant a little bit about what, in fact, the -- the
25 sentencing exposure might be if he is convicted, those

1 purely informational statements we don't think is what
2 is meant to be prohibited by the rule.

3 CHIEF JUSTICE ROBERTS: So if he -- if it's
4 my example and he says, this is what I've done the past
5 ten times, so you ought to think long and hard about
6 whether a bargain for one year is a good deal.

7 MR. YABLON: So -- and -- and this is
8 getting -- and then the judge may well be crossing the
9 line. And what the judge --

10 CHIEF JUSTICE ROBERTS: It's kind of a fine
11 line to -- to draw, isn't it?

12 MR. YABLON: There's no question that there
13 will be close cases. I would say that if you look to
14 the majority of cases that are actually out there, most
15 judges, of course, are very scrupulous about following
16 the rule. And when a judge is not, the judge is not
17 usually being circumspect about it, the judge is trying
18 to get a message across to the defendant.

19 And so there may be difficult line-drawing
20 cases, and that's true whether you're looking at the
21 remedial approach that we're asking for or the remedial
22 approach that the government's asking for.

23 JUSTICE GINSBURG: Mr. Yablon, the -- the
24 case that you're presenting would be quite strong if the
25 same judge -- if the magistrate judge also presided at

1 the plea hearing, but here we have two factors that are
2 special in this case. One is it's a different judge,
3 and two is we have the interval of some three months in
4 between. And then we have a plea hearing that looks to
5 me like it's exemplary. The district judge did go
6 through everything that Rule 11 calls for.

7 So it is a different case, isn't it, when we
8 have a plea hearing with a judge who is exerting no
9 pressure at all, has nothing to do with encouraging the
10 defendant to plead, but there was an earlier episode
11 where a magistrate judge did overbear?

12 MR. YABLON: And at no point during the plea
13 colloquy hearing is the district judge in any way
14 acknowledging or disavowing the magistrate judge's
15 comments, which, we submit, there is at least a very
16 strong probability that those comments affected the
17 defendant's thinking and the reason that the defendant
18 is at the Rule 11 hearing in the first place.

19 JUSTICE GINSBURG: But -- but the -- but the
20 judge did ask, do you recognize that your -- your
21 conduct satisfied the elements of the conspiracy? And
22 the defendant answered yes. And the -- the judge asked,
23 has anyone pressured you to plead guilty? And he
24 answers no. So --

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

1 situation, the defendant is likely not thinking about
2 pressure that may come from the judiciary itself. And
3 also, not to nitpick, but when he's asking that pressure
4 question he's asking whether anyone pressured him to
5 plead guilty today, which may not cause the defendant to
6 think back on why he actually started down the negotiation
7 road.

8 I think an important --

9 JUSTICE SOTOMAYOR: Mr. Yablon, I agree with
10 you totally. I'm not as much convinced by the delay in
11 pleading because defendants often think about it and I
12 can imagine a hypothetical where the lawyer comes in and
13 says, I told him to plead guilty and he said to me, I
14 don't want to, but the judge told me to.

15 So I don't think the time limit -- we don't
16 know if that happened. But what did happen is that the
17 defendant made a motion to withdraw his plea and he
18 directly said, "I entered the plea because I
19 strategically decided that the government would
20 eventually have to come forth and vacate the charges
21 against me." He said it himself with no pressure by a
22 lawyer because he was making the motion. How do you get
23 past that statement?

24 MR. YABLON: That statement reveals just how
25 little confidence we actually should have in the plea

1 decision that he made. Here is a defendant who for the
2 better part of a year was adamant about his desire to go
3 to trial and exercise his rights. It's the reason that
4 the in camera hearing happened in the first place
5 because he was unhappy that his lawyer just wanted him
6 to plead guilty. After that hearing, suddenly there are
7 plea negotiations and a plea deal, which it's clear that
8 he is never happy about from the start.

9 Even at the plea hearing, he is attempting
10 to tell the judge, look, I don't think that my conduct
11 actually is consistent with the conspiracy charge as
12 alleged. And he says later on at the sentencing hearing
13 when they are discussing the withdrawal motion that
14 basically he went forward because his lawyer was
15 instructing him that it was the right thing to do. And
16 if you look at that sentencing --

17 JUSTICE SOTOMAYOR: But that is the whole
18 point, which is this may be IAC, but I don't know how --
19 how you prove that what the magistrate judge said to him
20 led to his decision.

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

23 JUSTICE SOTOMAYOR: That's only if we don't
24 accept that prejudice is a consideration here.

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

1 at whether this conduct should be viewed as inherently
2 prejudicial the reason that you might do that is because
3 you might think that at least in all of these cases
4 there might at least be a reasonable probability that it
5 would affect where the defendant is. And here you have
6 a defendant who has been adamant that he's not going to
7 plead, and when you have the judge making these comments
8 in front of the defendant, having him lose confidence in
9 his right to go to trial, then it's likely that that is
10 shifting the defendant's mind set in a way that gets him
11 to the negotiating table. And it also reaffirms the
12 defense lawyer's position in this case.

13 And so you have a defense lawyer who may
14 then go back to the prosecutor and say, we're just going
15 to get this deal done, and it may not be the deal that
16 the defendant would otherwise have reached.

17 JUSTICE BREYER: You want us to basically
18 not apply the 11(h) with the harmless error business, and
19 you basically want to prevent bizarre results by making
20 a tough definition of the word "participate." That's
21 how I understand you. And maybe you are right, but it
22 sounds to me as you say it in reading the briefs that
23 this is really a job for the rules committee.

24 This is a rule. We don't normally have
25 structural errors in respect to rules. We have rules

1 committees there to listen to this kind of complaint, to
2 weigh it in the system as a whole and to come up with
3 better rules.

4 MR. YABLON: Let me address that in two ways
5 because we have two separate arguments and I want to try
6 to keep them distinct. One is that if you look at the
7 text and history of Rule 11, there is strong evidence
8 that Congress actually made an affirmative judgment not
9 to sweep in Rule 11 violations within the scope of Rule
10 11(h).

11 Our second argument is that even if Rule 11(h)
12 applies to all Rule 11 errors, that all Rule 11(h) does
13 is apply the same substantial rights language that you
14 see in Rule 52(a) and (b). And this Court has
15 recognized that, while that substantial rights language
16 is often synonymous with a case of specific prejudice
17 inquiry, that's not always true. And there are a number
18 of examples. The Court is familiar with the
19 constitutional cases in which the Court has said that an
20 error is structural without trying to determine -- make
21 a case-specific determination of prejudice.

22 But there are a number of nonconstitutional
23 cases as well in which the Court has said that an
24 individualized prejudice inquiry is simply
25 inappropriate, that the error affects substantial rights

1 by its nature. So one example that I think is fairly
2 close to the one we have here is -- is Gomez v. United
3 States, where you have the Court addressing a statutory
4 provision that prevents magistrate judges from
5 conducting the jury voir dire. And that provision is
6 violated and the Court is asked to conduct a prejudice
7 analysis, did it matter that the magistrate judge
8 conducted voir dire?

9 And the Court said, we are not going to go there.
10 This is -- this is in effect a structural defect in the
11 proceedings.

12 JUSTICE KAGAN: Well, Mr. Yablon, have we
13 ever said that about the violation of a rule of criminal
14 procedure, that it's structural error no matter what the
15 circumstances?

16 MR. YABLON: First, Justice Sotomayor, this
17 Court has said that rules of criminal -- I'm so sorry --

18 JUSTICE SOTOMAYOR: That's the first time
19 that has happened.

20 MR. YABLON: And I should be --

21 JUSTICE KAGAN: You worked for her, too, I
22 think.

23 MR. YABLON: Makes it that much more
24 embarrassing. She used to sit over there.

25 This Court has said that Federal rules and

1 statutes stand on equal footing, so whether we are
2 talking about applying this with respect to a rule or a
3 statute, it shouldn't make a difference; the analysis
4 should be the same. And in fact there is at least one
5 case where the Court did apply, in effect, a
6 structural analysis to -- to a rule violation and a
7 second case in which the Court at least left open the
8 possibility.

9 So the case in which the Court did so is the
10 McCarthy case, which is discussed extensively in the
11 briefs. And the Court referred to the 1966 version of
12 Rule 11 and said that prejudice adheres in a violation
13 of that rule and that it was not going to conduct an
14 individualized prejudice analysis. It was simply going
15 to grant relief where there had not been full compliance
16 with that provision.

17 Of course, the rule has been amended since
18 then, but that provides evidence that the Court is not
19 unwilling to adopt this kind of rule in the context of
20 the Federal Rules.

21 JUSTICE KAGAN: I would think, Mr. Yablon,
22 that one of the effects of doing what you are asking us
23 to do is that the rule will just get narrower and
24 narrower. In other words, if automatic reversal is
25 always the effect of finding a violation -- and I think

1 you acknowledge this in a way -- that people will just
2 find fewer and fewer violations. And I'm wondering why
3 we should do something like that rather than interpret
4 the rule as it was meant to be interpreted, but then
5 say, you know, somebody can look and say it really just
6 didn't matter that it was violated in this case.

7 MR. YABLON: So we think that our approach
8 is consistent with how the rule is, in fact, meant to be
9 interpreted. The rule really is about this problem of
10 placing judicial pressure on defendants to plead guilty,
11 and those are the cases that ought to be reversed.

12 But the Court has a line-drawing decision to
13 make either way. Either the line that the Court should
14 focus on is the line that separates participation from
15 nonparticipation or, again, a narrower class of
16 participation. And I want to get to this point that --

17 JUSTICE ALITO: But you are arguing for a
18 narrower interpretation of Rule 11(c)(1) than a number
19 of courts of appeals have adopted, isn't that correct?

20 MR. YABLON: There -- I believe there are
21 some decisions out there that have adopted probably a
22 broader construction than we think is necessary and
23 appropriate. But what is easier for reviewing courts
24 to monitor? Is it easier for them to monitor the
25 narrowing -- the improper narrowing of the rule over time,

1 or is it easier for them to monitor improper applications
2 of the harmless error rule, especially applications of it
3 that are happening in this kind of setting, where it's
4 going to be almost inherently a very speculative analysis,
5 an attempt to read the defendant's mind and ascertain
6 whether the defendant was influenced by what the judge
7 was saying.

8 And it would be much easier for appellate
9 courts to focus on the line-drawing exercise that
10 determines whether or not a violation had occurred or,
11 if you think that the rule is broader, whether the kind
12 of violation that occurred in this case occurred, than
13 it would be to try to make these case-by-case scouring
14 the record, individualized prejudice determinations.

15 JUSTICE ALITO: Could you say something
16 about Mr. Feigin's comments regarding what a judge can
17 and cannot do if the judge thinks that he or she sees a
18 violation of Lafler and Frye taking place?

19 MR. YABLON: So there ought to be things
20 that a judge is able to do in that situation. Suppose,
21 for example, that the judge becomes aware that the
22 defense attorney has given the -- his client false
23 information about the elements of the charge. It would
24 not violate Rule 11(c)(1) for the judge to say, I
25 understand that you were told that the elements of the

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

3 So there are -- there are certainly steps
4 that a judge can take to help root out the violation.
5 And I would say that the fact is that generally when it
6 comes to ineffective assistance of counsel claims, there
7 is only so much that the trial court can do. So
8 the fact that the trial court may not be able to solve
9 or prevent every ineffective assistance claim in this
10 context is not necessarily an argument against the rule
11 because the judge often is not aware of the privileged
12 communications. Now --

13 JUSTICE ALITO: What if the judge knows as a
14 result of pretrial motions that the evidence in the case
15 is very, very strong.

16 Let's say there's a -- there's been a motion
17 to suppress extremely incriminating evidence and the
18 motion has been denied, so the judge knows this is going
19 to come in. And the judge thinks if this comes in,
20 there's virtually very little chance that the defendant
21 is going to be acquitted, and yet the defendant -- and
22 the judge knows that a plea bargain -- a plea offer was
23 made and the defendant initially was going to take it,
24 and then before it was accepted, it's rejected.

25 Is there anything a judge can do in that

1 situation? Just sit back and, you know, wait for the
2 case to be -- to be reversed?

3 MR. YABLON: Well, the judge's role in that
4 situation is -- is not to step in as defense counsel or,
5 in effect, as second prosecutor. The judge -- I think
6 that there may be ways in that case for the judge to try
7 to alleviate the error without -- without crossing the
8 line. But when -- but when you start to make exceptions
9 in that -- in that situation, you -- you go down the
10 road of -- of the judge being the one who is evaluating
11 the evidence and who is, in effect, potentially
12 presuming the defendant's guilt. And the judge --

13 JUSTICE ALITO: It just puts -- puts the
14 judge in a very difficult position. It could -- can the
15 judge say, you -- do you realize that I denied your
16 motion to suppress that wiretap? And do you recognize
17 that on that wiretap, you conceded that the loss in this
18 case is \$20 million, and do you know that under the
19 sentencing guidelines, the sentence where the loss is
20 \$20 million is whatever it is, ten years in jail.

21 If the judge says all of that, has the judge
22 violated Rule 11(c)(1)?

23 MR. YABLON: And if this is happening in the
24 context of active discussions of whether the defendant
25 should or should not take a plea, then that -- that may

1 well cross the line.

2 JUSTICE KENNEDY: I don't know when it can
3 happen because there's no colloquy when there's a guilty
4 plea. The colloquy happens when there's a not guilty
5 plea.

6 MR. YABLON: I think -- isn't it the
7 opposite, Justice Kennedy? The colloquy happens after
8 the defendant --

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

11 MR. YABLON: So -- so taking -- so in that
12 instance, again, you have a situation that may not be
13 different from situations that arise in completely
14 different contexts, where the attorney is doing
15 something that's ineffective, for example, and the judge
16 just doesn't know about it. And -- and whether or not
17 that can be cured in this -- in this setting of the --
18 of plea discussions, it's just a little bit tangential,
19 I think, to the key issue.

20 CHIEF JUSTICE ROBERTS: Now -- well, but
21 you've answered a lot of these questions by saying, you
22 know, it's hard to draw the line and, you know, maybe in
23 that case, maybe in this case.

24 Most -- our precedents where we recognize
25 structural error and -- and plain error are ones that

1 are pretty easily categorized. Did a magistrate conduct
2 voir dire or did he not? You know right away one way or
3 the other. Here did he participate enough? You know,
4 well, if he told them how many times he sentenced people
5 this way, it's not, but if he said you ought to -- you
6 ought to pay attention to what I'm telling you when
7 you'd consider whether to plea or not, well, then it is.

8 It -- it seems to me in the typical plain
9 error cases, we're very -- the categories are very
10 sharply defined.

11 MR. YABLON: That's actually not --
12 not accurate. I would say, for example, take the
13 defendant's right to self-representation. And do you --
14 there may be obvious cases and when the defendant's
15 right to self-representation has been clearly denied.
16 But there are going to be line-drawing problems when
17 you're trying to figure out did standby counsel
18 intervene so much that he denied that right.

19 Or similarly with the public trial,
20 obviously, a court can be totally closed, but then there
21 are going to be difficult cases when you have to decide
22 whether the justifications for closing the courtroom
23 are --

24 CHIEF JUSTICE ROBERTS: I would say in both
25 of those examples, the line -- the gray area, if you

1 were, is really quite narrow than here, where almost
2 every time you've been asked a question about a
3 difficult hypothetical, you say, well, maybe, maybe not.
4 And I think that's quite different than saying is the
5 court closed or not or was the person -- you know, did
6 he represent himself in fact or not. And those just
7 strike me as much easier cases.

8 MR. YABLON: And, of course, I'm being asked
9 all of the difficult hypotheticals.

10 If you look at the cases that actually
11 rise --

12 CHIEF JUSTICE ROBERTS: Yes, but if you were
13 -- if you were arguing whether or not it's -- it's
14 categorical error when the magistrate conducts voir
15 dire, it'd be pretty hard for somebody to come up with a
16 tough hypothetical.

17 MR. YABLON: In that instance, yes. But
18 there certainly are instances in which the structural --
19 in which the Court has found structural error, even when
20 there will be difficult line-drawing problems. And --

21 JUSTICE GINSBURG: Mr. Yablon, one problem
22 with calling this structural error is that it's not so
23 clear that this is a -- a bad thing. That is, some
24 States, even today, allow a judge to participate in plea
25 bargaining, and the advisors -- the rules advisory

1 committee -- said, when it -- when it framed this rule,
2 that some commentators had said it was quite -- quite a
3 frequent thing that happened, that judges participated.
4 So it isn't like not having a public trial or not giving
5 a person counsel of choice.

6 It's, this was -- this was something that
7 still some jurisdictions think it's okay.

8 MR. YABLON: Your Honor, no jurisdiction
9 endorses judicial exhortations to plead guilty. And --
10 and so this Court can resolve the case just on that
11 narrower basis, that there is a category of cases that
12 clearly do involve direct judicial pressure. And no
13 State allow -- allows it, and those are clear violations
14 of the rules. So without needing to draw these other
15 lines about how broad participation may reach, the Court
16 can do that.

17 But even in those States, it's important to
18 note that -- that the Federal system has made a
19 different structural choice. So whether or not it may
20 violate the Constitution for States to have carefully
21 tailored procedures that allow some type of judicial
22 involvement, that's not the structure that the Federal
23 system has chosen. And when you're dealing with the
24 structural choice that was made in Rule 11, that judges
25 shall not, must not participate in plea discussions,

1 that that is as elemental to the Federal system of plea
2 bargaining that we have as many of the familiar elements
3 of -- of the trial are. And so the fact that States
4 have made -- made different structural choices does not
5 mean that it's not a structural error here.

6 Now, I do want to get back to this
7 line-drawing issue because I think that this is not
8 something that should trouble the Court too much, for a
9 couple of reasons.

10 First, in most cases, the line will not be
11 that hard to draw when you consider the purpose of Rule
12 11(c)(1), which is reducing judicial pressure, and
13 instances in which judges are stepping out of their role
14 as impartial adjudicators, and when reviewing courts
15 take that as the touchstone, there may be difficult
16 cases, but they're going to be able to resolve most of
17 them.

18 Now, if the Court feels like it may be
19 difficult to do line drawing, and it is uncomfortable
20 extending the rule -- the remedy that we're seeking that
21 far, it is entirely appropriate for the Court to -- to
22 take out a subcategory of Rule 11(c)(1) violations.

23 JUSTICE KAGAN: But that seems a bit odd,
24 don't you think, Mr. Yablon? You know, you're saying,
25 well, there are core violations as opposed to noncore

1 violations. I mean, presumably, that's part of what the
2 Court would think about when it was doing prejudice
3 analysis.

4 MR. YABLON: It would factor into the
5 prejudice analysis that the Court undertakes, but it
6 also is a reason just to -- to draw the line. I mean,
7 this Court in -- in various instances has
8 indicated that -- I mean, there are some -- some broad
9 rules out there, the right to the assistance of counsel.
10 It comes in different shapes. And the prejudice
11 analysis that applies for a total denial of the right to
12 counsel is different from the one that applies when
13 you're dealing with mere deficiency in counsel's
14 performance.

15 And there is -- and again, this is -- this
16 is a comparative line-drawing problem. Either you draw
17 the line looking at what a violation is or looking at
18 what a judicial exhortation is from the statement that
19 is made, or you engage in this freewheeling speculation
20 that the government wants engaged in, where you were
21 trying to read the defendant's mind. And that is simply
22 not how harmless error analysis normally proceeds, where
23 you have a closed universe of a record, you have
24 specific criteria that are being applied, and you can
25 posit what a reasonable juror is.

1 There is no reasonable defendant that can be
2 posited in the same way because defendants are
3 idiosyncratic and are entitled to be idiosyncratic.

4 JUSTICE KAGAN: Mr. Yablon, do you know of
5 any case where there is one of these core violations,
6 these exhortation cases, where the Court did not find
7 prejudice?

8 MR. YABLON: The answer is no, and that
9 would be -- and we would urge the Court that if it does
10 not accept our primary submission, that it make clear
11 that judicial exhortations like this are highly unlikely
12 to be harmless.

13 That is what the Fourth Circuit has done,
14 the Fifth Circuit, the Seventh Circuit, the Tenth
15 Circuit, the D.C. Circuit. They are in effect applying
16 a per se analysis, they're just not calling it that.
17 They are reversing in all of these cases.

18 And so if this Court is uncomfortable
19 calling it a per se rule, at least it should give very
20 strong indications that comments like this cannot be
21 written off, that they are highly likely, given the
22 position of the judge relative to the defendant, to
23 affect the defendant's thinking, to affect the way that
24 the defense counsel approaches the case, and possibly
25 the prosecution as well in those cases in which the

1 prosecution is aware of the error.

2 And we would go further and say that if the
3 Court were to go down this road, it would be useful for
4 the Court to provide the additional guidance of holding
5 that this particular error was not harmless. That would
6 send a signal to the lower courts that this conduct is
7 clearly off limits, and it would give them an indication
8 that the court means what it's saying, that these kind
9 of comments, where a judge is exhorting a defendant to
10 come to the cross, that he needs to plead guilty --

11 CHIEF JUSTICE ROBERTS: How do we -- if
12 we're giving this guidance, what do we say about the
13 fact that he had a different judge subsequent to this,
14 that he filed a speedy trial motion after this coercion,
15 which suggests that he wasn't coerced all that much.

16 Are we supposed to take all that into
17 consideration, too?

18 MR. YABLON: You should say that those
19 inferences are not adequate to overcome the inference
20 that you draw from this type of participation,
21 particularly here.

22 I mean, consider the change in judge. The
23 reason this hearing occurred before the magistrate judge
24 is because the defendant sent a letter to the district
25 court asking -- explaining his problems with his

1 counsel. He got a response from the magistrate judge.
2 So in the defendant's mind, the magistrate judge and the
3 district court are effectively one and the same, and you
4 would not want a system where district courts are
5 encouraged to send these issues to magistrate judges, so
6 magistrate judges can engage in these kind of comments,
7 but then the district court judge can basically just
8 cleanse it. It is going to affect the way that the
9 process plays out.

10 Now, the speedy trial issue, if I may
11 just -- we can equally draw the inference that that was
12 only done because counsel wanted to put some pressure on
13 the government to actually reach a deal. And it is that
14 kind of speculation that makes this error ill-suited to
15 the kind of remedial analysis the government favors.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Feigin, 13 minutes.

18 REBUTTAL ARGUMENT OF ERIC J. FEIGIN

19 ON BEHALF OF THE PETITIONER

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

21 I just want to make one quick point in
22 response to the notion that we're asking for some form
23 of new prejudice analysis here.

24 This is the exact same prejudice analysis
25 from Dominguez Benitez, that looks whether there is a

1 reasonable probability that the error affected the plea.

2 Unless the Court has any further questions,
3 I will rest --

4 JUSTICE KAGAN: Mr. Feigin, can I ask you
5 the same question that I asked Mr. Yablon, do you know
6 of any cases where in these -- where there are really
7 core violations, where a judge exhorts the defendant to
8 plea it -- does the Court ever find that
9 non-prejudicial?

10 MR. FEIGIN: I am aware of one or two State
11 cases in which the court has looked at the passage of
12 time as a reason why that kind of error wouldn't have
13 been prejudicial.

14 But otherwise, I agree with Respondent that
15 in the Federal courts of appeals, that does tend to get
16 reversed. And I think that supports the idea that if
17 the Court adopts the normal prejudice approach, and
18 reaffirms that approach in this case, that there's
19 not really that --

20 JUSTICE SOTOMAYOR: Do you disagree with how
21 the Fourth and Seventh Circuits and other circuits apply
22 a prejudice analysis, but one that says that it's highly
23 unlikely that you're not going to find prejudice? Do
24 you disagree with their analysis and approach?

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

1 my -- I'm not going to go so far as to endorse the
2 results they've reached in every single case --

3 JUSTICE SOTOMAYOR: No.

4 MR. FEIGIN: -- but I think insofar as they
5 approach the matter that -- you know, if there's a
6 fairly serious error and the defendant pleads guilty
7 right after that, that that's very likely absence of
8 extenuating circumstances to be prejudicial; we don't
9 have a problem with that.

10 Unless there are further questions --

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Counsel.

13 The case is submitted.

14 (Whereupon, at 12:01 p.m., the case in the
15 above-entitled matter was submitted.)

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