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

2 [10:18 a.m.]

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in case 06-5754, Rita versus United
5 States.

6 Mr. Cochran.

7 ORAL ARGUMENT OF THOMAS N. COCHRAN

8 ON BEHALF OF PETITIONER

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

11 Under the system described in
12 Justice Breyer's opinion for the Court in Booker, judges
13 would no longer be tied to the sentencing range
14 indicated in the guidelines. That, of course, was a
15 passage from this Court's recent decision in Cunningham
16 versus California. Mr. Rita is asking the Court in this
17 case to reiterate in strong enforceable terms that it
18 meant what it said in Booker, that the guidelines are
19 merely advisory provisions. The Government's assertion
20 that the guidelines deserve a presumption of
21 reasonableness was nothing more than an unfounded claim
22 put forth to justify its efforts to try and thwart the
23 Booker decision.

24 The ink wasn't given a chance to dry on the
25 Booker decision before the Department of Justice issued

1 a memo to all of its Federal prosecutors directing that
2 they adhere to the guidelines and that they seek
3 sentences within the guidelines in all but extraordinary
4 cases.

5 The district court below in this case did
6 not treat the guidelines as advisory when it imposed a
7 33-month within guideline sentence. The district court
8 did not consider Mr. Rita's military record, the fact
9 that he had been a combat soldier in two wars.

10 JUSTICE GINSBURG: How can you say that,
11 given that at the sentencing hearing, that military
12 record was brought out, his physical ailments were
13 brought out, his activity in law enforcement, all that
14 was brought out? And indeed, the judge was assisting
15 the defense attorney to make the case clearer when it
16 was presented.

17 MR. COCHRAN: In the district court,
18 Mr. Rita did put forward evidence of his military
19 records, health concerns, he -- the district court
20 received that information. The district court did not
21 consider that information because there's nothing in the
22 record where the district judge weighed any of that
23 information to determine what -- what effect to give any
24 of it.

25 JUSTICE BREYER: Well, you know, you don't

1 get a summary judgment case all the time. I used to get
2 them, and the district court would hear all the
3 arguments and write down the word denied. Does that
4 mean he didn't consider the arguments? That's a very
5 common thing. Here we have a district judge, he hears
6 all the arguments. The attorneys brought it out. It's
7 in the file. He reads the presentence report. It's all
8 there, and the judge says, on balance, I'm going to go
9 apply the guidelines. So how can you say he didn't
10 consider them?

11 MR. COCHRAN: Justice Breyer, the district
12 judge didn't say that we're going to weigh all of the
13 stuff, and I --

14 JUSTICE BREYER: No, he doesn't in a summary
15 judgment case either. I mean, I've had quite a few of
16 them, I used to, I think, where they just wrote denied.
17 That was the opinion.

18 MR. COCHRAN: Well, in the instance of a
19 summary judgment matter, we don't have 3553(c), that
20 requires the district court to state in open court in
21 front of the defendant the reasons for the imposition of
22 sentence.

23 JUSTICE BREYER: Now, he says the reasons
24 are these. I think that the guidelines sentence is a
25 reasonable sentence. Would that be sufficient?

1 MR. COCHRAN: It would not, Your Honor.

2 JUSTICE BREYER: Why not? What in the
3 statute or the law or the Constitution says that a
4 district judge, although it might be good form in a
5 difficult case to write more, but I've often written
6 opinions where I say, and the remaining arguments we
7 feel are not sufficient to change the result. That
8 means I don't think they're that great an argument, and
9 I don't answer every single one.

10 MR. COCHRAN: With regard to the first
11 question Your Honor posed, it's not sufficient for the
12 district court to simply state conclusions, which is
13 what happened in this case, that --

14 JUSTICE BREYER: Where in the law does it
15 say that?

16 MR. COCHRAN: Well, in 3553(c), it requires
17 that the judge give the reasons for the imposition of
18 the particular sentence.

19 JUSTICE KENNEDY: Where -- I'm looking at
20 that. It says shall consider. Am I missing something?

21 MR. COCHRAN: The preamble states --

22 JUSTICE KENNEDY: Can you give me your page
23 cite?

24 MR. COCHRAN: I'm sorry, Your Honor, on page
25 3-A of Petitioner's brief in the appendix. It states,

1 "the court at the time of sentencing shall state in open
2 court the reasons for its imposition of the particular
3 sentence." And that's what we contend requires the
4 district court to explain the facts that the court is
5 relying on to impose the particular sentence in the
6 case.

7 JUSTICE BREYER: So it isn't sufficient, in
8 your view, that the judge just says, the reason I
9 imposed this sentence is that's the guideline sentence,
10 and I think in this circumstance it's reasonable?

11 MR. COCHRAN: That's correct, Your Honor.
12 Because the guidelines don't take into account all the
13 myriad facts, and in this case, did not take into
14 account the military record, the employment record,
15 Mr. Rita's health concerns. The guidelines specifically
16 did not take those into account.

17 JUSTICE BREYER: I think these other factors
18 that have been brought out, while they're serious
19 factors, I don't think they're enough to warrant a
20 different sentence. Suppose he adds those words?

21 MR. COCHRAN: Your Honor, I think the --

22 JUSTICE BREYER: What I'm worried about
23 basically is, I don't think in the law there's a special
24 category that requires a judge to give special reasons
25 in a guideline case. I think it's the same as any other

1 matter. Judges do normally give reasons. And I'd worry
2 a bit about creating a special situation where district
3 judges have to do something unusual.

4 MR. COCHRAN: I don't think that this is
5 unusual, Your Honor. I think the court has to explain
6 the rationale for imposing the sentence, and not only
7 does it have to do so in court, in front of the
8 defendant, so the defendant understands the sentence
9 that he is receiving --

10 JUSTICE BREYER: Well, I get where you're
11 going. Can I say this in an opinion, would this satisfy
12 you? And of course, like any other matter, judges do
13 normally give reasons. They do normally reject
14 arguments with reasons, and it's the same here. Would
15 that satisfy you?

16 MR. COCHRAN: I think it would have to be
17 specific to the issues raised by the parties. And in
18 this case, at a minimum, the judge would have to address
19 the three issues that Mr. Rita put forward and discuss
20 those: His military record, his employment, his health
21 concerns. It would have to address any issues that the
22 Government would raise, and any issues that the district
23 judge was considering that maybe neither party had
24 raised to the court as well.

25 JUSTICE SCALIA: How do you reconcile the

1 language in the prologue of (c) which says, the court
2 shall state the reasons, with (c)(2), which says that if
3 the sentence is not of the kind or is outside the range
4 described in (a)(4) of the guidelines, the court shall
5 state the specific reason for the imposition of a
6 sentence different from the guidelines?

7 Now, this seems to set up some dichotomy
8 between giving reasons and giving the specific reason.
9 Where does that line fall in your estimation?

10 MR. COCHRAN: Well, I think foremost, Your
11 Honor, is that that provision came about prior to the
12 Booker decision when the guidelines were mandatory. And
13 what that addresses and what it was meant to address was
14 if the court were to depart, then it was -- it needed to
15 explain that departure in a greater reason to enable the
16 sentencing commission to take that information into
17 account in revising the guidelines.

18 That is still a purpose with the sentencing
19 commission, to revise the guidelines, and they can still
20 use that information. But it -- at the very least, we
21 need information from the sentencing judge about each of
22 the matters that he or she --

23 JUSTICE SCALIA: You haven't answered my
24 question. I mean, you explain why it's put in there,
25 but I want to know what is the difference between giving

1 the reasons and giving the specific reason.

2 MR. COCHRAN: The specific reason I think,
3 Your Honor, is so that the sentencing commission can
4 take that information into account in later revisions of
5 the guidelines. That was the purpose at the point that
6 statute was passed.

7 JUSTICE SOUTER: But are you saying now that
8 that distinction should be ignored?

9 MR. COCHRAN: I don't know, Your Honor, if
10 it's so much that it should be ignored inasmuch as the
11 district court needs to give as many reasons, or as
12 clear a reason for the imposition of the particular
13 sentence. That will help --

14 JUSTICE SOUTER: But it sounds to me as
15 though you want all the reasons to be specific. I mean,
16 I understand your argument. But if we accept that
17 argument, then the distinction between reason and
18 specific reason basically is going to be a matter of
19 history, and perhaps it should be.

20 MR. COCHRAN: It, it may, Your Honor. And,
21 and because that provision predated this Court's Booker
22 decision, it still holds relevance but not nearly the
23 relevance it had when the guidelines were mandatory.

24 JUSTICE GINSBURG: So your position would
25 be, Mr. Cochran, that the obligation to be even-handed

1 would have to -- that the trial judge would also have to
2 go through -- now this defendant maintained his
3 innocence. He didn't express any remorse. He accused a
4 Government agent of perjury. All that, he would have to
5 take into account, just as specifically?

6 MR. COCHRAN: Your Honor, I think that the
7 Court certainly could consider all of that; and -- and
8 if pressed by the Government would need to consider
9 that. But certainly at a minimum, the Court needs to
10 --

11 JUSTICE GINSBURG: Isn't that what the
12 Government pressed at the sentencing hearing?

13 MR. COCHRAN: It did, Your Honor, and again
14 the district court never came out with any specifics
15 regarding any of those issues other than the conclusion
16 that it felt that the guideline range was not
17 inappropriate.

18 JUSTICE KENNEDY: Suppose the district court
19 says I give these following -- I've considered these
20 following specific factors. But in my view, the
21 consistency and nationwide uniformity that the
22 guidelines strive to achieve is of great importance; and
23 for that reason, I'm following the guidelines?

24 MR. COCHRAN: I don't --

25 JUSTICE KENNEDY: Is that an inappropriate

1 judgment for the district court to make?

2 MR. COCHRAN: I think it's inappropriate,
3 Your Honor, because while there should be uniformity in
4 an attempt to move in that direction, uniformity is not
5 the end all and be all. 3553(a) addresses
6 individualized sentencing of the defendant before the
7 court.

8 JUSTICE KENNEDY: It's not the end all.
9 Suppose the district judge said I think this is of great
10 importance. You don't think that the Booker opinion --
11 or do you think the Booker opinion rejected uniformity
12 and consistency as an important factor?

13 MR. COCHRAN: I don't believe the Booker
14 decision rejected that, Your Honor. What I believe the
15 Booker opinion said was that for there to be advisory
16 guidelines, for there to be constitutional sentencing
17 practices, then uniformity is going to have to give way
18 to some extent. At least at the very beginning.

19 Once the district courts apply the 3553(a)
20 factors, and go through the statute, and consider the
21 guidelines, the district courts will then explain their
22 rationale; and then that rationale will be -- in our
23 opinion, will show where the shortcomings of the
24 guidelines are.

25 JUSTICE ALITO: Mr. Cochran, are you arguing

1 the sentencing in this case violated the Sixth
2 Amendment?

3 MR. COCHRAN: Not as it was applied. It
4 came close in the sense that the district court was
5 laboring, in our opinion, under the belief that the
6 guidelines held some control.

7 JUSTICE ALITO: If it didn't violate the
8 Sixth Amendment, then your argument is based on the
9 Sentencing Reform Act?

10 MR. COCHRAN: Well, it came -- it may have
11 violated the Sixth Amendment. I don't know that I would
12 concede that. But to avoid any constitutional issue, if
13 we analyzed this under the statute, clearly the district
14 court didn't comply with the statute.

15 JUSTICE ALITO: You can't say whether it did
16 or did not violate the Sixth Amendment?

17 MR. COCHRAN: The district court held the
18 guidelines to a greater quantum than simply advisory.

19 JUSTICE ALITO: Well, was your client's
20 sentence enhanced by any fact that should have been
21 submitted to the jury?

22 MR. COCHRAN: Well, under -- under a pure
23 advisory system -- and I think Your Honor is addressing
24 the cross-reference in this matter -- in a purely
25 advisory system, the guidelines were calculated

1 correctly in Mr. Rita's case, because under a purely
2 advisory system, the district court could look at that
3 cross-reference, understand that it came about from
4 uncharged and unproven conduct, and disregard it.

5 But by not doing so in this case, and that
6 cross enhancement doubled his effective guideline range,
7 then this case may very well be unconstitutional because
8 of the extra weight that the court gave the guidelines.

9 JUSTICE KENNEDY: Mr. Cochran, you do
10 contend, do you not, that if the guidelines had been
11 mandatory, there would have been a violation of the
12 Sixth Amendment.

13 MR. COCHRAN: No question, Your Honor.

14 JUSTICE STEVENS: Because of the, the
15 accessory after the fact point.

16 JUSTICE KENNEDY: That's right, Your Honor,
17 absolutely.

18 JUSTICE BREYER: Then the question
19 ultimately is, does it violate the Sixth Amendment to
20 say that we have a presumption there, a sentence is in
21 the guidelines as a reasonable -- if you're an appellate
22 court judge. And you think it does violate the Sixth
23 Amendment?

24 MR. COCHRAN: Our position is that the
25 presumption does violate the Sixth --

1 JUSTICE BREYER: Then I guess the argument
2 of the other side, which I would like you to address, is
3 that, in which there -- we didn't think it violated the
4 of Sixth Amendment if the district judge simple applied
5 3553 -- uh, 3553(a). And of course, 3553(a) includes
6 all of these things that go into the guidelines; it make
7 a big point of that in 3553(a).

8 So why -- why couldn't you say, you know,
9 all these factors are taken into account by the
10 commission? They start with an effort to a apply them
11 in typical cases. This is their judgment in typical
12 cases. So it is entitled to some kind of weight; and --
13 at least in a typical case.

14 MR. COCHRAN: Your Honor, the guidelines
15 should be consulted. No question --

16 JUSTICE BREYER: No, no, not consulting
17 them. What I'm trying to do is to how much weight can a
18 judge reading this give them without violating the Sixth
19 Amendment? All I'm trying to do here is not whether the
20 guidelines are good, bad, or indifferent. Congress
21 wanted to apply them. We excised the mandatory to
22 comply with the Sixth Amendment. Now, what else do we
23 have to do to comply with the Sixth Amendment? Because
24 I would think unless we have to do something else, we
25 shouldn't do it, because Congress wanted it.

1 MR. COCHRAN: I would contend, Your Honor,
2 that the Court needs to very clearly explain that the
3 guidelines are, are a reference. They are --

4 JUSTICE KENNEDY: The guidelines are what?

5 MR. COCHRAN: Are a reference.

6 JUSTICE KENNEDY: Can you say it is an
7 initial benchmark?

8 MR. COCHRAN: I don't -- when we start
9 establishing benchmarks and presumptions, I think that's
10 where we, we --

11 JUSTICE KENNEDY: So benchmarks are bad.
12 Presumption is bad. Great weight, that's bad?

13 MR. COCHRAN: That's bad, too. And I think
14 it's just another thing to consider.

15 CHIEF JUSTICE ROBERTS: Does it matter what
16 judge did in other cases? I mean, if we look on the day
17 before he said, well, the guidelines say this, but I
18 think this case is different, so I'm going to depart,
19 and the day after he says I know what the guidelines
20 are, but I'm going to impose a higher sentence?

21 I mean, how do we know he's -- when he says
22 I looked at the guidelines and I think they're
23 appropriate, that he's considering himself bound by
24 something that he may or may not agree with, as opposed
25 to what he said? Which is, well, I cannot find that

1 they're inappropriate?

2 MR. COCHRAN: And what that tells me,
3 Mr. Chief Justice, is that, that the district court felt
4 that the guidelines had a center of gravity, that the
5 judge was bound -- in other words, shifted the burden to
6 the defendant to say, well, I -- unless you can show
7 that these are inappropriate, that it is a setting of a
8 benchmark, it's a drawing of a line, and we contend that
9 that is what the Sixth Amendment prohibits.

10 If the guidelines are advisory, if they are
11 but one of many factors to be considered, together with
12 all of the other factors in 3553(a), the court can use
13 that information, can use that reference. But once it
14 starts putting any greater weight on the guidelines --
15 and the statute doesn't admit to that.

16 JUSTICE GINSBURG: How about the point that
17 Justice Breyer made that these other factors have been
18 taken into account by the sentencing commission because
19 Congress told them to consider those same factors?

20 MR. COCHRAN: Well, Your Honor, the
21 sentencing commission by its own admission has not taken
22 into account all of the factors. In the very first
23 guideline manual, 1987, the sentencing commission itself
24 said it could not take into account all of the facts
25 that play into human conduct.

1 JUSTICE BREYER: There are two separate
2 things there. The general aims of sentencing, the four
3 basic aims of sentencing, I believe the commission
4 certainly took into account. A separate thing was the
5 rule that said you can depart only for a matter that has
6 not been fully considered by the guidelines.

7 And there the original version, I believe,
8 said that we've considered nothing thoroughly. Except
9 for certain specific matters that had been mentioned
10 like age, race, and we'll refer to statutorily. Now,
11 that is what you're thinking of? I mean, if that's what
12 you're thinking of, I don't think it's relevant to what
13 your present point is.

14 MR. COCHRAN: I'm not, Your Honor. First of
15 all, I don't know and would contend that the initial
16 sentencing commission did not take into account all of
17 the four purposes of sentencing. They centered on crime
18 control --

19 JUSTICE BREYER: That's because when they
20 looked at all of the literature, they explained it, the
21 rehabilitative purpose was not that it wasn't taken into
22 account, it was there was a consensus among experts that
23 there isn't much you can do about it. That's different
24 from not taking into account.

25 MR. COCHRAN: The other point I think with

1 regard to that, Your Honor, is in looking at 3553(a)
2 that statute gives the district court the dual commands
3 of first considering all of those factors and then
4 imposing a sentence sufficient but not greater than
5 necessary. The statute does not give to the sentencing
6 commission that obligation.

7 JUSTICE SCALIA: Mr. Cochran, I have this
8 concern: If we accept your submission that the district
9 court should just consider the guidelines together with
10 everything else, give them a presumption of validity,
11 anything else, just something to consider, that would
12 presumably eliminate any Sixth Amendment problem with
13 the district court's findings of fact.

14 But the district court's sentence is going
15 to go on appeal. And the appellate court in reviewing
16 it for reasonableness, let's assume in this case the
17 appellate -- the appellate court says oh, no, this
18 person had -- we find as a matter of fact, given the
19 record, military service, you know, which we think
20 should have been taken into account. And, therefore, we
21 set it aside.

22 Now, the next case that comes up, which
23 doesn't have the element of military service, in all
24 other respects the same as your client's case, it comes
25 up to the court of appeals, and the court of appeals

1 would say, ah, we don't have that different fact here
2 and therefore we affirm the sentence.

3 Isn't -- in other words isn't the finding of
4 a fact necessary for the process of judicial review,
5 even if it is not made necessary for the purposes of the
6 district court's determination? He would not get that
7 sentence but for this fact.

8 MR. COCHRAN: That's correct, Your Honor.
9 And --

10 JUSTICE SCALIA: So you haven't shown us a
11 way out of the problem.

12 MR. COCHRAN: In a purely advisory system,
13 the district court is bound by the statutory minimum and
14 maximum. And as this Court has said in Cunningham, if
15 the Court is bound simply by that statutory minimum and
16 maximum, then the factual finding as to where within
17 that is up to the district court.

18 It's only when we establish thresholds as
19 the guidelines do we run into the constitutional
20 problem.

21 JUSTICE SCALIA: No, even if you don't --
22 don't establish thresholds by reason of the guideline,
23 you are establishing thresholds upon judicial review,
24 guidelines or not.

25 If the -- if the appellate court says, oh,

1 given there's this fact in this case, the sentence below
2 was reasonable, but in the next case, where that fact
3 does not exist, the court of appeals says, ah, the
4 sentence is unreasonable, in other words, that fact is
5 made a necessary condition for giving the higher
6 sentence.

7 So you haven't -- you haven't solved the
8 problem of the, of the apparent conflict between --
9 between Booker and the advisory guidelines.

10 MR. COCHRAN: Well, I think so long as the
11 district court can evaluate and consider and potentially
12 reject what the guidelines say, just as the Court can
13 consider the effect of -- of the person's military
14 record, Mr. Rita was a combat veteran in two wars, which
15 is separate and apart from someone who may have been an
16 Army recruiter --

17 JUSTICE SCALIA: You're not focusing on my
18 point. I concede that the district court is free as a
19 bird -- free as a bird -- but you have appellate review.
20 And the appellate court in reviewing for reasonableness
21 is going to make a particular fact determinative of
22 whether this sentence can stand or not. Isn't that
23 right?

24 MR. COCHRAN: It is.

25 JUSTICE SCALIA: And that's going to be a

1 problem.

2 MR. COCHRAN: I think what the court would
3 have -- the appellate court would have to do is evaluate
4 all of that through the prism of 3553(a). Is the
5 sentence that was imposed the least sufficient sanction
6 that the court below could have imposed. And if not,
7 for whatever reasons, vacate it and return it back to
8 the district court.

9 CHIEF JUSTICE ROBERTS: Counsel, what if
10 there weren't guidelines at all, and the district court
11 said maybe, you know, it's new, I want to see what other
12 judges have done; he presses a button on the computer,
13 give me what the sentences were looking at these facts,
14 and finds out in the last 100 cases, this is what the
15 sentence was. And he says this seems to me no different
16 than those and that's the sentence I'm going to impose.
17 Is there any problem with that?

18 MR. COCHRAN: There is. And again, because
19 3553(a) is an individual weighing of the defendant --

20 CHIEF JUSTICE ROBERTS: Yes, well, he looks
21 at all the individual factors and he says they seem not
22 terribly different from these 100 other cases and the
23 range in those 100 other cases was, you know, 5 to 7
24 years, and so I'm going to give him 5 years.

25 MR. COCHRAN: If the district court

1 considers all those facts and considers what may have
2 been done and it is sufficient, if not greater than
3 necessary given those facts, then the court can do that.

4 CHIEF JUSTICE ROBERTS: How is that
5 different than the -- how is that different than looking
6 at the guidelines, which did that in a much more
7 comprehensive way, and saying, I don't see anything
8 different in this case from the normal guidelines case
9 and so I'm going to impose that sentence?

10 MR. COCHRAN: Well, the guidelines didn't
11 take everything into account, and the sentencing courts
12 were coming from 18 years of mandatory guidelines, of
13 being required to follow this book that necessarily
14 didn't incorporate all of the human factors in
15 sentencing. And they have held to that.

16 JUSTICE SCALIA: Well, it did incorporate
17 them in that district judges were free to depart from
18 the guidelines if indeed they found there was some one
19 of these human factors not considered by the guidelines
20 which existed in the particular case.

21 MR. COCHRAN: In theory, yes,
22 Justice Scalia. But in practice, no, because what
23 happened in the very cases as United States versus Foy
24 out of the Ninth Circuit, the defendant in that case
25 argued to the district court that he should have a

1 departure based upon lack of mutual guidance, and it was
2 a reasoned decision. It went to the Ninth Circuit. The
3 Ninth Circuit found it to be a reasoned decision; and
4 within the next amendment process of the Sentencing
5 Commission, it was eliminated as a departure basis with
6 no discussion at all.

7 So yes, there may have been departures, but
8 they were systematically removed, and in fact chapters
9 5(h) and 5(a) show that very clearly.

10 JUSTICE SCALIA: Well, if they were
11 systematically removed then all of these other human
12 factors that you're complaining about were considered by
13 the guideline commission and were simply rejected.

14 MR. COCHRAN: They weren't considered, Your
15 Honor, and in the history of those amendments that's
16 borne out.

17 And if the Court has no further questions,
18 I'd like to reserve some time.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Mr. Dreeben.

21 ORAL ARGUMENT OF MICHAEL R. DREEBEN

22 ON BEHALF OF THE RESPONDENT

23 MR. DREEBEN: Thank you, Mr. Chief Justice,
24 and may it please the Court:

25 The court of appeals appropriately applied a

1 presumption of reasonableness in reviewing the sentence
2 imposed pursuant to the advisory guidelines system that
3 this Court announced in United States versus Booker.
4 The guidelines represent the integration of the multiple
5 purposes of sentencing reflected in section 3553(a) that
6 the district court is obligated to consider. The
7 commission also represents an expert body that has
8 considered the various parameters of sentencing and the
9 fact patterns that arise in the Federal system and has
10 made an effort over time to arrive at an appropriate --

11 JUSTICE STEVENS: Isn't it true, just to get
12 one thought out on the table, that there are factors
13 that the guidelines don't -- did not consider, such as
14 military service?

15 MR. DREEBEN: Justice Stevens, the
16 commission considered that factor and then determined
17 that it was not generally appropriate to a sentence
18 outside the guidelines.

19 JUSTICE STEVENS: But isn't it true that
20 under the guideline no weight is given to military
21 service?

22 MR. DREEBEN: The guidelines specifically do
23 not give weight to it. They permit a judge --

24 JUSTICE STEVENS: What should a judge do if
25 he thought some weight should be given to military

1 service?

2 MR. DREEBEN: Under Booker the judge should
3 do that. That is the difference between an advisory
4 guidelines system and a mandatory guidelines system.
5 The judge can give weight to factors That the commission
6 decided should not have weight in the sentencing
7 process. That is the essence of what it means for the
8 guidelines --

9 JUSTICE SCALIA: And presumably cannot give
10 weight to factors that the commission decided should
11 have weight.

12 MR. DREEBEN: He can do that, too,
13 Justice Scalia.

14 JUSTICE BREYER: Are we back to the original
15 version, which I'll read what it says. It says: "With
16 a few specific exceptions -- race, sex, national origin,
17 creed, religion, socioeconomic State -- with those
18 exceptions, the commission does not intend to limit the
19 kinds of factors, whether or not mentioned anywhere else
20 in the guidelines, that could constitute grounds for
21 departure in an unusual case." That's what it said. A
22 part of the guidelines in the heartland. If it's not
23 the heartland, depart.

24 Now, what I wonder is are we not back under
25 your theory of it just to where we were when it started

1 out, before the commission started ruling all these
2 things out and began to make all its -- the judge could
3 do that.

4 MR. DREEBEN: I think we're back,
5 Justice Breyer, to a further point even than the first
6 set of guidelines, because even under the first set of
7 guidelines application of the guidelines was mandatory
8 unless the court found an aggravating or mitigating
9 circumstance that wasn't taken into account.

10 JUSTICE BREYER: We said we took nothing
11 into account and therefore any circumstance that makes
12 the case unusual would be in principle a ground for an
13 exception.

14 MR. DREEBEN: I understand that,
15 Justice Breyer.

16 JUSTICE BREYER: You're saying more than
17 that is necessary.

18 MR. DREEBEN: I think that the
19 reconciliation of this Court's merits opinion in Booker
20 and its remedial opinion in Booker does dictate that the
21 judge has additional freedom to impose a sentence that's
22 different from what's described in the guidelines.

23 JUSTICE BREYER: He could do this: He could
24 set aside the guideline on the theory that the guideline
25 itself is unreasonable, that is it doesn't properly take

1 account of sentencing. But suppose he doesn't do that.
2 Then, if you take your view that there's a presumption
3 in its favor and if it is the normal case, not an
4 unusual case in any respect, how can he not apply the
5 guideline?

6 MR. DREEBEN: Justice Breyer, I think we
7 have to distinguish between what the job of the district
8 court is and what the job of the appellate court is; and
9 in this case, the Government is arguing for a
10 presumption of reasonableness on appeal. Once the
11 district judge has determined that the guidelines
12 sentence aligns with his own application of the section
13 3553(a) factors, our submission here is that a court of
14 appeals can generally presume that that is a reasonable
15 sentence. The defendant of course has the opportunity,
16 or the Government if the Government has appealed, to
17 show that that presumption is overcome.

18 JUSTICE SOUTER: But unless there is a way
19 to calibrate the strength of the presumption, there's no
20 clear way to distinguish the presumption from the
21 mandate. The mandate is gone. You say yes, they
22 consider other things. But unless we can calibrate the
23 presumption in some way that says, you know, a mandate
24 was force 60 and a presumption is a force 40, something
25 like that, there's no way to tell the two apart in

1 practice.

2 MR. DREEBEN: Justice Souter, I'm not sure
3 that that would be true even if what we were talking
4 about was a direction to the district judge to presume
5 that he would impose a guidelines sentence. But that's
6 not what we're talking about. The district judge does
7 not operate and does not have to operate under the
8 position that we're arguing for with a presumption that
9 the judge will impose a guidelines sentence unless
10 persuaded otherwise. The judge's obligation is to --

11 JUSTICE SCALIA: He doesn't have to do it
12 unless he wants to be sure of being affirmed.

13 MR. DREEBEN: I would think that what the
14 judge wants to do is be sure that he's complied with his
15 statutory obligations.

16 JUSTICE KENNEDY: Well, perhaps I
17 misunderstood Justice Souter's question, but I have this
18 concern, and I thought it was his concern as well. At
19 the appellate level, is the presumption something that
20 can only be overcome by a clear and convincing showing
21 or is it just an initial benchmark? We're playing with
22 standards and words here.

23 MR. DREEBEN: Well, we are.

24 JUSTICE KENNEDY: And when we talk about
25 presumptions at the appellate level, that's actually a

1 little strange in any event. You usually talk about
2 presumptions as assisting us in finding a fact.

3 MR. DREEBEN: That's true, Justice Kennedy.
4 But I think what it reflects at the appellate level is
5 that the court of appeals enters the case with an
6 attitude that, our job is to decide whether what the
7 district judge did was reasonable. We can operate --

8 JUSTICE KENNEDY: So we write that this is
9 an additive thing?

10 MR. DREEBEN: Yes, I think that it's not so
11 different from the court of appeals saying we can enter
12 this case feeling pretty confident that we can affirm a
13 guidelines sentence unless the person who challenges
14 that shows us a good reason otherwise.

15 JUSTICE SOUTER: Well, is your view -- on
16 your view, is the appellate court engaging in some kind
17 of de novo review or is the appellate court supposed to
18 engage in a review that it will disturb the sentence
19 only if it is shown to be unreasonable?

20 MR. DREEBEN: The latter, Justice Souter.
21 And I think that in that regard there is a range of
22 reasonable sentences that could be imposed based on a
23 given set of facts.

24 CHIEF JUSTICE ROBERTS: Well, if you -- if
25 you have that, two criminals, criminal defendants, with

1 the same identical background and everything else, one
2 judge says, I think military service should be taken
3 into account, so I'm going to depart from the guidelines
4 by 3 years. The judge next door says, I don't think it
5 should be taken into account so I'm going to impose the
6 guideline sentence. Both cases are appealed. They're
7 consolidated for argument. What is the court of appeals
8 supposed to do? Uphold both of them?

9 MR. DREEBEN: The court of appeals can
10 uphold both of them if it concludes that the actual
11 sentence that's imposed is reasonable. And in the
12 second case that the Court is going to hear today the
13 Government argues for a proportionality principle that
14 should govern the review of sentencing.

15 JUSTICE SOUTER: What is reasonable is -- is
16 not merely a sort of number within a spectrum. It seems
17 to me that what is reasonable is a function in part of
18 the reasons that are given. And in the Chief Justice's
19 view, two diametrically opposed reasons are given for
20 two different sentences. Does the, does the appellate
21 court in his example say, well, I think reasonable
22 people could go either way on that, so however it comes
23 out it's fine on appellate review? Isn't that what the
24 court would have to do in order to affirm both
25 sentences, other things being equal?

1 MR. DWYER: You're right, Justice Souter,
2 and I can't say that that would be the first choice of
3 the Congress that enacted the Sentencing Reform Act.

4 JUSTICE SOUTER: Isn't it clear that it
5 would have been the last choice of the Congress?

6 MR. DREEBEN: It is, and it's not the first
7 choice of the Government, either. But it strikes me
8 that it is something of an inevitability once this Court
9 has declared that mandatory guidelines are impermissible
10 under the Constitution if judicial factfinding --

11 JUSTICE ALITO: What does the Sixth
12 Amendment have to do with the selection of the
13 sentencing philosophy that is to be imposed? How can
14 there be a Sixth Amendment violation if either the
15 guidelines or our case law says military service is or
16 is not a relevant factor? I don't see how that has
17 anything to do with anything that you can get out of the
18 Sixth Amendment.

19 MR. DREEBEN: It probably does not,
20 Justice Alito. But what happened in the first part of
21 Booker is that the Court declared that the guidelines
22 are advisory and advice. It's advice that can be
23 accepted or rejected.

24 JUSTICE BREYER: I know, but Booker says
25 what we're trying to do is to come close to what

1 Congress wanted but not violate the Sixth Amendment.

2 Now, what I think we're talking about now --
3 I think -- i mean, you sort of shed some -- you
4 clarified something very well for me, which is that in
5 this case we're talking about the situation where the
6 district judge applies the guidelines sentence, and then
7 what's the attitude of the court on appeal, and the
8 attitude is going to be, well, the Sentencing Commission
9 thinks it's okay, the judge thinks it's okay, okay, you
10 have to -- you better show me a good reason to think to
11 the contrary. Fine.

12 But the interesting problem is the problem
13 of the next case which you're now talking about, is,
14 well, what happens if the district judge and when should
15 be the district judge and how free should the district
16 judge feel he is to depart from the guidelines sentence
17 even if it's not an unusual case.

18 MR. DREEBEN: Let me try to address that and
19 try to address Justice Alito's point about the question
20 of how much sentencing philosophy can be decreed by the
21 sentencing commission or Congress before a Sixth
22 Amendment problem arises.

23 As I understand this Court's sequence of
24 opinions from Apprendi leading up to the most recent
25 decision in Cunningham, if the law establishes a level

1 of punishment that may be imposed based on the facts
2 found by the jury and says to the judge, judge, you may
3 not go above it unless you find a particular fact, that
4 fact is subject to the Sixth Amendment rule that the
5 Court has announced and must be found by a jury.

6 JUSTICE SCALIA: Or some fact, not
7 necessarily a particular fact.

8 MR. DREEBEN: Any fact at all, as a matter
9 of fact is what the Court has said, although I
10 understand that to mean facts pertaining to the offense
11 and the offender, not facts about the world such as the
12 prevalence of crime.

13 Now, what that leads me to conclude is that
14 in order to escape the bright line rule that's been
15 announced in this sequence of cases, including Booker
16 itself and most recently Cunningham, a judge must be
17 able to look at the set of facts that the jury found,
18 determine what level of punishment would be advised by,
19 say, a guidelines system, and not be bound to impose
20 that level of punishment if the judge feels that a
21 different level of punishment is appropriate.

22 If that is a correct understanding of what
23 this Court has held, it necessarily implies that a judge
24 does have a certain amount of freedom in an advisory
25 guidelines system to disagree with what the Sentencing

1 Commission has found, give the judge's reasons, and then
2 is subject to appellate review for the reasonableness of
3 that explanation and, the Government submits, subject to
4 a proportionality principle, so that the sentence that's
5 imposed outside the guidelines is a reasonable one and
6 not an arbitrary one.

7 Now, if I'm wrong about that and it is not
8 necessary for the court to have the legal freedom to be
9 able to disagree with what the Sentencing Commission
10 said, that would be very good from the Government's
11 perspective. But as I understand the complementary
12 rules that are established by Booker, what an advisory
13 guidelines system requires is that the guidelines be
14 treated as advice rather than mandate. So while the
15 guidelines have determined that military service is not
16 ordinarily relevant to the level of punishment, a judge
17 may determine in a particular case that he disagrees.

18 JUSTICE STEVENS: May I ask you, this is the
19 hypothetical: Supposing a judge thinks military service
20 is relevant, and he decides to impose a sentence a
21 little below the guidelines. But then he says, I
22 recognize that in this circuit there is a strong
23 interest in uniformity and the court of appeals has
24 adopted a rule where they will presume a within
25 guidelines sentence is reasonable and will affirm in

1 those cases. And I think with respect to the court of
2 appeals, I think I would be wise to impose the
3 guidelines sentence, so I will do so even though my own
4 judgment is that it should be slightly lower. What
5 should the court of appeals do with such a sentence?

6 MR. DREEBEN: I think the court of appeals
7 should correct the judge on a mistaken apprehension of
8 law, which is that the judge --

9 JUSTICE STEVENS: Should reverse the judge
10 then, within a -- a within guidelines sentence?

11 MR. DREEBEN: In the circumstance,
12 Justice Stevens, I think that you put your finger on two
13 different types of review. In the circumstance in which
14 a district judge operates with what I'll call legal
15 blinders on that prevent him from complying with --

16 JUSTICE STEVENS: No. He operates with
17 total candor. He's saying exactly what he feels like
18 saying.

19 MR. DREEBEN: I'm hoping that it's a
20 misunderstanding of what the court of appeals has said,
21 because the court of appeals should not have told the
22 judge you're obligated to impose a guideline sentence.

23 JUSTICE STEVENS: Well, they didn't say
24 you're obligated, but you can be pretty sure you'll be
25 affirmed if you do impose within guidelines sentences.

1 MR. DREEBEN: Judges are still obligated to
2 comply with 3553(a), which requires them to exercise
3 discretion. Now if a judge decides I might as a
4 personal matter if I were writing the guidelines write
5 them differently, and I might give great weight to
6 military service, but one of the things that I'm
7 required to do under section 3553(a) is to consider the
8 need to avoid unwarranted disparity between defendants
9 who have been convicted of similar criminal conduct and
10 have similar records. And therefore, I am going to
11 moderate my own personal preference and not impose a
12 significant outside the range sentence, in order to
13 ensure that I fully have taken into account the fact
14 that we are in a Federal system with 674 Federal
15 district judges, and we cannot have all our own personal
16 guidelines systems.

17 Now if a judge does that, I don't think
18 there's anything wrong with that. I think that judge
19 has actually complied with --

20 CHIEF JUSTICE ROBERTS: What if the court of
21 appeals does that? What if the court of appeals says
22 we've got 10 district judges in this circuit, nine of
23 them do not take military service into account, one
24 does, and we think that's inequitable, doesn't serve the
25 interest in uniformity. And so even though that one

1 judge says in the exercise of my discretion I'm going to
2 depart, we're going to reverse that as unreasonable?

3 MR. DREEBEN: Mr. Chief Justice, I think
4 there's a difference between a sentence that varies from
5 what other judges would do and a sentence that is
6 unreasonable.

7 If the sentence that is different from what
8 other judges would do is not supported by a cogent and
9 coherent explanation, and it is unduly productive of
10 disparity because, say, it takes a guidelines range like
11 this one, of 33 months to 41 months, and the judge says
12 in my view military service means that this defendant
13 gets probation.

14 Or to take an example that's on the other
15 side, suppose that the judge says this defendant
16 actually didn't get any extra credit in his criminal
17 history for his prior crime, but he has been convicted
18 before of lying to the Government about his gun charges.
19 I'm now going to take him up to the statutory maximum or
20 near it and give him eight years. I think in those
21 circumstances a court of appeals can and should say,
22 hold on, this is a view that the district judge is
23 entitled to take on the merits. He's entitled to give
24 greater weight to that factor, whether it's aggravating
25 or mitigating, than what the guidelines did, but not to

1 this extent, or we're going to be left with a system in
2 which disuniformity is the main principle.

3 JUSTICE BREYER: It's not that complicated.
4 All that happens is the court of appeals says, look, in
5 the case of bank robberies we've discovered about 33
6 percent of the defendants in the typical case have been
7 in the Army. And therefore, we think that just ordinary
8 armed services is not a reason, ordinary armed --
9 services in the military is not a reason for a
10 diminished sentence. That's all, period. Or they can
11 say it the other way, the absence of a military service
12 is a reason for having the higher sentence, put it any
13 way you want. And by the way, district judge, if you
14 disagree with that, we're going to reverse you because
15 we think it's unreasonable. Okay. What about that?

16 MR. DREEBEN: That to me sounds identical to
17 the system that pre-existed Booker's holding.

18 JUSTICE BREYER: It did. But is there
19 anything in the Sixth Amendment that forbids that?

20 MR. DREEBEN: This Court hasn't specifically
21 addressed --

22 JUSTICE BREYER: Well, what do you think?
23 Because I would think that if you're going to answer
24 that question yes, you are saying that not even the
25 court of appeals can try to assure a degree of fairness

1 among different defendants in respect to sentencing.

2 MR. DREEBEN: Well, Justice Breyer, I would
3 like to be able to answer the question yes and say that
4 courts of appeals can establish their own sub-legal
5 rules as --

6 JUSTICE BREYER: It's not sub-legal rules.
7 What it's called is precedent. What you do is you
8 decide a case and you decide this is unfair, and then
9 the thing that as a similar case comes along, is you
10 decide it the same way. And if a district judge doesn't
11 follow that, you reverse it.

12 MR. DREEBEN: Justice Breyer, if do you
13 that, what you have is each court of appeals functioning
14 as a sentencing commission.

15 JUSTICE BREYER: Exactly. You've simply
16 substituted stare decisis and the necessity of the
17 district court following circuit law for the guidelines.
18 And --

19 MR. DREEBEN: Exactly.

20 JUSTICE BREYER: If the guidelines are
21 unconstitutional because they make facts automatically
22 determinative, I assume that would be unconstitutional
23 because it makes facts automatically determinative.

24 MR. DREEBEN: I assume too under the
25 rationale --

1 JUSTICE BREYER: Well then, in other words,
2 the Constitution of the United States prevents the
3 courts themselves from trying to assure that sentences
4 who are -- that individuals who are in similar
5 positions, commit similar crimes, will be treated in
6 similar ways. That to me is possible, but of course
7 I've been in dissent in these cases. But it seems to
8 me --

9 JUSTICE SCALIA: So long as the jury
10 determines the facts that make them similar.

11 JUSTICE BREYER: We're back --

12 JUSTICE SCALIA: The problem here is what
13 makes them similar.

14 MR. DREEBEN: I understand this dialogue.
15 And what we have --

16 (Laughter.)

17 I too have been with the dissenters in these
18 cases, and what I'm trying to argue for here is a set of
19 principles that appellate courts can apply and that
20 district courts can look to when sentencing, that will
21 come as close as is reasonably possible to achieving
22 Congress's aims in the Sentencing Reform Act without
23 crossing over the bright line rule that this Court has
24 announced --

25 CHIEF JUSTICE ROBERTS: I don't know how

1 terribly different it is than the normal review for
2 abuse of discretion. I mean, you don't even need two
3 judges in my earlier question. Let's say you have the
4 same judge, and for three weeks every criminal defendant
5 who comes before him he says, I think if you have
6 military service, you should get a reduction. And then
7 all of a sudden he says, I see you have military
8 service, but I'm not going to give you a reduction. I
9 mean, is he bound by some abuse of discretion standard
10 to be a little bit consistent? And if that's the only
11 type of appellate review we're talking about, to ensure
12 some degree of consistency in how similar individuals
13 are treated in similar cases, I don't see that it raises
14 any concern.

15 MR. DREEBEN: Well, Mr. Chief Justice, I'm
16 not arguing for any proposition that I think would raise
17 concern. I do think that a general tenet of abuse of
18 discretion review is that the court of appeals can
19 affirm a result that it would not necessarily have
20 reached itself.

21 JUSTICE GINSBURG: Mr. Dreeben, may I ask
22 you, please, to address a point that Mr. Cochran raised?
23 I think you were very helpful in saying this presumption
24 for the guidelines is how the court of appeals evaluates
25 a district court sentence, that there is no presumption

1 that binds the district judge.

2 But one of the main points that Mr. Cochran
3 made in his presentation was the district judge has to
4 give reasons. He -- this was just a summary paragraph
5 at the end of the sentence hearing. He has to respond
6 to what defendant presented. He has to respond to what
7 the Government presented. There is an obligation
8 stemming from subpart (c) to give reasons, and that's
9 what he saw as the principal flaw in this sentence, that
10 the court of appeals has used. Reasons weren't given
11 for it.

12 MR. DREEBEN: Justice Ginsburg, I don't
13 think there was anything problematic with what this
14 district judge did. As Your Honor noted, this was a
15 sentence that was imposed after a lengthy sentencing
16 hearing in which the court engaged in a dialogue with
17 defense counsel about the three bases and the exclusive
18 bases on which defense counsel asked for a downward
19 departure. The judge at least four times in this
20 transcript brought up Section 3553, recognizing that the
21 judge was well aware of his obligation to imply the
22 purposes of sentencing and the factors that were
23 presented to him. Now he did that and he made comments
24 along the way that indicate why he did not find physical
25 condition, military service, or asserted vulnerability

1 in prison to be reasons that would justify giving this
2 defendant a lower sentence.

3 And in his ultimate explanation, though it
4 is brief, he pointed to two of the Section 3553 factors
5 explicitly. He pointed to the seriousness of the
6 offense and he pointed to the need for public
7 protection.

8 Now if you look at the legal obligations
9 that the judge had under Section 3553(c) to explain
10 himself, the statute actually sets up a hierarchy of
11 three different levels of explanation. First, in any
12 case the judge is to state the reasons for the sentence.
13 Second, if the sentencing range is greater than 24
14 months, the judge is supposed to explain the particular
15 reason for giving a sentence at one end or another end
16 of the range. And finally, if the sentence is outside
17 the range, the judge is to give the specific reason for
18 a sentence outside the range. That statutory framework
19 makes it entirely plausible to say that if a judge
20 imposes a guideline sentence and explains, I see no
21 reason not to impose a guideline sentence, he has met
22 his burden of explanation without having to respond
23 literally and in sequence to each argument that the
24 defendant has made.

25 JUSTICE STEVENS: May I ask this question?

1 The district judge is reviewed under an abuse of
2 discretion standard, which I take it means there's a
3 presumption he got it right. Is that correct? There's
4 a presumption the district judge sentence is correct?

5 MR. DREEBEN: Well, Justice Stevens, our
6 position is more complicated than that, because within a
7 guidelines range if a sentence is imposed, the
8 Government --

9 JUSTICE STEVENS: Why shouldn't there be
10 also the same presumption when it is outside the
11 guidelines range?

12 MR. DREEBEN: Because sentences that are
13 outside the guidelines range are more likely to be the
14 cause of or a source of unwarranted disparity than a
15 sentence within the range. And that is why that if the
16 court of appeals is interested in fulfilling what Booker
17 said the role of the court of appeals is, which is to
18 iron out sentencing differences, there is more
19 reason for the --

20 JUSTICE STEVENS: Well, do you think the
21 interest in uniformity, in same sentences across the
22 board is stronger than the interest in getting the
23 correct sentence for the particular defendant who's in
24 court at the time?

25 MR. DREEBEN: Well, there isn't any one

1 correct sentence usually.

2 JUSTICE STEVENS: No, there isn't. But if
3 you say the district judge has broad discretion, which
4 he does, and the review is under abuse of discretion,
5 why should there not always be a presumption that the
6 district judge got it right?

7 MR. DREEBEN: Because there are more legal
8 elements that go into sentencing and sentencing review
9 than just those that you've named, Justice Stevens.
10 Section 3553(a) itself, which is the guidepost for
11 review, mandates that the district court consider the
12 guidelines, consider the policy --

13 JUSTICE STEVENS: Yes, but it's sort of like
14 findings of fact. They must take into consideration all
15 sorts of aspects of the case, and you have a strong
16 presumption that the findings of fact are accurate. Why
17 don't you have a strong presumption that the ultimate
18 judgment on the sentence is also accurate?

19 MR. DREEBEN: What happens when a sentence
20 is imposed outside the range is that there is a greater
21 risk of infringing the main purpose of the Sentencing
22 Reform Act, which was to avoid unwarranted disparities;
23 and in contrast to a sentence within the range which
24 does not merely run that risk to the same degree, a
25 sentence outside the range may well. It's different

1 from what the sentencing commission with its expertise
2 and its experience has recommended as the appropriate
3 sentence, given those facts.

4 JUSTICE SCALIA: Well, you're -- I mean,
5 this is a self fulfilling prophecy. You're saying if
6 you don't comply with the guidelines, you're not going
7 to have uniformity. Well, I -- my goodness. Is that
8 consistent with the notion that the guidelines are
9 advisory?

10 MR. DREEBEN: I wouldn't put it as strongly
11 as that, Justice Scalia. What I would say is that the
12 further that a sentence diverges from the guidelines
13 range, the greater the possibility of unwarranted
14 disparity; and as a result of that, a court of appeals
15 should look more critically at the reasons that the
16 district court gave and ensure that the constellation of
17 reasons and facts that's presented is not so likely to
18 be a disproportionate sentence than --

19 JUSTICE SCALIA: But that's just
20 inconsistent with the notion which I think is correct,
21 that the district judge can simply disagree with the
22 basic -- basic reasons of the commission, can simply
23 disagree with the fact that the commission considers
24 white collar crime, for example, something that should
25 justify incarceration.

1 MR. DREEBEN: But Justice Scalia,
2 reasonableness review connotes that the court of appeals
3 will review the reasons that the district court gave for
4 that disagreement.

5 JUSTICE SOUTER: So doesn't your presumption
6 argument come down to an argument for a sufficiently
7 comprehensive statement of reasons, with a more
8 extensive statement required the further the court gets
9 from the guidelines? Isn't that what it boils down to?

10 MR. DREEBEN: It does for an out of range
11 sentence, Justice Souter. I think that for a sentence
12 within the range, the judge's statement that I have
13 considered the guidelines range and I think it's
14 appropriate does explain why that judge has given the
15 sentence that he's given. It's consistent with the
16 statute and it's consistent with the Constitution. Now
17 when --

18 JUSTICE SOUTER: Is there -- may I interrupt
19 you? Because your time is getting short.

20 Is there a difference between a presumption
21 of reasonableness to the guidelines on the one hand and
22 a rule that says the further you get from them, you can
23 get as far as you want to, but the further you get from
24 them, the more extensive your explanation has to be?

25 Is there a distinction between those two,

1 two rules?

2 MR. DREEBEN: There is a distinction between
3 them but I think they are complementary rules and in the
4 next case the Government will argue for a presumption
5 that is precisely what you have articulated,
6 Justice Souter. A greater and more extensive and more
7 persuasive explanation is needed the further that you go
8 from the guidelines range.

9 CHIEF JUSTICE ROBERTS: Or presumably the
10 further the facts suggest that you ought to depart from
11 the guidelines range? If you've got a submission here
12 18 compelling reasons, you shouldn't follow the
13 guidelines, and you get one sentence from the district
14 court saying -- you know -- I followed the guidelines,
15 presumably that would be the same as a significant
16 departure without further justification?

17 MR. DREEBEN: It wouldn't be identical but I
18 agree with you, Mr. Chief Justice, that a sentence
19 within the guidelines can be unreasonable if there is a
20 compelling case for a sentence outside the range because
21 the guidelines simply don't fit in that circumstance.

22 The sentencing commission itself recognized
23 that the guidelines were generalizations; they carved
24 out a heartland in the language of the sentencing
25 commission's first set of guidelines, and that there

1 will be circumstances that would justify different
2 sentences.

3 JUSTICE SCALIA: Is the system that you're
4 describing any different for mandatory guidelines that
5 are subject to departure when the district judge finds a
6 significant reason, which was what mandatory guidelines
7 had?

8 MR. DREEBEN: Yes, Justice Scalia. It is
9 quite --

10 JUSTICE SCALIA: Wherein is it different?

11 MR. DREEBEN: It is different precisely on
12 the area that, that you yourself articulated. The judge
13 can disagree with the sentencing guidelines and
14 determine that on the basis of the facts that the jury
15 found, the judge would impose a different sentence, and
16 that conclusion is then subject for reasonableness
17 review and we submit based on a proportionality
18 principle.

19 CHIEF JUSTICE ROBERTS: Thank you, Dreeben.
20 Mr. Cochran, you have three minutes remaining.

21 REBUTTAL ARGUMENT OF THOMAS N. COCHRAN

22 ON BEHALF OF PETITIONER

23 MR. COCHRAN: That you, Mr. Chief Justice.

24 I would like to return first to the across
25 the board reasonableness review that this Court

1 established in Booker. That in and of itself shows why
2 there cannot be a presumption of reasonableness on
3 appeal. Because you are holding the presumption to a
4 different standard at that point. It is not a
5 reasonableness across the board. You are putting the
6 burden on one the parties, most likely the defendant, to
7 come forward and explain why the presumption should be
8 rebutted.

9 That flies in the face with the across the
10 board reasonableness this Court set forth in Booker.

11 The guidelines are fraught with disparity.
12 That why is they are advisory. That's why they can only
13 be advisory. And the district courts must be allowed to
14 look at them, to see them, to consider them, but
15 ultimately to impose a sentence outside them for valid
16 reasons.

17 In Mr. Rita's case, the court didn't. The
18 court felt the guidelines held some undue weight. It is
19 indicated in the record in two places, first and
20 foremost on page 49 of the joint appendix, where the
21 court at the beginning of the sentencing hearing states:
22 Other than the motion for downward departure that you
23 submitted, do you have any other objections; and what
24 I'm trying to do now is determine where your client fits
25 within the sentencing guidelines.

1 Clearly the judge was rooted in the
2 guidelines and that's why he gave a sentence of 33
3 months at the low end.

4 JUSTICE GINSBURG: The, the judge also
5 pointed out that the jury made certain findings and he
6 thought he was bound by them; that is, the defendant
7 protested his independence, and the jury had found him
8 guilty of false statements.

9 MR. COCHRAN: That's correct. That's --

10 JUSTICE GINSBURG: The judge was bound by
11 those.

12 MR. COCHRAN: That's correct, Your Honor,
13 but interestingly the court found very dubious the
14 additional information regarding the cross-reference.
15 And on page 87 of the joint appendix, the court states
16 it was not able to evaluate the seriousness of that
17 other investigation; and yet that was the
18 cross-reference that doubled his guidelines sentence.

19 We would ask the Court to rule in this case
20 that the presumption of reasonableness cannot be
21 accorded to the guidelines.

22 CHIEF JUSTICE ROBERTS: Mr. Cochran, you've
23 started out by saying there were two places in the
24 record that you thought showed the judge was bound by
25 the guidelines. 49, what was the other one?

1 MR. COCHRAN: Your Honor, the other one was
2 page 87.

3 CHIEF JUSTICE ROBERTS: Of the one -- oh,
4 that point? Okay.

5 MR. COCHRAN: And that would be in the
6 second paragraph, Mr. Chief Justice, where the court
7 found it was unable to stray or found the guidelines
8 were inappropriate; and I suggest that that is a, a
9 giving of greater weight and too much so in this case.

10 Your Honor, Mr. Rita asks the Court to find
11 that a presumption cannot be accorded to the guidelines,
12 that his sentence was unreasonable in this case, and
13 that his case be returned for resentencing. Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 Mr. Cochran. The case is submitted.

16 (Whereupon, at 11:18 a.m., the above-titled
17 case was submitted.)

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