IN THE SUPREME COURT OF THE UNITED STATES

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MARIO CLAIBORNE, :

Petitioner :

v. : No. 06-5618

UNITED STATES. :

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Washington, D.C.

Tuesday, February 20, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:19 a.m.

APPEARANCES:

MICHAEL DWYER, ESQ., Assistant Federal Public Defender, St. Louis, Mo.; on behalf of Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

[11:19 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument next in 06-5618, Claiborne versus United States.

Mr. Dwyer.

ORAL ARGUMENT OF MICHAEL DWYER

ON BEHALF OF PETITIONER

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

The district court's 15-month sentence combined with 3 years of supervised release conditioned on drug treatments and the acquisition of a GED was a reasonable sentence. In the uniform and constant tradition of Federal criminal sentencing, the district judge in this case treated Mario Claiborne as an individual. She considered the guidelines and after doing so turned to the judgment that 3553(a) demands in every case. She issued a sentence to avoid unwarranted disparity, to impose just punishment, and to ensure that deterrence did not throw away Mario Claiborne's chances to resume his responsibilities to himself, to his family, and to his community.

The court of appeals, in contrast to the district court's careful attention to the 3553(a) factors, focused solely on the guidelines. The court of

appeals applied its extraordinary circumstances rule. That rule re-tethers sentencing to the guideline.

JUSTICE GINSBURG: What would be your test of reasonableness for appellate review?

MR. DWYER: I think a sentence would be reasonable if a reasonable judge on the facts and circumstances of that case would find that the sentence imposed was sufficient but not greater than necessary to satisfy 3553(a) standards.

JUSTICE KENNEDY: It seems to me that gives very little weight to the goal, which I think is a congressional goal, of nationwide consistency in eliminating the disparities in the sentencing system which cause great disrespect to the justice system.

MR. DWYER: I think that the statute speaks of unwarranted disparity and does not speak in terms of uniformity. And there is necessarily a tension between the individualized sentencing that 3553(a) requires and concerns about nationwide uniformity.

But I think that what distinguishes sentencing under the advisory guidelines system from the Presentencing Reform Act system are several. One is now we explicitly have purposes of sentencing and factors the judge must consider. 3553 didn't exist before that time.

Secondly, in every case, as a practical matter, the guidelines are going to exert a gravitational weight because they are there. They must be considered as part of the statute.

JUSTICE KENNEDY: Can I substitute "substantial" for "gravitational" without offending your position or affecting your position?

MR. DWYER: I don't -- my position would be that 3553(a)(4) is the correct place for consideration of the guidelines. It's just one of seven factors. As a practical matter, I think it's going to get --

JUSTICE KENNEDY: Kind of a weak law of gravity like the Moon. It's only at one-seventh.

(Laughter.)

MR. DWYER: As a legal matter weak. As a practical matter, I think unfortunately it's going to be very strong. And I think one of the real dangers of an advisory guideline --

JUSTICE KENNEDY: Well, I guess the question is how strong should we say or can we say, or can Congress say it is?

MR. DWYER: I think that the strength should be no more than one of the 3553(a) factors, because I think the danger, particularly after 20 years of guideline sentencing, is that courts will routinely and

mechanistically apply the guidelines instead of exercising their discretion, which now runs to the full limit of 3553(a).

JUSTICE KENNEDY: Then it seems to me that to accomplish the goal that you want to accomplish in this case, you almost remove the appellate courts from the process.

MR. DWYER: I think the appellate courts are -- I think Booker considered a very deferential standard of review. The cases that the Booker Court cited to illustrate the standard of review of reasonableness were all highly deferential decisions regarding revocations following supervised release, affirming sentences that were many times what the chapter 7 policy guidelines would require. The court of appeals necessarily must be deferential or I think it pushes the system back into a mandatory --

JUSTICE ALITO: Well, suppose the court of appeals had done exactly what it did in this case, but it said, we're not giving any special weight whatsoever to the guidelines, we're basing this just on our own evaluation of the sentencing factors that are set out in the Sentencing Reform Act. Would there be a problem there?

MR. DWYER: I think there would,

Justice Alito, because I don't think that the role of the appellate court is to substitute its judgment for the application and weight applied to the 3553(a) factors for the district court.

JUSTICE ALITO: That's a principle that you derive from what? From the Sixth Amendment? From the Sentencing Reform Act? From where?

MR. DWYER: Well, I think it derives in part from the Sentencing Reform Act, which contemplated individualized sentencing.

JUSTICE ALITO: The Sentencing Reform Act required, as enacted by Congress, required trial judges to apply the guidelines, to follow the guidelines. And you're saying that the Sentencing Reform Act now precludes appellate review of -- it gives the trial judges unlimited discretion or extremely broad discretion?

MR. DWYER: Certainly extremely broad discretion.

JUSTICE ALITO: How do you get that out of the statute that was enacted to narrow their discretion?

MR. DWYER: Even under a mandatory guidelines system that this Court considered in Koon, it recognized that the Sentencing Reform Act also had an important goal of individualized sentencing. And the

Court in Koon recognized that district courts in their institutional position have a special competence to determine what's ordinary in a case, what's unusual in a case. The court of appeals lacks that special competence. It sees only a tiny fraction of the number of guideline cases. It doesn't have --

CHIEF JUSTICE ROBERTS: So one of the guides for reasonableness review is what's ordinary in a particular type of case?

MR. DWYER: I think that what guides the court of appeals on reasonableness review is to look to the particular case and determine if the reasons on the record in that case, the district court's --

CHIEF JUSTICE ROBERTS: It's impossible to do in the abstract. If you're just looking at a particular case, you have no idea whether 5 years is reasonable or not. There has to be a background to it so that you know that in this type of case, people usually get a sentence of 3 years or they usually get a sentence of 10 years. And it seems to me that what's ordinary is going to be a judge -- a driving fact in determining what's reasonable.

MR. DWYER: I think the court of appeals' job is to ensure that the district judge provides reasoned elaboration of its judgment on the facts of

that case that establish that the district court had complied with 3553(a), and on the facts of that case, selected a sentence which is sufficient but not greater than necessary.

I don't believe that it is the court of appeals' job, as was remarked earlier, to become a sentencing commission and begin to reexamine and reweigh district courts' decisions.

CHIEF JUSTICE ROBERTS: Even if you're looking at not just the number, but the reasons. In other words, the question I asked earlier, you've got nine district judges, they all say we do not depart downward for military service, and you've got one district judge that says we do. It seems to me that if the court of appeals can't review that to bring about some uniformity in the factors that are appropriate to consider, then it's essentially a lawless system.

MR. DWYER: I think it is not lawless in the sense that courts of appeals need to determine whether in a particular case, the differences it finds are warranted on the facts and circumstances of that case, whether the district judge has consulted the guidelines, has looked at the history and characteristics of that defendant, has looked at the nature and circumstances of the crime. And if those reasons satisfy the court that

a reasonable judge looking at those facts --

CHIEF JUSTICE ROBERTS: On my particular case, what's the right answer for the court of appeals? They've got two cases before them. One, the judge departs three years because of military service. The prosecutor appeals. The other, the judge refuses to depart because of military service and the defendant appeals.

Should those -- what should happen with those two cases?

MR. DWYER: I think the same process of review applies to each. And it may result -- and that process of review is on the record in that case, would a reasonable judge have arrived at that sentence?

And that review may result in both cases being reversed, one, or the other, or neither being reversed.

JUSTICE BREYER: Where does that come from as a matter of law? That is, suppose -- now you can say I -- if you want, say my hypothesis is wrong, but if I start with an assumption that Congress did want the court of appeals to try to create greater uniformity in sentencing, and it wanted cooperation between the courts of appeals and the sentencing commission, indeed the sentencing commission itself is an effort to copy a

system that exists in Britain where courts of appeals create a degree of uniformity.

Suppose I start with that assumption and say that's what the guidelines were about and the reason that number 4 is in 3553, it's not just one factor among many. After all, it was attached to a bill that was the guideline bill.

And indeed, the part we excised was a floor amendment that came along later to make it even tougher. So if I start with the assumption that's what Congress wanted, not what I wanted, Congress wanted it, now is there something in the Constitution that forbids it?

That's where I start -- I am starting personally with that question in mind, always, if this is what Congress wanted, we should try to do it unless there's something in the Constitution that forbids it. And is there something in the Constitution that would forbid the court of appeals to do what on page 91 they did here, leaving the word extraordinary out of it?

Now, just going through the different elements of this case and coming to the conclusion that what the district judge did was unreasonable?

MR. DWYER: I think there is a constitutional problem with that. And it is that if -- it reinstitutes the mandatory guidelines system. And I

think if there is to be an effectively advisory system, sentencing cannot center on the guidelines. The district judge needs to be free to accept or reject that advice and 3553(a), instead of the guidelines, becomes the focal point for sentencing.

JUSTICE BREYER: It's not mandatory. It says the district, the court of appeals judge says, now, let's think here. We have 8 -- 7 people on the sentencing commission that have really looked into that. And they think that in an ordinary course with this small amount of drugs, the person ought to get so many months. That reflects a lot of thought. Seems reasonable to us. And here the district judge is giving him half that or 40 percent of that without a good reason that we can find.

The judge said he did it because it was just one little episode and we think there were many episodes. And that's basically their reason.

Now, now -- what -- the Sixth Amendment forbids that?

MR. DWYER: Of course, the court of appeals did not adhere to your hypothetical in this case. In --

JUSTICE BREYER: Yeah --

MR. DWYER: The Eighth Circuit in this case simply said it is not a guidelines sentence, it is an

extraordinary variance and we are reversing. The district court has to consider the sentencing guidelines and generally that must be part of the reason -- elaboration of judgment, so they will necessarily be considered on appeal.

But the notion somehow that simply because a sentence is in the guidelines, all disparity problems have been resolved, is clearly not true. As the amici briefs, and our brief have pointed out, even under a mandatory guidelines system, racial disparity increased, regional disparity increased. It's disparity that individualized sentencing, the judicial discretion necessary to do that kind of individualized sentencing, can counteract. And that is genuine uniformity.

As -- as you pointed out in the Koon decision, or the Koon pointed out borrowing your language from Rivera, the district court's special competence to determine what is ordinary and unusual is exactly the kind of information the sentencing commission needs to determine whether a guideline works or doesn't work.

JUSTICE SOUTER: Aren't you really saying that the most weight that the guidelines can be given, or guidelines can be -- is that -- I apologize for my voice -- the most weight the guidelines can be given is,

is the weight of necessary advertence? The guidelines, in effect, are at odds with the rest of 3553(a). The rest of them say individualized sentencing. The guidelines, in effect, says, no, sentencing by the guidelines.

Therefore, in order to -- to break this, in effect, logical incommensurateness, on your view, I think the most that you can concede is that before a district judge sentences finally, he must show that he has considered the value of uniformity as something different from individualized sentencing, but that's as much as he can be required to do.

Is that a fair statement of your position?

MR. DWYER: Yeah. And I think 3553(a), in fact -- I expect Mr. Dreeben to say this -- talks about uniformity, twice, in the sense that both 3553(a)(4), which requires consideration of the guidelines, and 3553(a)(6) talks about unwarranted --

JUSTICE SOUTER: Yes. I -- I stand corrected here. I'm sorry.

MR. DWYER: But I agree with you that it is a consideration -- and I'm not talking about a check list. I'm not saying that we just use a list and that's enough. There has to -- I think sentencing under an advisory system requires reason and judgment. We tried

to stress in our brief that judgment is somehow different. It may involve fact-finding but is not the determinant, the automatic jury kind of finding that the guidelines require.

JUSTICE KENNEDY: Well, as one of the themes that you advance, you indicate that if your approach is followed that the guidelines will then be adjusted over time.

I assume they would be adjusted to be more precise, but then we are right back where we started because you want to give the guidelines very little effect. It seems to me, in a way, you're arguing against yourself.

If your view is accepted and the result is considerable disparity, I suppose all that Congress can do is have mandatory minimums.

MR. DWYER: I don't believe that, that the results are going to be considerable disparity. Certainly no more disparity than existed under the mandatory guidelines which wasn't being addressed particularly.

I think indeed there may be more non-guideline sentences, but less true disparity, because it really is kind of idle to talk about disparity unless you are measuring it against something.

And 3553(a) provides those purposes, and true disparity is measured --

JUSTICE KENNEDY: Do you think it is idle to talk about disparity before the Sentencing Reform Act was adopted? You remember those days.

MR. DWYER: I do remember those days. And I think there are two significant points about that. One, judges sentenced in the pre-Sentencing Reform Act, knowing that their sentence wasn't the real time served. So that a judge may say 20 year sentence knowing the defendant was immediately eligible for parole and was going to get out soon.

The real number was parole eligibility sentencing. So that looking at just the actual sentence imposed did not tell you very much about disparity. And none -- in the study that the sentencing commission in its amicus cited -- that study explicitly said that none of the studies looking at pre-Sentencing Reform Act interjudge disparity considered actual sentences served as opposed to actual sentences imposed.

JUSTICE BREYER: Yeah, yeah. But there -- you know, we can go back into that, but there was a whole history that people testified, tremendously, no opposition, virtually none, that you needed a judge wheel. Why do you need a judge wheel in New York if, in

fact, the sentence didn't depend on the personality of the judge? And why did you get different sentences across the country which I don't -- I've never heard a possibility of explaining that the judges didn't understand what the parole commission was like. That's a different issue.

So what -- what I'm concerned about is if we followed your position literally, what we're saying is that the Constitution of the United States prevents any effort to create uniform sentences throughout the country for people who different judges -- God doesn't tell us what the right sentence is. We don't know. There are reasonable sentences within a vast, vast range of possible sentences.

And you're saying we have to go back to that. And that wasn't -- I'm looking, in other words, for you to tell me something that says we don't have to be back to that, but we don't have to make it that rigid either. And that's what I'm looking for, to be honest with you, and I haven't -- I'm not certain I get it.

MR. DWYER: I don't believe that sentencing under an effectively advisory system under the standards of appellate review that I've described, which I think is the standard Booker described, is in a sense an empty exercise on appeal, and leading simply --

JUSTICE GINSBURG: Could you describe it again? Because I'm not clear what your answer was to what the appellate court stance is. I take it the appellate court would owe deference to the district court's determination?

MR. DWYER: Yes.

JUSTICE GINSBURG: And no particular deference to the guidelines?

MR. DWYER: That would -- yes, I would agree with that.

JUSTICE GINSBURG: So what is it other than -- is this arbitrary and capricious?

MR. DWYER: I think that the court of appeals will first look to ensure that there was reasoned elaboration of a judgment complying with 3553(a), that the district court considered all of the factors and arrived at a judgment that this sentence was sufficient but not greater than necessary.

Secondly, I think that the court of appeals under that deferential standard of review that Booker described would look to see if this is a sentence that a reasonable judge would find sufficient but not greater than necessary on those facts.

JUSTICE GINSBURG: But the -- one problem is that two judges, both reasonable, might approach the

facts in this very case differently. That is, one as in this case might think as she expressed it, to sentence him to more than 15 months would throw away his life. Another might say it's -- it's unreal to assume that he just sold 23 grams of crack when he admitted that he had been out on that same street every night for two and a half weeks. So the quantity is much larger. And he was in that sense a repeater, so I'm going to sentence him to at least the bottom of the guidelines, nothing less.

Those could be reasonable determinations, two different reactions that judges would have to the same set of facts.

MR. DWYER: Yes. That is correct. And I think that is what will result under an effectively advisory system. But here we're talking --

JUSTICE SCALIA: In any case, you -- you, you are not driven to the alternative that Justice Breyer suggests, that there is no way to achieve absolute uniformity. It's very easy. It was what the dissenters in the Booker remedial phase urged, which is use facts found by the jury and you can have the sentences as rigid as you like.

It is really only, only when you want to let the facts be found by the judge that you come into the difficulty that, that we're arguing about. But it's

certainly not decreed by logic or by heaven that there is no way to achieve determinate sentencing. There certainly is.

MR. DWYER: I agree, Justice Scalia.

JUSTICE BREYER: Do you agree? Because I think that system would, in fact, give total sentencing power to the prosecutor, who would determine the sentence by the kind and degree of evidence that he introduced and what he charged. So I agree that that might produce some kind of judicial uniformity, but only because the prosecutor would have total power to decide what the sentence will be.

MR. DWYER: Well, I -- I also appreciate the dialogue. And --

JUSTICE SCALIA: You don't -- you don't have to engage in our dispute here.

(Laughter.)

JUSTICE BREYER: We're pointing out there are problems to every solution. And that's why I'm still looking for the --

MR. DWYER: And -- and one of the serious problems in the solution that Booker chose is that while judicial discretion, which I think 3553(a) requires and mandates, and an advisory system requires, that, too, doesn't deal with the necessary exercise of

prosecutorial discretion which has an enormous thumb on the scale, and which the district court, in the day to day work of the criminal system in the courts, in the district courts, has a far greater appreciation for, than a court of appeals would.

JUSTICE GINSBURG: Mr. Dwyer, before we get to the prosecutor, you were candid in saying a district court -- different district judges could act reasonably, one of them giving whatever it was, 33 months, and the other giving 15 months, both of those would be reasonable and could be affirmed on appeal.

But one of, one of the arguments that was made by defense counsel here was just there was -- there is an irrational disparity between the penalty for crack and the penalty for powdered cocaine.

Your predecessor thought that was so wrong, he thought it was unconstitutional. I think at the very least you ought to take into account that if this man were distributing or possessed for distribution powdered cocaine instead of crack, the sentence range, the guideline sentence range would have been six months to a year. Now we know that Congress wanted to retain that disparity. Is a district judge free to say under advisory guidelines, I am going to ignore the difference, I'm going to treat this defendant as though

he possessed powdered cocaine?

MR. DWYER: I think that the judge in the obligation of imposing an individual sentence must consider the advice of the guidelines but must also be free to shape and tailor that advice as the circumstances of that case require.

JUSTICE GINSBURG: Well, specifically, can you take into account, can he say I'm going to treat him as though he possessed powdered cocaine? Can he do that? Yes or no?

MR. DWYER: Yes.

JUSTICE GINSBURG: Even though we know that Congress didn't want that to happen?

MR. DWYER: Yes, because I think if the judge can elaborate reasons to justify that judgment in that case --

CHIEF JUSTICE ROBERTS: That's got nothing to do with that case. That's got something to do with a judgment apart from the particulars of the case about whether crack should be treated the same as powdered crack cocaine. It's got nothing to do with the individual case.

MR. DWYER: Well, I beg to differ, Chief Justice Roberts, because the differences were predicated on assumptions about the type of individuals who would

engage in that. And the court in her experience could look at it and say you aren't the typical crack defendant, you are more like the people who come before me who are involved in powdered cocaine, or you don't possess the violence, the weaponry and the other things that justified Congress's decision to create disparate sentences for these two kinds of cocaine.

JUSTICE KENNEDY: Well, I think you ran away from Justice Ginsburg's hypothetical just a little bit. Let's assume that Congress wants to keep this distinction and let's assume that there's no constitutional problem with the distinction. There might be, but let's assume.

Can the judge simply say, I ignore that congressional -- congressional judgment is wrong. I'm not going to do that.

MR. DWYER: I don't think that the district judge's role is to make categorical pronouncements.

JUSTICE KENNEDY: Is the judge permitted --

JUSTICE STEVENS: To what extent is the Congress's purpose later than the Congress that enacted the statute we're construing? The statute we're construing was enacted by one Congress and these expressions came later.

MR. DWYER: Well, I would resolve the

problem by saying that the district judge must consider the guidelines. The district judge doesn't sit in review of the policy. It has to apply it to a specific person. In a particular case, as in Mario Claiborne's, that policy produced a sentence that would have been too great.

And the application had some numbers to it, so she said it was more serious because it was a crack cocaine case, you're going to get more than somebody who was involved with powder would get, but you don't need to get as much as the guidelines call for, for the reasons that she expressed on the record at the sentencing.

If I could reserve the balance of my time, unless there are other questions?

CHIEF JUSTICE ROBERTS: Thank you, Mr. Dwyer. Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF RESPONDENT

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

This Court in Booker concluded that the remedial severing of the statute's provision for mandatory application of the guidelines and a provision governing the standards of review on appeal rendered the

statute constitutional. It further implied a standard of review of reasonableness of guideline sentences on appeal, and it did not elaborate what that reasonableness requirement means.

The Government submits that the best interpretation of a reasonableness form of review would be one that conforms as closely as it can to Congress's original intent of minimizing and eliminating unwarranted sentencing disparities between similarly situated defendants.

JUSTICE SCALIA: As closely as it can, and the "as it can" depends upon violation of the Sixth Amendment by entitling defendants to sentences determined by facts found by a judge instead of a jury.

Suppose in this case the court of appeals instead of disallowing the lower sentence, approved it? And then in the next case that comes up involving what was the small amount of equivalent, 5.26 grams of cocaine powder rather than crack, okay? Suppose in the next case it would have been 30 grams of powder. And the district court judge once again departs just the way the departure was here, and the court of appeals says no, that departure is unreasonable.

You now have circuit law which says 30 grams, you get the guidelines sentence; 5.26 grams,

you're entitled to a lesser sentence. Okay?

Why isn't -- why haven't we fallen back into the same problem that produced Booker/Fanfan? You have fact findings being made by the judge. It's a judge who decides whether it's 30 grams or 5.26 grams. What difference does it make whether that factual difference produces an entitlement to a sentence on the basis of the guidelines or on the basis of an opinion by or a series of opinion by a court of appeals? Isn't the Sixth Amendment equally violated?

MR. DREEBEN: Justice Scalia, as I think we talked about in the last argument, in theory it could be if this Court concludes that judicial determinations on appeal are equivalent to guidelines promulgated by a commission or statute, and if what the court of appeals does is essentially function as a sentencing commission, literally prescribing particular levels of punishment for recurring sets of facts.

The Government's submission here is not that the court of appeals has to do that in order to apply a proportionality principle. A proportionality principle will look to all of the facts of the case and will try to get a handle on, is this a reasonable sentence in response to all of the facts and circumstances that the judge articulated within --

JUSTICE SCALIA: But if you have two cases that are in other respects similar, and the court of appeals has held 5.26 is too little to apply the guidelines, it's okay to depart downward the way this judge did, it seems to me that the next case that comes up, the defendant has an entitlement to that lower sentence.

MR. DREEBEN: Well, he doesn't, Justice Scalia, because the second defendant may not encounter a judge who concludes that that quantity warrants the same level of leniency or any leniency at all. That judge will retain the judge's classic discretion to look at the totality of the facts and conclude whether a sentence that would be below the range is a reasonable sentence. And unlike a situation that some of us might prefer in which the court of appeals would ensure that like cases are treated with reasonable consistency, the system of reasonableness review on top of advisory guidelines will not produce perfect levels of consistency.

And what the defendant is entitled to under the Sixth Amendment rulings of this Court is knowing that if the law says if I commit this crime and these are the facts that support it, my level of sentence is this and no higher, that any higher sentence that's

produced by a fact finding gives him a jury trial entitlement. That's what the Sixth Amendment entitles you.

But no defendant who commits a crack offense can say that even after a series of court of appeals rulings that mark out various points of reasonableness. That defendant will not know whether the judge that he or she appears in front of will give the same kind of weight to those facts as some other judge did who was affirmed or reversed. Nor will that judge be able to say what is the constellation of policy and factual reasons that this particular judge will find in announcing the judge's sentence.

So I don't think that a proportionality principle runs afoul of the Sixth Amendment. And I don't think that it runs afoul of anything in 3553(a) or any other part of the statute. What the Court is left with is the task of interpreting reasonableness, and I submit it should ask the same question that it asked in Booker itself: Which alternative, the Petitioner's alternative in this case or the Government's, conforms more closely to Congress's original claim in the Sentencing Reform Act?

The Petitioner's version of appellate review as I understand it is very light review, if at all, of

the substance of what the district judge does. It may reach a truly extreme case such as if a judge said a second degree murderer, I think probation is the appropriate sentence. Perhaps the Petitioner would concede that that would be arbitrary and irrational; but beyond such an extreme case that it is so unlikely to arise that Petitioner can feel free to give it away, Petitioner gives the Court nothing, and gives the courts of appeals nothing to apply standards to determine whether a particular sentence is reasonable. And that is what the court of appeals have been reaching for when eight of them have adopted this proportionality principle.

JUSTICE STEVENS: May I ask this question: It seems to me that in sentencing there are two different broad categories of decision that the judge has to make, one involving the severity of the crime, and the other the characteristics of the particular offender.

And might it not be the case that you give a greater presumption of following the guidelines when you're talking about the severity of the offense, and a greater deference to the trial judge when you're evaluating the factors of the individual that might affect the sentence? There might be a difference in the

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MR. DREEBEN: I think at a high level of generality, that is true. Because what the sentencing commission is good at is taking paradigmatic circumstances and assigning them a numerical weight that will transfer into a sentence. And what the strength of the district judge is is looking at the defendant in front of that particular judge and seeing how that person's characteristics may map onto the policies of sentencing.

But I don't agree that that distinction would support a two-track form of appellate review that would give the district judge greater deference to take personal characteristics into account and to impose widely varying sentences. That is exactly the situation that we had in the pre Sentencing Reform Act era when any district judge could choose whatever policies of sentencing appeal to that judge, find the facts, and impose a widely disparate sentence. And as the Court well knows, there was no appellate review of that exercise of discretion unless it could be shown that the judge didn't exercise discretion at all.

Now it is not an exercise of discretion if a judge simply says for this crime, I always give the same sentence. That would not take into account the full

range of facts and factors that are present in the sentencing court and as a result, that wouldn't be an exercise of discretion.

But in the pre Sentencing Reform Act era, the judge had pretty much plenary reign to decide what facts mattered. If we continue with that same sort of deference on appeal in the Booker remedial opinion, then it's hard for me to see how appellate review can serve any valid purpose of channeling and ensuring some consistency and uniformity in the way district judges impose sentencing.

JUSTICE BREYER: What do you think about taking some of the Rivera ideas -- I'm slightly hypothesizing this -- and following up with what Justice Stevens said. You'd say look, one thing a district judge can't say, he can't say that I believe the guideline is right for a typical case. And I think this is a typical case. And I won't follow the guideline. You couldn't think those three things?

MR. DREEBEN: I agree.

JUSTICE BREYER: So one big power a judge has that they didn't have before, after Booker, is to say the guideline itself is unreasonable. So we're -- let's just say -- and there if they say that, the district judge could decide whether or not, the court of

appeals could decide is the guideline reasonable or not reasonable. But leave those cases aside. I imagine they'll be few and far between.

Now we take one they assume is reasonable. And now unlike the past, the judge has to do three things. One, to give the kind of thing that -- the reason he's not following the guideline, which he admits is reasonable for a typical case. So what's the kind of thing that leads you to think yours is not typical? And he says it. And then he has the evidence as to the related facts. And then he has the degree of departure.

As to the first thing, the court of appeals could review it and decide whether it is or is not the kind of thing. As to the second and third, they also could review it but only after giving considerable weight to what the district judge thinks about the case in front of him.

Now maybe that's -- I mean, you might not have a reaction to that. I'd have to sort of think about it.

MR. DREEBEN: Well, Justice Breyer, if the system that you're describing is a replica of the system that existed under Koon versus United States --

JUSTICE BREYER: Not quite --

MR. DREEBEN: -- then it runs into the same

problem that led to the constitutional problem in Booker. Where I think I would amend Your Honor's proposal is that if the judge concludes that this is a typical case but the guideline really doesn't prescribe what I think is a reasonable sentence and here are the reasons why, in the pre-Sentencing -- in the pre-Booker system, that could have been problematic legally. Today, it is not forbidden. But what it should be subject to is a reasonableness review check on appeal that take a look at what are the reasons that the district judge articulated for that sentence.

JUSTICE SCALIA: Why, why do we assume that the district judge cannot depart from the guideline recommendation unless he thinks the guideline recommendation is unreasonable? He doesn't -- does he have to find it's unreasonable? There can certainly be two reasonable sentences; and he's under no obligation to select the guidelines sentence, is he?

MR. DREEBEN: That's correct.

JUSTICE SCALIA: So he doesn't have to determine that it's unreasonable. I don't think we should approach the discussion as though that's, that's the situation.

MR. DREEBEN: I do think, though, that the Court should be concerned about each district judge

formulating his or her own set of personal sentencing guidelines and then applying them in the court to the cases that appear on that judge's docket without any check on appellate review to ensure that, although the sentence might be in some possible world reasonable, it's out of whack with what the Sentencing Commission has prescribed and what other district judges are doing. If there is no check on appeal, then I do think that the clock has been turned back to the 1983 era before the Sentencing Reform Act; and that does not seem to me a reasonable interpretation of what the Booker remedial opinion thought it was accomplishing. What the Booker remedial opinion said that it was accomplishing was providing an important mechanism that Congress itself had intended, namely appellate review, in order to iron out sentencing differences.

And our submission is that inherently means some form of substantive proportionality review.

JUSTICE BREYER: That's the other thing I'm not certain about, the proportionality, and the reason I'm not certain of it is I'm not certain what it means. That is, it sounds nice, as if you're saying something, but proportional to what? I mean, I can think of two problems. One problem, of course, is that the chart in the guidelines is written on a logarithmic scale and

that means that if you move from one level, from 9 to 10, it's 3 months or 2 months; if you move from 29 to 30, it's 2 years.

Now, whether you're at 29-30 or whether you're at 9 and 10 might depend upon things that just have nothing to do with your reason for departure. You might have added on something for having a gun and your reason for being lenient might have to do with the person's having a gun. So you're going to say it make a difference whether you were high up or whether you were low down, when your reason for departing has nothing to do with whether you're high up or whether you were low down? You see? It doesn't actually work, I don't think, proportionality review, because it's so hard to say what's proportional.

MR. DREEBEN: I think what is proportional is a matter of common sense, and the eight circuits that have been using this rule have not had a great deal of difficulty in noting that you look at the extent to which the sentence varies from the guidelines range, you look at the absolute amount of time that's involved, and have a sense of is this a significant deviation away from what the guidelines would actually describe.

JUSTICE BREYER: Well, why use the word "proportional," because the other thing is what the

Chief Justice brought out, is that why is it that if a person has a bad reason, I mean, why should a bad reason justify a little departure rather than a lot? And if he has a good reason, well, why doesn't it justify a lot just as much as it might justify a little?

MR. DREEBEN: If the sentencing court articulates a bad reason, namely a reason that's irrational or one that does not respond to facts of the case, then that really shouldn't justify the sentence at all and what the court of appeals should do is vacate it, send it back for resentencing, and allow the district court to articulate the reasons why the sentence that the court now chooses to impose is an appropriate sentence under 3553(a).

JUSTICE GINSBURG: Mr. Dreeben, if we could focus on the facts of this case and what the district court appeared to do, she made a kind of proportionality judgment, too. She said this is a young man. It's his first offense. He has a good family relationship, a good work record. I am making a determination that will put him away for a significant amount of time. But I'm trying to figure the point at which he will lose touch with his family, with his work, he will be thrown away.

That was the judgment that she made. She tried to make a sentence that would be significant, 15

months, but that would not be so long that it would put him out of touch with his children and his wife and his work.

Now, in -- by some measures that would be entirely reasonable. But on your measure, it isn't reasonable.

MR. DREEBEN: That's right. And I think, Justice Ginsburg, you've done a better job of articulating a justification for the sentence than the judge's own articulation, which did not focus on family separation and employment to the degree that you have now articulated it. What the judge did was focus on the quantity of drugs and the fact that the defendant didn't have any criminal history and that he qualified for the safety valve.

She also said, without specifying any other cases, that other cases that have come before my court have had -- you know -- perhaps larger quantity of drugs and very different sentences. When a court of appeals is asked to review that line of reasoning and try to decide whether the outside the guidelines sentence is reasonable, it makes sense for the court to ask, do we know anything, for example, about what this judge is saying about other cases with other drug quantities? There's no specifics in the record that enable the Court

of Appeals to measure the accuracy or the validity of that observation. It's also relevant for the court of appeals to say the guidelines range itself has taken into account all of the factors that this judge has previously noted and what has happened in the sentence is that the judge has varied widely from the sentence for reasons that the commission already took into account. Now, that doesn't prohibit the judge from relying on those facts, but it does mean that the farther the sentence goes from the guidelines range the more likely there is to be unwarranted disparity.

JUSTICE GINSBURG: But you did leave out what -- she didn't elaborate on it, but she said, I would be throwing him away. And I take it what she was saying by that is it would be -- he would be incarcerated beyond the point where he could reintegrate into the community.

MR. DREEBEN: Well, this brings me to my last point about this particular sentencing, which is that in this very case Judge Jackson looked at the defendant. She said, candidly I don't know really very much about you other than what I've learned about in the presentence report and I can't tell whether you're unlucky or you're stupid, and then effectively gave him a sentence that reflected, you know, a tremendous

indulgence of a presumption that maybe this kid needs a wakeup call and nothing more. What she ignored is his own proffer in the safety valve that he had been on a street corner for 2-1/2 months selling crack cocaine, that he was arrested and placed into the State system, put into a pretrial diversion program through a drug court, in essence being said, here's your chance, you know, straighten up, we are going to be lenient on you, we're going to give you an opportunity to reintegrate with your family, and what did the defendant do but get caught within 6 months with 5 grams of crack.

And on that record -- and this is what the court of appeals said -- there's a disconnect between the judge's conclusion that, with little information more than what she had in the PSR, the kid deserved leniency versus the fact that he had already had that chance and he had not --

JUSTICE STEVENS: Yes, but didn't the court of appeals draw the inference that he had been distributing drugs during that 6-month period and that was not supported by the record? Am I wrong on that?

MR. DREEBEN: Well, Justice Stevens, we're not relying on the inference of the --

JUSTICE STEVENS: Would it have been error for the court of appeals to find a fact like that that

was not supported by the record and didn't it do it in this case.

MR. DREEBEN: Well, supported by the record is something of a judgment call. You'd have to assume that Mr. Claiborne was found by the police, 6 months after he had previously been arrested for crack offenses, holding a 5-gram bag of crack and that was the very first time after his arrest that he had been in possession of drugs, that just he got extremely unlikely, the police caught him.

JUSTICE STEVENS: And the court of appeals is willing to draw a factual conclusion that he had in fact distributed during that 6-month period?

MR. DREEBEN: That's right. And I would say that a reasonable fact-finder could draw that conclusion.

JUSTICE STEVENS: But should the court of appeals act as a fact-finder in that posture of the case?

MR. DREEBEN: Not in my view. And I think on this record that's not a fact that we're relying on. It's not a fact that the Government --

JUSTICE STEVENS: Is it not possibly a fact that would justify the conclusion that they committed error?

MR. DREEBEN: This aspect of the court of appeals opinion in my view is not essential to the judgment that it reached, which is correct.

JUSTICE STEVENS: It may not have been essential, but it may have contributed to their judgment.

MR. DREEBEN: It may have, but what they did not mention is an equally validate reason for concluding that this is a defendant who is in effect a recidivist even though he had no criminal history. He had been previously arrested for crack distribution crimes. He had admitted that this was not -- the occasion of his arrest wasn't the first opportunity that he had to deal crack. He'd been doing it for 2-1/2 months. And the judge essentially turned all of those facts off. She did not really factor that into her sentence at all.

And the court of appeals, although it may have fastened on the wrong time frame in concluding that this defendant was in effect a recidivist and not the sort of blameless ingenue that the trial judge had treated him as, the record does indeed support the court of appeals' central conclusion, which is this defendant, despite his criminal history, really looks more like a recidivist. And when you're talking about a defendant whose mandatory minimum sentence would have been 5

years, but who gets out of that sentence because he satisfies the safety valve which allows defendant who is a first-time offender and meets certain other requirements to get a sentence under the mandatory minimum, that defendant's culpability had already been substantially reduced under the guidelines because of the safety valve and because of his criminal history. And the judge basically said: I'm going to take a chance with him and give him a much lower sentence than what the guidelines described.

Our view is the judge can look at the facts she looked at, but she went down to a level that is productive of unwarranted disparity.

JUSTICE STEVENS: May I ask just one other question? I do not understand you to argue that the court of appeals can apply a presumption of unreasonableness just because there's a departure.

MR. DREEBEN: That's correct. We're not arguing for a presumption of unreasonableness on appeal. We're arguing for a presumption of reasonableness for a guidelines sentence. For an out of guidelines sentence there is no presumption that it is unreasonable, but the court of appeals under a proportionality analysis would look and require increasingly strong reasons with the increasing degree of variance from --

JUSTICE BREYER: That's the part, they said that. An extraordinary reduction must be supported by extraordinary circumstances. What worries me about that it sounds like a slogan. I would think an extraordinary reduction must be supported by whatever reasons that justify the extraordinary reduction, period.

And it also sounds like you're going to start getting a mechanical set of charts and things, which is going to be a true nightmare, and if we really were to repeat that it would take on a tremendous force of generative law which would worry me quite a lot because I just think it's too complex to reduce to a formula. What you want is a reason that supports the sentence.

It is --

MR. DREEBEN: I think you want a better reason for a sentence that is farther away from some mean.

JUSTICE BREYER: Better than what? Better than justifies it?

MR. DWYER: Perhaps the best way to do this is to give a example. Suppose that the shoe were on the other foot. Suppose that Judge Jackson had looked at this defendant and said, you know, this defendant did not learn from his experience. He was given leniency in

the State court. He didn't take advantage of that opportunity. His statutory maximum is 20 years and I'm going to give him, maybe not the statutory maximum, I'm going to give him an 18-year sentence, or suppose she said a 15-year sentence or a 10-year sentence.

I submit that in that circumstances the Petitioner would be here saying, well, the guidelines recommended a sentence of between 37 and 46 months and this is a dramatic increase from that and the reason is not something that's particularly unusual, it's a very usual reason, and as a result, the magnitude of this deviation is unreasonable.

And I have no problem with a Petitioner making that argument if that's what happens to his or her client. My problem is that without that kind of anchoring effect of the guidelines in a proportionality review, a court of appeals has almost nothing to work with.

JUSTICE SCALIA: But what happens when that case -- it goes back down to the district court. The district court says well, okay, not 10 years. Nine years. Okay? It goes back up. I mean, you know, when do we end this game? Or does the court of appeals take over the sentencing function and specify -- you know, five years?

MR. DREEBEN: Justice Scalia, I don't think that the courts of appeals are, at least absent very unusual circumstances, to act as sentencers to specify a sentence. There have been a couple of instances where courts of appeals have said this is really the bottom sentence that we can see that would be reasonable on this particular constellation of facts. I think that reflect as sense of potential impatience with a ping-pong game that would occur if the court of appeals says your sentence is unreasonable, Mr. District Judge, and the district judge imposes a sentence that's one day lower.

Another solution to that problem would be reassignment to a different judge who would start with a clean slate and could read the court of appeals' opinion and apply the section 3553 factors.

We are not suggesting that the court of appeals should assume the sentencing role here. All we're suggesting is that the court of appeals needs to have some intelligible legal principles that allow it to identify and select unreasonable sentences versus reasonable sentences; and when you have wide statutory ranges as you do in the Federal system, if you don't have the guidelines describing at least a benchmark, it's not more, then I don't think courts of appeals have

a good, coherent, consistent way of fulfilling their tasks. And if the courts of appeals can do that, can look more with greater scrutiny at a sentence the farther that it goes outside the guidelines range, without violating the statute and without violating the Constitution, then it seems to me the only thing for the Court to ask at that point is which approach, that approach of proportionality, or and approach that basically says appellate review is procedural only, absent the most glaringly aberrant sentences, conforms to Congress's intent of producing a greater degree of uniformity and consistency.

JUSTICE SCALIA: Well, it wouldn't be, just be procedural only. You -- you could say procedural plus, you know, certainly review of the facts on, on which the district court was -- was proceeding. So you, if you could find that the determination that this was just a good kid who made a mistake is, is an unreasonable finding, you could reverse for that reason.

MR. DREEBEN: That -- that is true. But I submit that -- I would like to hear what Petitioner has to say. If Petitioner's client had been given 10 years in this case, I have no doubt that Petitioner would be arguing that's an unreasonable sentence. But I don't see how you reach that judgment assuming that the court

has articulated a rationale that's consistent with section 3553 and a rational interpretation of the facts, unless you have the guidelines as an anchor for the analysis.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Dreeben.

Mr. Dwyer, you have two minutes remaining.

REBUTTAL ARGUMENT OF MICHAEL DWYER,
ON BEHALF OF PETITIONER

MR. DWYER: I believe that Justice Breyer put his finger on one of the central problems with the Government's proposed rule. And that is what does it mean? The Government talks about substantial variances in Petitioner's case. The court of appeals spoke of it as extraordinary variances. And the Government doesn't suggest to us that substantial means the same thing or means something different from extraordinary. And we've already demonstrated in our brief why relying on percentages as the court of appeals also did, is pointless, because, one, if -- the arithmetic gets very complicated at the low end and the percentages just don't make any sense from a proper application of a rule of law.

The Government's proposal, apart from having

no basis in the statute and no basis in Booker, is just not susceptible of any kind of application because nobody really knows what it means.

CHIEF JUSTICE ROBERTS: What about Mr. Dreeben's parting challenge? What are you going to do if your client gets 10 years? You're going to argue that's an extraordinary departure from the guidelines, right?

MR. DWYER: I'm certainly going to argue that under the facts and the record before the Court, that was not a sentence that was sufficient but not greater than necessary. And I think the absence of a prior record, the young man's work history, all of those factors, the low amount of crack cocaine involved, his age, all of the things which as Justice Ginsburg pointed out that judge relied on in her sentencing decision, could not possibly support a 10-year sentence.

And you know, it is easy to do this in a, in a hypothetical sort of way. But the district judge -- and this was a very experienced district judge -- looking at the person in the eye, made a call based on judgment. And that call was not treated with any respect in the court of appeals. It was sloganeered away as an extraordinary variance. And -- because the court of appeals focused only on the guidelines.

The -- this Court in crafting the appellate standard can't just look to determine what Congress might have intended because of the constitutional problem that lurks behind it. And that constitutional problem is a resumption of mandatory guidelines.

Thank you very much.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

The case is submitted.

(Whereupon, at 12:18 p.m., the case in the above-titled matter was submitted.)