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

2 (10:14 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 09-10245, Freeman v. United  
5 States.

6 Mr. Heft.

7 ORAL ARGUMENT OF FRANK W. HEFT, JR.,

8 ON BEHALF OF PETITIONER

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

11 William Freeman's plea agreement, his  
12 presentence report, and the sentencing record all show  
13 that his term of imprisonment was based on a crack  
14 cocaine guideline that was retroactively lowered by the  
15 United States Sentencing Commission. This case asked  
16 the Court to decide whether the fact that a sentencing  
17 court accepted a plea agreement under Criminal Rule  
18 11(c)(1)(C) precludes eligibility for a sentence  
19 reduction under section 3582(c)(2). We submit that  
20 Mr. Freeman is not barred from eligibility for a (c)(2)  
21 sentence reduction for several reasons.

22 First, under the ordinary definition of  
23 "based upon" and in the context of this particular  
24 statute, since the subsequently lowered guideline was  
25 used to determine Mr. Freeman's term of imprisonment,

1 that term of imprisonment was based on the subsequently  
2 lowered guideline.

3 Second, the categorical ban on eligibility  
4 adopted by the Sixth Circuit and advanced by the  
5 Government frustrates the purpose underlying section  
6 (c)(2) and finds no support in the plain language of the  
7 statute, of the rule, and under the terms of  
8 Mr. Freeman's plea agreement.

9 Third, a record-based analysis that reviews  
10 the plea agreement, the presentence report, and the  
11 sentencing record to determine the basis of the sentence  
12 is -- is best suited to correctly implement section  
13 (c)(2), and it's -- that record-based analysis supports  
14 the conclusion that Mr. Freeman's sentence was indeed  
15 based on a retroactively lowered guideline. The -- the  
16 Sixth Circuit --

17 CHIEF JUSTICE ROBERTS: If -- if we issue an  
18 opinion and we analyze the statute's language, the  
19 statute's purpose, and the statute's legislative  
20 history, would the opinion, the judgment be based on  
21 each of those or -- or not? In other words, does  
22 everything that goes into the final determination, would  
23 you say that determination is based on each of those  
24 factors individually?

25 MR. HEFT: Yes. Certainly, it is based --

1 the determination certainly would be based on the  
2 statute, Your Honor, but, as we've -- we've argued in  
3 our brief, we've asked the Court to take what we believe  
4 to be a record-based analysis and look at -- look at the  
5 record in this case, look at the terms of the plea  
6 agreement, look at the --

7 CHIEF JUSTICE ROBERTS: No. My --

8 MR. HEFT: I'm sorry.

9 CHIEF JUSTICE ROBERTS: I think my question  
10 goes in a different direction. This plea agreement, I  
11 think, could be said to be based on the sentencing  
12 guidelines, but it is also based on the agreement. In  
13 other words, the combination of the two of them is what  
14 gives you the -- the sentence. So how can you say it's  
15 based on only the sentencing guidelines when it may not  
16 have been imposed in the absence of the plea agreement?  
17 Probably wouldn't have been.

18 MR. HEFT: Mr. Chief Justice, we don't  
19 believe that that's mutually exclusive. A sentence can  
20 be a guideline -- a sentence based on the guidelines,  
21 and it can be a sentence based on a C plea agreement.

22 JUSTICE ALITO: You quote one definition  
23 of -- the noun "base" in your brief uses a point from  
24 which something can develop, but you omit another  
25 standard definition of the term, the principal element

1 or -- or ingredient of anything, considered as its  
2 fundamental part. Why do you do that?

3 MR. HEFT: Well, Your Honor, I -- I think  
4 the dictionary definition that we've given encompasses  
5 the definition that Your Honor has just -- just  
6 described. The -- and our position --

7 JUSTICE ALITO: Well, there's two -- there  
8 are two different definitions. One is something that  
9 provides a starting point for analysis. The other is  
10 the fundamental thing on which something is -- it rests.

11 MR. HEFT: Well -- well, our contention  
12 is --

13 JUSTICE ALITO: Now, if you use the latter  
14 definition, you have to decide which is more fundamental  
15 here, the agreement between the parties or the  
16 sentencing guidelines, which certainly provided the  
17 starting point for the analysis of the sentence by  
18 the -- by the district court.

19 MR. HEFT: Justice Alito, that's correct.  
20 The guidelines certainly were the starting point, but  
21 they were also the principal foundation of this  
22 agreement because what the agreement is --

23 JUSTICE GINSBURG: Isn't it enough for you  
24 to say -- or based not in whole, but in part -- based  
25 on, something could be based on several things, and one

1 of them is the guidelines that then existed?

2 MR. HEFT: Certainly. Certainly. And this  
3 -- this plea agreement reflects that it was based on the  
4 guidelines. If you --

5 CHIEF JUSTICE ROBERTS: Well, then are you  
6 saying the plea agreement was based on the fact that he  
7 was caught with -- with two guns rather than four guns?  
8 Would you be willing to say that? In other words,  
9 everything -- your position, it seems to me, could be  
10 criticized for saying everything that contributes to the  
11 final 106 months, that that sentence is based on every  
12 one of those things --

13 MR. HEFT: Well --

14 CHIEF JUSTICE ROBERTS: -- which makes the  
15 -- which makes the statutory language largely mute on  
16 this.

17 MR. HEFT: Well, Your Honor, the -- the  
18 sentence is based on a number of guidelines. Each -- no  
19 sentence is based on just one guideline, as this plea  
20 agreement reflects. It's based on a compilation of  
21 guidelines. It's -- it's based on the crack guideline,  
22 and as prior --

23 CHIEF JUSTICE ROBERTS: Well, it's also  
24 based on things that are not reflected in the  
25 guidelines. You've got a particular U.S. attorney who

1 is more lenient in prosecuting these types of crimes  
2 than another one. The fact that you got the minimum  
3 under the guidelines might be based on that. It's based  
4 on the fact that this person felt he could handle 106  
5 months in prison, and he wasn't willing to risk whatever  
6 the top -- what was the top sentence under the guideline  
7 calculation?

8 MR. HEFT: It would have been 117 months.

9 CHIEF JUSTICE ROBERTS: So he figures it's  
10 better for me to get -- it's based on his decision that  
11 I -- 106 months is better than the risk of 117.

12 MR. HEFT: Well, certainly there are a  
13 number of factors that go into plea bargaining and  
14 negotiation, but what -- I think what the court has to  
15 look at is what is said in that plea agreement. And I  
16 think, as Justice Ginsburg pointed out a minute ago, the  
17 definition of "based on" -- if a guideline sentence  
18 is -- if a sentence is based in part on the guidelines,  
19 that would be adequate under the -- under section --

20 CHIEF JUSTICE ROBERTS: What sentence would  
21 he have gotten if he were just sentenced under the  
22 guidelines, no plea agreement?

23 MR. HEFT: He would have got the -- he would  
24 have received the same sentence, Your Honor.

25 CHIEF JUSTICE ROBERTS: Well -- well, how do



1 we know that?

2 MR. HEFT: Well --

3 CHIEF JUSTICE ROBERTS: The guidelines give  
4 you a range. The judge might have given him 117 months.

5 MR. HEFT: But -- but the plea agreement  
6 here was for the bottom of the guidelines. The parties  
7 calculated --

8 CHIEF JUSTICE ROBERTS: No, I know. I'm  
9 putting aside the plea agreement. What would he have  
10 gotten under the sentencing guidelines? We --we don't  
11 know, right?

12 MR. HEFT: It would have been left --  
13 left -- well, assume it depends upon the nature of the  
14 plea, Your Honor. You're talking --

15 CHIEF JUSTICE ROBERTS: There's no plea. He  
16 is convicted at trial.

17 MR. HEFT: It would be somewhere within that  
18 guideline range. That's correct.

19 CHIEF JUSTICE ROBERTS: So how can you say  
20 that this is based on the guideline range when the  
21 guideline range would not have been determinative?

22 MR. HEFT: Well -- well, we're looking --  
23 we're looking at the content of the plea agreement, Your  
24 Honor. The -- the plea agreement says --

25 CHIEF JUSTICE ROBERTS: Yes, I know, but my

1 hypothetical is in a different context.

2 MR. HEFT: But even -- even at that, Your  
3 Honor, if -- that sentence ultimately is going to be  
4 based on a guideline range, and if that guideline range  
5 is subsequently lowered by the Sentencing Commission,  
6 then the --

7 JUSTICE SOTOMAYOR: Counsel, could you --  
8 maybe it would be easier if you would describe to us the  
9 situations you don't think would be based on the  
10 guidelines.

11 The Solicitor General claims that since  
12 every plea negotiation has to start with the guideline  
13 calculation as a starting point for departure and/or  
14 consideration by the judge under 6B1, that every C plea  
15 agreement would be considered based on. Are you taking  
16 that position?

17 MR. HEFT: No, Your Honor. Absolutely not.

18 JUSTICE SOTOMAYOR: All right. So I'll give  
19 you a couple of examples, but you give me more. Would a  
20 plea agreement that doesn't mention the guidelines at  
21 all but picks a sentence within the actual guideline --  
22 is that based on the guideline?

23 MR. HEFT: Possibly, Your Honor.

24 JUSTICE SOTOMAYOR: All right. And how  
25 about one that departs or varies from the guideline, the

1 range, whichever word you want to use?

2 MR. HEFT: Your Honor, the -- the Sentencing  
3 Commission, in 1B1.10 note 3, says that a  
4 below-guideline sentence can be based on the guidelines.

5 JUSTICE SOTOMAYOR: So there -- the  
6 Solicitor General is right; there really isn't any  
7 situation that you're claiming is not based on?

8 MR. HEFT: Oh -- oh, no, Your Honor. There  
9 are -- there are C pleas.

10 JUSTICE SOTOMAYOR: Give me the examples.

11 MR. HEFT: All right. Well, first of all,  
12 we've cited cases in our brief where circuit courts have  
13 determined that a C plea was not based on the  
14 guidelines. But let me give you another example.

15 Let's just assume the guideline range is  
16 something like 151 to 188 months, and then -- but the  
17 parties agree to a sentence of 60 months, and they do  
18 that for several reasons. First of all, maybe the  
19 defendant is elderly. Maybe the defendant has serious  
20 medical conditions. Maybe the defendant has -- was  
21 sexually abused as a child. If those are the factors,  
22 if that's the reason why the defendant got that --  
23 received that 60-month sentence, that sentence is not  
24 based on the guideline range.

25 JUSTICE ALITO: Well, wouldn't the

1 guidelines, even in that situation, provide the starting  
2 point for analysis? Isn't the district court obligated,  
3 and isn't the -- doesn't the presentence report have to  
4 go through the guidelines calculation before the  
5 sentence is imposed? So you start out with the -- the  
6 guideline sentence of whatever the figure was that you  
7 mentioned, and then you go from there, and maybe you  
8 depart downward.

9 MR. HEFT: That -- that's true. The -- the  
10 guidelines would be the starting point of any  
11 negotiation, but --

12 JUSTICE ALITO: So why wouldn't that be  
13 based on the guidelines? Just because there's such a  
14 big downward departure?

15 MR. HEFT: It -- Your Honor, it would not be  
16 based on the guidelines if those other factors were the  
17 motivating reason for the imposition of the sentence.

18 JUSTICE BREYER: Sorry, I don't understand  
19 that. Don't the guidelines provide for departures?

20 MR. HEFT: They do, Your Honor.

21 JUSTICE BREYER: Well -- and aren't you  
22 giving a guideline sentence, if you give your reasons as  
23 is required by the Sentencing Commission in 6B1.2 and  
24 you say -- the judge says, I think this is a special  
25 case and, therefore, I am giving a lower sentence? Just

1 as he's required to do under the guidelines in order to  
2 accept a C type agreement.

3 MR. HEFT: If the parties can show that the  
4 sentence is tied to the guidelines.

5 JUSTICE BREYER: Well, how could it not be?  
6 Wouldn't the judge have to say it's not tied to the  
7 guidelines, because I am varying and I no longer wish to  
8 apply the guideline? If he doesn't say that, isn't he  
9 applying the guideline?

10 MR. HEFT: In that instance, he would be --  
11 he would be applying it.

12 JUSTICE BREYER: Whether he gives the  
13 specific robbery 3-point whatever it is, 17 months, or  
14 whether he says, I have a special case and I depart  
15 under section 5 of the guidelines. Both of those are  
16 guideline sentences, aren't they?

17 MR. HEFT: If the -- if the judge were to  
18 take -- were to actually apply those guidelines and say,  
19 based on that guideline, I am going to depart, that  
20 sentence is based on the guidelines.

21 JUSTICE SOTOMAYOR: So from what base does a  
22 judge depart downward? From the crack cocaine range or  
23 from the downward departure range?

24 MR. HEFT: I think it would depend on the  
25 nature of the agreement, Your Honor. It may very well

1     depend on -- the judge may depart from the crack  
2     cocaine.

3                   JUSTICE SOTOMAYOR:   So aren't you just  
4     asking us to permit district court judges to make up  
5     their own C agreement, to decide what the parties would  
6     have done in the absence of a higher range?  And don't  
7     we fall prey to sort of just asking district court  
8     judges to create their own agreements?

9                   MR. HEFT:   No -- no, Your Honor.  I don't  
10    believe that's -- that's not what we are asking the  
11    Court to do at all.

12                  JUSTICE GINSBURG:   Mr. Heft, are you relying  
13    on -- this was -- this is a plea agreement that said,  
14    specifically, defendant agrees to have his sentence  
15    determined pursuant to the guidelines, and then the  
16    judge says that he was adopting the probation report and  
17    the application of the guidelines as set out therein, so  
18    both the -- the defendant says, I agreed to a  
19    determination pursuant to the guidelines, and the judge  
20    says, I'm going to apply the guidelines in giving you  
21    your sentence.

22                  So the hypotheticals we're talking about are  
23    quite far afield from where you have a specific  
24    statement by the defendant and the sentencing judge that  
25    the guidelines are being applied.

1                   MR. HEFT: That is correct, Your Honor, and  
2     that's why we've asked the Court not to take a  
3     categorical approach to this issue, but to take either a  
4     case-by-case approach or a record-based analysis, to  
5     allow the district judge to determine, as Justice  
6     Ginsburg pointed out, what our -- you know, what is the  
7     --

8                   JUSTICE KAGAN: Mr. Heft, would you require  
9     those kinds of statements in the agreement or in the  
10    colloquy in order to satisfy the standard? Suppose  
11    those statements just didn't exist.

12                  MR. HEFT: That's certainly problematic,  
13    Justice Kagan. If those -- if there was nothing in that  
14    plea agreement to tie the sentence to the -- the  
15    sentence -- the agreed sentence to the guidelines, that  
16    certainly would be problematic.

17                  But that doesn't resolve the issue one way  
18    or the other, because the judge would have to consider  
19    the presentence report to see if there's a connection or  
20    correlation between the agreed sentence and the  
21    guidelines, and also the judge could look at the guilty  
22    plea colloquy and sentencing transcript to see if the  
23    attorneys actually expressed their intent about where  
24    this sentence came from.

25                  JUSTICE KAGAN: Mr. Heft, that seems very

1 complicated. You have to look at everything and you're  
2 not giving us a lot of guidance as to what you do when  
3 you -- when you see these things. I mean, this sort of  
4 case-by-case, all-things-considered approach just seems  
5 as though you're going to get a lot of inconsistent  
6 decisions.

7 MR. HEFT: Respectfully, Your Honor, I  
8 disagree. I think this is what district judges do all  
9 the time, not just in the context of a C plea, but a B  
10 plea as well. They have to look at the nature of the  
11 plea agreement. They have to look at the PSR. They  
12 have to look at the sentencing transcript to -- to  
13 determine whether or not the defendant is -- is eligible  
14 for that sentence reduction.

15 So judges are doing this routinely. They're  
16 doing this --

17 JUSTICE ALITO: Well, in every case, they  
18 have to go through the guidelines calculation, and the  
19 parties have the opportunity to object to the  
20 calculation, right?

21 MR. HEFT: Yes, Your Honor.

22 JUSTICE ALITO: So what does paragraph 12 of  
23 the plea agreement contribute here, other than with  
24 respect to the fine and things besides the sentence that  
25 we're talking about? It doesn't seem to me to add



1 anything substantively.

2 MR. HEFT: I -- well, Your Honor, I think it  
3 does, Justice Alito. I think it does add -- it adds  
4 substance, and it adds meaning to that plea agreement  
5 because in paragraph 11 where the parties very  
6 meticulously go through the offense level, tie that to  
7 the guidelines, and then -- then they state in paragraph  
8 12, the -- the defendant agrees to be sentenced pursuant  
9 to the -- to the guidelines. That's very clear that the  
10 review in the guideline calculation is what the sentence  
11 is based on. And --

12 JUSTICE SCALIA: Can a -- can a sentencing  
13 judge be found to have abused his or her discretion in  
14 approving a plea -- a C plea agreement which provides  
15 for less than the minimum guideline sentence and gives  
16 no -- no particular reason for that? Would that be  
17 appealed as an invalid sentence?

18 MR. HEFT: Well, Your Honor, under -- under  
19 section 3742, the government could -- could appeal an  
20 incorrect application of the guidelines if that's what  
21 Your Honor is referring to.

22 JUSTICE SCALIA: Well --

23 JUSTICE GINSBURG: But now you're talking  
24 about a plea agreement, which the government has  
25 consented to whatever this agreement is and whether --

1    whether -- sometimes a plea agreement will say okay, if  
2    you take a plea, we'll drop certain charges or we'll  
3    charge a small amount -- value of the drug. Was there  
4    any of that in -- in this plea?

5                   MR. HEFT: No, Your Honor. Mr. Freeman  
6    pleaded guilty to all charges in the indictment. The  
7    parties stipulated the amount of -- of drugs that were  
8    found on his person when he was arrested. So there were  
9    no dismissed charges, no amended charges in this plea  
10   agreement.

11                   JUSTICE SCALIA: Let -- let me ask my  
12   question a different way. In deciding whether to  
13   approve the plea agreement, doesn't the judge have to  
14   consider whether it is an application of the guidelines,  
15   whether it is wildly inconsistent with the guidelines,  
16   whether it does not take into account valid reasons for  
17   departure from the guidelines?

18                   MR. HEFT: Yes. The judge would have to  
19   consider the guidelines. Right.

20                   JUSTICE SCALIA: Then, if that's the case,  
21   then every plea agreement is based on the guidelines,  
22   every single one, because the judge always has to  
23   consider how do the guidelines apply to this plea  
24   agreement.

25                   MR. HEFT: Well, Justice Scalia,

1 consideration of the guidelines alone is not enough to  
2 determine whether or not that sentence is actually based  
3 on them.

4 JUSTICE BREYER: I don't understand why you  
5 resist that. I mean, that's precisely what the  
6 guidelines say. The only ones that aren't guideline  
7 sentences are -- are dismissal charges, where it's an  
8 agreement to dismiss. But a type B, type C -- the  
9 guidelines themselves say that the judge, here's what  
10 you do. Judge, you look and see if the guidelines  
11 sentence is there. Is it a guideline sentence? If it  
12 is, you can approve it. If it isn't, you can't.

13 I mean, that's my reading of what it says.  
14 So -- so why do you resist that conclusion?

15 MR. HEFT: Well, Your Honor --

16 JUSTICE BREYER: And, of course, the judge  
17 now could depart from the guidelines -- I mean, "vary,"  
18 whatever that word -- technical word, is -- "vary." He  
19 can say, I'm not going to apply the guidelines at all.  
20 But if he is going to apply the guidelines, isn't that  
21 what they tell him to do? I've always thought that.  
22 You may tell me I'm mistaken.

23 MR. HEFT: They -- they do; obviously they  
24 do consider the guidelines, but then the other question  
25 is whether or not the sentence is based on those

1 guidelines --

2 JUSTICE BREYER: Well, how could it not be,  
3 since the judge has no power if he is to apply the  
4 guideline --

5 MR. HEFT: Well --

6 JUSTICE BREYER: -- to accept any agreement  
7 other than agreement that corresponds with the  
8 guideline? That's what it says. It says the court  
9 should accept a recommended sentence or a C -- the  
10 specific sentence -- only if the court is satisfied  
11 either that it is within the applicable guideline range  
12 or if it's based on a departure under the guidelines.  
13 That seems to me what it says. Isn't that what it says?

14 MR. HEFT: That is what it says, Your Honor,  
15 but --

16 JUSTICE BREYER: Okay. Then if that's so,  
17 every sentence is -- you're going to say no?

18 MR. HEFT: No.

19 JUSTICE BREYER: I mean, I thought that was  
20 helping you, but if you want to say no, go say no and  
21 explain why that is.

22 (Laughter.)

23 MR. HEFT: Your Honor, to go back to the  
24 point that Justice Sotomayor made --

25 JUSTICE BREYER: Yes.

1                   MR. HEFT:  -- with the hypotheticals, there  
2 still can be C pleas that are not based on the  
3 guidelines.

4                   JUSTICE BREYER:  How?

5                   MR. HEFT:  Well, the example --

6                   JUSTICE BREYER:  Give me an example.

7                   MR. HEFT:  Well, the example that I gave --  
8 I gave previously.

9                   JUSTICE BREYER:  What?

10                  MR. HEFT:  There's a guideline range.

11                  JUSTICE BREYER:  Yes.

12                  MR. HEFT:  But the judge bases his decision,  
13 his or her decision, solely on other -- factors other  
14 than the guidelines.  As I mentioned earlier --

15                  JUSTICE BREYER:  Are we supposed to  
16 psychoanalyze the judge?  The judge says on his writing,  
17 checks the box:  This is a guideline sentence.  It is  
18 robbery.  It is precisely within the robbery range.  But  
19 I -- I am going to give it the low end of the range  
20 because I believe that the -- he has a lovely mother and  
21 family and so forth.

22                  Okay?  You're saying that isn't based on the  
23 guideline.  No?  Okay.  Is that the point?

24                  MR. HEFT:  Well, it depends what the judge  
25 does at sentencing, Your Honor.

1 JUSTICE BREYER: What he does is he applies  
2 the guideline sentence. He has to do that. Now, within  
3 that range, he has applied the guideline sentence, he  
4 got the information. He says, I am satisfied it  
5 applies -- done.

6 Now are we supposed to look further and say  
7 what his true reason is? Is that what you're saying?

8 MR. HEFT: It would -- Your Honor, I would  
9 submit it would depend on the nature of the -- the plea  
10 agreement, whether or not that sentence is -- is  
11 actually based -- going to be based on the guidelines.

12 JUSTICE KAGAN: Well, I suppose --

13 JUSTICE SCALIA: Incidentally, and it sort  
14 of bears upon this discussion, are the guidelines  
15 mandatory when they are applied in approving a plea  
16 agreement? In other words, does Booker/Fanfan not apply  
17 to the application of the guidelines when a judge is --  
18 is approving a plea agreement? Do you think the  
19 guidelines are mandatory in that situation?

20 MR. HEFT: No, Your Honor. They're --

21 JUSTICE BREYER: You were -- you were just  
22 at the very point when we decided Booker, is that right?  
23 It was -- your -- your sentencing took place in July  
24 2005 and we came out with Booker in --

25 MR. HEFT: I believe it was March of 2005.

1 JUSTICE BREYER: All right. So it's quite  
2 possible the judge wasn't totally -- but I mean -- I  
3 agree; it's much more complicated after Booker. I don't  
4 know how to treat yours.

5 MR. HEFT: That's true.

6 JUSTICE BREYER: It's on the cusp.

7 JUSTICE ALITO: What if there had been  
8 evidence here of that? What if the government in  
9 connection with this plea agreement had dropped counts  
10 or had decided not to seek a superseding indictment  
11 adding counts? Would -- would the situation be the  
12 same?

13 MR. HEFT: Yes. Your Honor, I think it  
14 would; it would be the same. Because the court would  
15 have to look at, again, what the terms of the plea --  
16 plea agreement was and what the parties determined.  
17 Now, the -- I think what I should emphasize is that  
18 we're only talking about eligibility here; and if -- if  
19 those -- if those concessions that the government has  
20 made would -- would perhaps result or at least in the  
21 government's view, result in an unjustified windfall,  
22 that -- that's -- that is not a critical factor in  
23 determining eligibility. That's not factor at all in  
24 determining eligibility.

25 That could come into play after eligibility

1 is determined and the judge -- district judge determines  
2 whether or how much.

3 JUSTICE ALITO: How would that possibly  
4 work? Let's say the government drops count -- agrees to  
5 a plea on count 1 with a guideline range of 60 to 65  
6 months; drops count 2, which would have increased the  
7 guideline range to, let's say, 100 to 105 months; and  
8 says this is our deal, you know, you agree to -- to 65  
9 months and we're going to drop count 2. All right?

10 MR. HEFT: Yes.

11 JUSTICE ALITO: And then the guideline for  
12 that is lowered, and you say in determining whether the  
13 defendant is eligible, what -- the government would then  
14 have to have a mini-trial and prove that the -- prove  
15 count 2?

16 MR. HEFT: No. No. No. No. It would --

17 JUSTICE ALITO: How would it work?

18 MR. HEFT: It would work -- assuming that  
19 the defendant is eligible, the case is remanded to  
20 district court.

21 JUSTICE ALITO: Right.

22 MR. HEFT: As in this case, there would be a  
23 recalculation of the guidelines to determine if the --

24 JUSTICE ALITO: Right.

25 MR. HEFT -- guideline range would be



1 reduced, and then, as the judge said in this case said,  
2 if you have objections, let me know; file your  
3 objections. That's where the government could file --

4 JUSTICE ALITO: Yes. The government files  
5 its objections and says, well, we dropped count 2. And  
6 the defendant says, well, I wasn't guilty of count 2.

7 MR. HEFT: That's -- that's up to the  
8 district judge's discretion, whether or not to -- to  
9 reduce that -- that amended guideline sentence.

10 JUSTICE ALITO: How is the judge going to  
11 decide that?

12 MR. HEFT: Well, the -- I think that's  
13 something that district judges decide every day, whether  
14 or not -- because the judge presumably has -- has  
15 been -- is familiar with the case, with the presentence  
16 report, with the terms of the original plea agreement,  
17 with the facts of the case; and the -- and the judge can  
18 make an assessment based on those factors whether or not  
19 the sentence reduction should be granted and, if so, how  
20 much of a reduction should be granted.

21 JUSTICE SCALIA: But Justice Alito's  
22 hypothetical points out -- points up the fact that even  
23 though the agreement may mention the guidelines, it may  
24 do that just for the purpose of enabling the -- the  
25 judge more readily to approve the agreement, but there's

1 no reason to believe that the government is interested  
2 in the guidelines, as opposed to being interested in  
3 putting this person away for a certain amount of time,  
4 especially when another count is dropped and the  
5 government says, well, I'll -- you know, I'll drop it  
6 if -- if this guy goes to prison for 2 years. But if  
7 the government had known he's not going for 2 years, he  
8 is only going for a year and a half or a year, the  
9 agreement might not have been concluded. So it  
10 really -- I mean, it doesn't further the intent of both  
11 parties, at least, to say when the guideline is changed,  
12 the agreement changes.

13 MR. HEFT: Well -- well, the agreement  
14 certainly has been -- was modified by the amended  
15 guideline, and that's where the district judge has to  
16 exercise his or her discretion whether or not to grant  
17 that reduction.

18 JUSTICE GINSBURG: But in that event, the  
19 sweet part would be open to reconsideration too. I  
20 mean, you can't say, I want the good part, the lowered  
21 guideline, but I also want to keep that certain counts  
22 are dropped and that a certain quantity of drugs was  
23 agreed upon. You would have to reopen the whole thing.

24 MR. HEFT: No, Your -- no, Justice Ginsburg.  
25 I don't think you'd have to reopen the case. Again, I

1 think the judge could look at the presentence report,  
2 the government could make its objections saying here's  
3 why we gave that particular sentence, and the judge  
4 could exercise his or her discretion to say whether or  
5 not the defendant is going to get that sentence  
6 reduction.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 MR. HEFT: Thank you, Your Honor.

9 CHIEF JUSTICE ROBERTS: Mr. Gannon.

10 ORAL ARGUMENT OF CURTIS E. GANNON

11 ON BEHALF OF RESPONDENT

12 MR. GANNON: Mr. Chief Justice, and may it  
13 please the Court:

14 When a criminal defendant and the government  
15 agree to a specific sentence and that agreement is  
16 binding on the sentencing judge by virtue of Rule  
17 11(c)(1)(C), the resulting sentence is based on the  
18 parties' agreement. It is not based on the advisory  
19 guideline range that would otherwise have been used at  
20 sentencing, even if the sentence corresponds to that  
21 range.

22 JUSTICE SOTOMAYOR: Counsel --

23 JUSTICE KENNEDY: Well, here the agreement  
24 at various points says that the parties agree on the  
25 calculation of the guideline. I think it's paragraph 11

1 and 12. They say that the sentence is according to the  
2 guidelines. So there's reference to the guidelines  
3 throughout, and the court made the guidelines  
4 calculation.

5 MR. GANNON: The court certainly made the --

6 JUSTICE KENNEDY: So it seems to me fair  
7 under the statute to say that it is based on the  
8 guidelines.

9 MR. GANNON: Well, the question --

10 JUSTICE KENNEDY: And there are other  
11 provisions in the agreement you might argue about.

12 MR. GANNON: Well, I think the statutory  
13 question here isn't just whether the sentence is based  
14 on the guidelines. The language under 3582(c)(2) is  
15 whether the defendant was sentenced to a term of  
16 imprisonment based on a sentencing range that has  
17 subsequently been lowered by the Commission. So it's  
18 not just whether the guidelines played a role; it's  
19 whether this particular sentencing range was what was  
20 driving the sentence.

21 And, Justice Kennedy, you point out pages  
22 25, 26 of the plea agreement in the Joint Appendix. And  
23 I think it's instructive that the agreement deals  
24 differently with the fine component, as Justice Alito  
25 referred to earlier, than it does with the term of

1 imprisonment. At the bottom of page 25, the agreement  
2 says that a fine will be at the lowest end of the  
3 applicable guideline range. And then if you go over to  
4 pages 27 and 28 in paragraph 11, that's where the  
5 guideline calculation occurs. And notice it is an  
6 incomplete calculation. The parties don't actually come  
7 up with a final calculation because they don't come up  
8 with a criminal history. They don't --

9 JUSTICE KENNEDY: Well, they do come up with  
10 a recommendation, which is three levels below the  
11 otherwise applicable guideline.

12 MR. GANNON: They -- they come up with a  
13 recommendation for purposes of determining the offense  
14 level, the base offense level of 22 and then reduced to  
15 19.

16 JUSTICE KENNEDY: Yes, but that's all based  
17 on the guidelines.

18 MR. GANNON: Well, that aspect is based on  
19 the guidelines, but then the guideline application  
20 computation is incomplete because the next paragraph,  
21 paragraph B, says we aren't agreed on what the criminal  
22 history is going to be. And to the next paragraph,  
23 paragraph C specifically says that the foregoing  
24 statements of applicability of sections of the  
25 sentencing guidelines are not binding upon the court.

1 The defendant understands the court will independently  
2 calculate the guidelines at sentencing; that is --

3 JUSTICE KENNEDY: But that doesn't mean that  
4 the court can't base its conclusion on his  
5 independent -- on its independent judgment on the  
6 guideline.

7 MR. GANNON: Well, I think what I'm trying  
8 to say, Justice Kennedy, is the agreement expressly  
9 contemplates that the judge needs to determine the  
10 applicable guideline range for purposes of determining  
11 what the fine will be. And that's different from the  
12 way the plea agreement deals with the term of  
13 imprisonment because if we go back to page 26, it does  
14 not tie the -- the term of imprisonment to a guideline  
15 range. That's completely different from the way it  
16 deals with a fine. It specifically says there's an  
17 agreement that the sentence of 106 months of  
18 incarceration is the appropriate amount. And so that  
19 happens to have been at the bottom end of the guideline  
20 range that would have been applicable if the parties'  
21 agreement -- if the parties' prediction about the likely  
22 criminal history calculation turned out to be the right  
23 one.

24 JUSTICE KENNEDY: Well, you're talking about  
25 what "based on" means, and that's an important part of

1 your argument. If I could just, while I've got you,  
2 jump to this question of what happens on remand if you  
3 lose the case. On remand, I take it, you're not bound  
4 by the agreement because of the last --

5 MR. GANNON: Well, I --

6 JUSTICE KENNEDY: -- the last of section 24  
7 says the defendant argues for any sentence other than  
8 the one to which he has agreed to and breached the  
9 agreement.

10 MR. GANNON: Well, at that point the remedy  
11 for the breach would be that the United States is  
12 relieved of its obligations under the agreement.

13 JUSTICE KENNEDY: Would you -- what would  
14 that mean?

15 MR. GANNON: Well, I think that's -- that's  
16 part of the problem in a case like this where there was  
17 a specific sentence agreement, that it's impossible for  
18 government to get back the things that it gave up at the  
19 time, that were agreed to under --

20 JUSTICE KENNEDY: Well, it's got guilty  
21 pleas on all of the counts. We know that.

22 MR. GANNON: Well, but it also --

23 JUSTICE KENNEDY: In your position, in your  
24 view, would the government be able to take the position  
25 that the guilty pleas stay in place, but it now wants

1 maximum?

2 MR. GANNON: Well, I think that -- that  
3 would --

4 JUSTICE KENNEDY: Maximum guidelines.

5 MR. GANNON: I don't think that the  
6 3582(c)(2) contemplates that the sentence will be  
7 increased. The only thing, as the court --

8 JUSTICE KENNEDY: Yes, except that the  
9 agreement does. The agreement relieves you.

10 MR. GANNON: Well, I think that's if --

11 JUSTICE KENNEDY: Of any obligation. I see  
12 what you mean.

13 MR. GANNON: Now that the sentence has  
14 become final, I think 3582(c)(2) has opened a narrow  
15 window for ways in which the otherwise final sentence  
16 could be modified. It only contemplates that the judge  
17 will have the discretion to reduce the sentence if it  
18 is, first, a sentence that was based on the relevant  
19 guideline range that's subsequently been amended and  
20 made retroactively applicable. But also, second, then  
21 the judge would need to comply with a policy statement  
22 that appears in 1B1.10 of the --

23 JUSTICE KENNEDY: So you say the judgment's  
24 final, so the fact that the plea -- that there's a  
25 breach of the plea agreement is irrelevant at this



1 point?

2 MR. GANNON: Well, I think that the remedy  
3 that the agreement contemplates of the government being  
4 released from its other obligations in the plea doesn't  
5 really leave us much of an option at this point. We're  
6 not going to be able to go back and argue that he should  
7 have been sentenced at the upper end of the range that  
8 we're talking about. We're not going to be arguing that  
9 the criminal history should have been a higher or that  
10 the criminal history substantially underrepresented the  
11 seriousness of his history where he had 10 years of  
12 offenses preceding this one. There may have even been a  
13 potential career adjustment that -- that went by the  
14 boards. That's mentioned on page 162 of the Joint  
15 Appendix.

16 JUSTICE SCALIA: Mr. Gannon, you assert that  
17 the -- within the language of the statutory provision,  
18 the sentence here is not based on the guidelines, but  
19 it's based on the agreement, and the agreement arguably  
20 is based on the guidelines.

21 MR. GANNON: I think the agreement is  
22 arguably -- I mean, I don't think the face of this  
23 agreement proves that it's based on the guidelines, but  
24 I -- it is obvious that the parties negotiated in the  
25 shadow of the guidelines.

1 JUSTICE SCALIA: If -- if you take that  
2 position, that "based on" means determined by  
3 absolutely, then I don't think any sentence would ever  
4 be based on the guidelines after Booker/Fanfan.

5 MR. GANNON: Well --

6 JUSTICE SCALIA: The guidelines form part of  
7 the consideration of the judge, but the judge's decision  
8 is not based on the guidelines. Just as here, the --  
9 the agreement -- the guidelines form part of what  
10 produces the agreement, so also they form part of what  
11 produces the judge's decision. And it seems to me, if  
12 that's going to be enough for the judge's determination,  
13 it ought to be the same for the agreement.

14 MR. GANNON: Well, I think it's not clear  
15 that the judge needed to be considering the guidelines  
16 in the course of deciding whether to accept the plea  
17 agreement. And Justice Breyer earlier had a colloquy  
18 with Mr. Heft about guideline 6B1.2, which, even before  
19 Booker, was a nonbinding policy statement. And so, to  
20 be sure, when 3582 was enacted, the guidelines were  
21 binding, and, therefore, it -- they would have been  
22 expected to have played a larger role in most sentences.

23 JUSTICE SCALIA: No, but let's -- let's  
24 assume there is no plea agreement.

25 MR. GANNON: Yes. And --

1 JUSTICE SCALIA: You -- you have a judge who  
2 sentences post-Booker/Fanfan. Now, his sentence is not  
3 based on the guidelines any more --

4 MR. GANNON: I think --

5 JUSTICE SCALIA: -- any more than this  
6 agreement is based on the guidelines. The guidelines  
7 are one of the things that he must take into account and  
8 does take into account in determining the sentence.

9 Now, if that is enough for purposes of  
10 determining whether this statute -- statutory provision  
11 applies to a sentence imposed directly by a judge, it  
12 seems to me the same analysis ought to apply to a  
13 sentence imposed through a plea agreement.

14 MR. GANNON: Well, I think that there's a  
15 different purpose that's being served by asking the  
16 3582(c)(2) inquiry, which is asking the judge to -- to  
17 go back and redo the aspects of his analysis that would  
18 have been different had the -- the relevant guideline  
19 range been changed at the time he engaged in his  
20 analysis, and --

21 JUSTICE SCALIA: So you -- you acknowledge  
22 that "based on" covers post-Booker/Fanfan sentences by  
23 the judge?

24 MR. GANNON: Outside of the context of a  
25 specific C --

1 JUSTICE SCALIA: Yes. Yes. Yes.

2 MR. GANNON -- a specific sentence rendered  
3 under type C that -- on page 28 of our brief, we  
4 acknowledge that in most contexts, it's -- it's open to  
5 -- to contend that the sentence was based on the  
6 relevant guidelines --

7 JUSTICE SCALIA: Even though -- even though  
8 the guidelines are just one of the things that have to  
9 be taken into account?

10 MR. GANNON: It is -- the test that we state  
11 in the subheading of that section of our brief is  
12 whether they're of legal consequence in the  
13 determination.

14 JUSTICE KAGAN: Defining "legal consequence"  
15 is your test, Mr. Gannon --

16 MR. GANNON: Well, our -- the.

17 JUSTICE KAGAN: It's not a binding legal  
18 consequence post-Booker.

19 MR. GANNON: The test that we have for --  
20 the overarching test is whether it is of legal  
21 consequence, and the phrase that you're talking about on  
22 page 27 of our brief, Justice Kagan, is when we know  
23 that there is something that was of binding legal  
24 consequence and was controlling, we know that that is  
25 the thing that the sentence was based on.

1 JUSTICE KAGAN: So that's not your test.  
2 What is your test instead?

3 MR. GANNON: Well, that is -- in -- when  
4 something literally is controlling the analysis -- the  
5 parties' agreement here binds the district judge -- we  
6 know that that is what the sentence is based on. There  
7 isn't any -- any --

8 JUSTICE KAGAN: Yes, but is -- is there some  
9 other instances in which you would say that something is  
10 based on, even though it's not of binding legal  
11 consequence?

12 MR. GANNON: Well, it would be of legal  
13 consequence even if it weren't controlling. This Court  
14 has -- has made clear even after Booker that under  
15 3553(a), courts still need to go through the relevant  
16 guidelines analysis. They apply the guidelines. It may  
17 turn out that the sentence turns out not to be based on  
18 the relevant guideline range because the judge --

19 JUSTICE KAGAN: Well, then I'm back with  
20 Justice Scalia, because if it's only of legal  
21 consequence, not of binding legal consequence, if it's  
22 something that somebody considers rather than something  
23 that is determinative, it seems to me the same in the  
24 non-plea context and in the plea context.

25 MR. GANNON: Well, I don't think that's true

1 in the context of a specific sentence agreement under a  
2 type C plea because of -- and this is reinforced by the  
3 language in the policy statement, 1B1.10, which the  
4 Court last term in Dillon held is binding and controls  
5 what needs to be done during the sentence reduction  
6 proceeding. And it specifically refers to the guideline  
7 provisions that were applied when the defendant was  
8 sentenced. And that's something that happens in the  
9 process of the 3553(a) factors applicability.

10 JUSTICE ALITO: Why doesn't this line of  
11 questioning lead logically to the conclusion that no  
12 sentence after Booker and Fanfan is based on the  
13 guidelines? Because, today, a sentencing judge can  
14 engage in the same analysis that the Sentencing  
15 Commission may engage in when it decides that a  
16 guideline range should be lowered and that that should  
17 be retroactive. The judge can do that at the time when  
18 the sentence is imposed.

19 We roll the clock back on the crack -- on  
20 the crack cocaine guidelines. Under the authority that  
21 judges now have under Booker and Fanfan, a judge could  
22 say, well, I see that this is the crack cocaine  
23 guideline right now, but I think it is too harsh for all  
24 the reasons that were later persuasive in lowering the  
25 range, and therefore, I am sentencing below the range.

1                   So it seems to lead logically to the  
2   conclusion that 3582 is yet another provision of the  
3   Sentencing Reform Act that was tied to the old  
4   pre-Booker mandatory sentencing regime, and now that  
5   that is out the window with Booker and Fanfan, the  
6   whole -- the whole mechanism is -- is superfluous.

7                   MR. GANNON: Well, I -- I understand the  
8   point that the analysis has certainly changed since  
9   Booker, but it is still the case that the defendant can  
10  appeal an error in application of the guidelines after  
11  Booker.

12                  If the judge were to -- to misapply the  
13  guidelines before he engages in the analysis that you're  
14  talking about, Justice Alito, that would be grounds for  
15  an appeal. In retrospect, if the judge is asked whether  
16  the sentence was based on the guidelines, he -- he may  
17  say that particular sentence wasn't, because I ended up  
18  disregarding the guidelines under 3553(a). I did the  
19  analysis. I was exercising my sentencing discretion the  
20  first time around under 3553(a), and the guidelines  
21  ended up not being the basis of the sentence.

22                  And that is not something that is an option  
23  in a type C plea agreement, because there, the defendant  
24  cannot appeal when the judge agrees to the sentences in  
25  the agreement.

1 JUSTICE ALITO: Well, I find it hard to -- I  
2 find it hard to understand the analysis that would  
3 require courts to decide whether some (c)(1)(C) plea  
4 agreements are based on the guidelines and some are not  
5 based on the guidelines. Maybe they are all based on  
6 the guidelines, and then the obligation would be on the  
7 government to put a provision in a standard plea  
8 agreement requiring the defendant to give up the  
9 opportunity to move for a sentence reduction if the  
10 guideline range is subsequently lowered.

11 Or maybe none of them are based on the  
12 guidelines because -- for the reasons I just mentioned:  
13 This whole mechanism is now needed no longer as a result  
14 of Booker and Fanfan.

15 MR. GANNON: Well, I think in the context of  
16 an actual specific sentence plea agreement, that is the  
17 one that we think is off the table, because that is what  
18 is going to control the sentence. And some type C plea  
19 agreements affirmatively contemplate application of the  
20 guidelines, as this one does with respect to the fine.

21 And so when you have a plea agreement that  
22 tells the district judge, you are bound to apply a  
23 guideline provision once you've accepted this agreement,  
24 we haven't taken the position that the resulting  
25 sentence there is not based on the relevant guideline



1 range, but that is not what is going on here.

2 JUSTICE BREYER: All right. You want us to  
3 decide this case. I completely agree with what Justice  
4 Alito is saying, Justice Scalia, that maybe the world  
5 after Booker is different. And I have not thought that  
6 one through.

7 I am thinking this case is a pre-Booker  
8 case. It is not real. I am thinking it is on the cusp,  
9 so how am I to treat this case? If it is a case where  
10 the guidelines apply, if it is such a case -- and I  
11 think maybe everyone here has assumed throughout that it  
12 was. Am I right about that? Were you saying this is a  
13 case where the guidelines do not apply, where they are  
14 not binding? I mean, where pre-Booker doesn't count?

15 MR. GANNON: Well, I -- I --

16 JUSTICE BREYER: How do you want us to take  
17 this, pre-Booker or post-Booker?

18 MR. GANNON: Well, I think that the answer  
19 is, it's different. But this is a -- this is a  
20 post-Booker case.

21 JUSTICE BREYER: I know, you think the -- I  
22 think it is completely different regardless. So let's  
23 avoid that controversy at the moment, and you tell me  
24 whether you want me to take it pre-Booker or  
25 post-Booker.

1                   MR. GANNON: The sentencing proceeding  
2 occurred six months --

3                   JUSTICE BREYER: I want you --

4                   MR. GANNON: -- after the Booker opinion  
5 came out.

6                   JUSTICE BREYER: All right. So you want to  
7 -- you want to set aside this post-Booker?

8                   MR. GANNON: Yes, but.

9                   JUSTICE BREYER: Then perhaps we should have  
10 the pre-argument. If we are taking this pre-Booker, I  
11 would have throughout it is QED.

12                  MR. GANNON: I disagree, Justice Breyer.

13                  JUSTICE BREYER: I mean, imagine that the  
14 that the Sentencing Commission -- imagine. It is not  
15 true, but imagine that the Sentencing Commission had  
16 written the following words: "Plea bargaining over  
17 sentences is above," as many argued they should. They  
18 write those words. Then they write the next word,  
19 "exception." There is an exception, however; you are  
20 permitted to plea bargain about a sentence insofar as  
21 you argue about the range, where, within the range, it  
22 applies. And of course when you apply the guidelines,  
23 as when you always apply the guidelines, here or  
24 elsewhere, departure is an unusual case.

25                  Now, suppose those were the words that the

1 Commission had written. Could -- how -- is it possible  
2 under those circumstances you would still be arguing  
3 this sentence under the -- plea bargaining abolished  
4 except over where within the range -- is it possible you  
5 would be arguing that this is not based on the  
6 guidelines?

7 MR. GANNON: Well, I think that had the  
8 Sentencing Commission adopted such a position, and if it  
9 were binding on the sentencing judge --

10 JUSTICE BREYER: Oh, it is, because of  
11 (a)(4). It used to be --

12 MR. GANNON: Which is -- well, because --

13 JUSTICE BREYER: -- because it says in the  
14 sentencing guidelines, Judge, you will apply the  
15 guideline, unless you find a circumstance the Commission  
16 did not adequately take into account and in respect to  
17 that, you may and must consult policy statements, but  
18 guidelines and other materials. That is what it says.  
19 Okay?

20 So take I am right on that. Assume I am  
21 right. You can disagree with me, and I will look into  
22 it.

23 MR. GANNON: Before Booker was decided,  
24 it -- several of the circuits had already concluded that  
25 a judge could accept a type C plea agreement that had a

1 sentence outside the range, and that that wasn't a  
2 guidelines-based sentence.

3 JUSTICE BREYER: I want an answer to my  
4 hypothetical, because I am trying to figure out how to  
5 think about it, and you will help me if you answer my  
6 hypothetical.

7 MR. GANNON: I think in those circumstances,  
8 the Commission effectively would have repealed type C  
9 plea agreements, because --

10 JUSTICE BREYER: Yes, that's right. That's  
11 what they wanted to do. Okay? Now, that is correct.  
12 But you can still have them.

13 MR. GANNON: In your hypothetical, that is  
14 what they wanted to do.

15 JUSTICE BREYER: You could still have them,  
16 but they allow them only for the purpose of where within  
17 the range the sentence will lie. Okay?

18 MR. GANNON: In those circumstances I think  
19 that it would be fair to say that the sentence was based  
20 on the guideline range --

21 JUSTICE BREYER: Fine.

22 MR. GANNON: -- because the agreement hadn't  
23 given any reason for the judge to -- to leave the  
24 guidelines.

25 JUSTICE BREYER: Correct. Now I would like

1 -- because if they wrote those words, C agreements are  
2 abolished, but for where within the range -- okay? You  
3 agree it would be based on the guidelines. Now what I'd  
4 like you to do is to look at section 6B, whatever that  
5 is.

6 MR. GANNON: 6B1.2 --

7 JUSTICE BREYER: Exactly.

8 MR. GANNON: -- is on the last page of  
9 the --

10 JUSTICE BREYER: You tell me how this  
11 differs from what I just said.

12 MR. GANNON: Well, I think it differs in two  
13 key ways. First of all --

14 JUSTICE SCALIA: You were about to tell us  
15 where it is?

16 MR. GANNON: It is on the last page of the  
17 government's appendix which is the 16A of our brief.  
18 And I think that it differs in two regards. First of  
19 all, it -- it was a policy statement that even before  
20 Booker was not binding on the sentencing judge. The  
21 Commission determined that -- that this particular  
22 guideline was not binding on judges the same way other  
23 provisions in the guidelines where.

24 JUSTICE KAGAN: But I thought you just told  
25 me that -- binding -- was not a part of the test

1 anymore.

2 MR. GANNON: Well, I -- but the question is  
3 whether the judge even had to apply it at all, and the  
4 judge did not need to. And -- the second point that I  
5 was going to get to is that, unlike the colloquy that  
6 Justice Breyer had with Mr. Heft earlier on, it doesn't  
7 say the court may accept the agreement only if the court  
8 is satisfied that it is within the guideline range. It  
9 gives the court permission to accept the agreement.  
10 This is a policy statement that gives the court  
11 permission to accept the agreement when it is within the  
12 guideline range or when there is a justifiable  
13 departure, but it does not then say that everything else  
14 is prohibited.

15 JUSTICE BREYER: It's only if. The words  
16 there are "only if." It said should accept the  
17 recommended sentence or a plea agreement requiring  
18 imposition of a specific sentence only if the court is  
19 satisfied either that such sentence is appropriate  
20 within the guidelines, or departure.

21 JUSTICE SCALIA: You're reading a different  
22 --

23 JUSTICE BREYER: I am? I'm reading 6B1.3, I  
24 am reading commentary on the policy statement.

25 MR. GANNON: This is for 6B1.3?

1 JUSTICE BREYER: Yes. I am reading the  
2 commentary on the --

3 JUSTICE SCALIA: He is reading the  
4 commentary.

5 JUSTICE BREYER: Yes.

6 MR. GANNON: I've been looking at a text of  
7 6B1.2 itself, which leaves out the word only. But I  
8 think that here, even if you go back to the pre-Booker  
9 practice, I think it was clear that judges were able to  
10 depart from the guidelines to accept type C plea  
11 agreements that imposed the sentence that was outside  
12 the guideline range, and they -- and it wasn't  
13 considered an abuse of discretion.

14 JUSTICE BREYER: I think you're right. You  
15 see that is why I am having such a hard time. I am  
16 having a hard time because first I put myself back in  
17 the Commission days, and there the Commission did want  
18 to abolish C.

19 MR. GANNON: Well--

20 JUSTICE BREYER: And then that is what it  
21 intended to do and that is what it said it did, but for  
22 what we are talking about. Now, you first raised the  
23 question of did they have the authority to do that and I  
24 agree with you that that is a legitimate question. I  
25 made you assume it away, but I think it is a legitimate

1 question.

2 Now we have the additional question of how  
3 Booker/Fanfan changes that and for what and when. Do  
4 you see why I am puzzled and why I was asking you rather  
5 harshly to start with my hypothetical?

6 MR. GANNON: I -- I do think that -- that  
7 this gets puzzling as -- as you get further down, but I  
8 think that this is the simplest case. It is a narrow  
9 category of cases. We are dealing with a subset of one  
10 particular type of plea agreement. It is distinct from  
11 every other aspect of Federal sentencing. It's unlike  
12 what happens when somebody goes to trial; in those  
13 circumstances the judge clearly has the discretion to  
14 apply the sentencing guidelines at the time of  
15 sentencing.

16 It is different from regular type B plea  
17 agreements where the parties have come up with an  
18 agreement and the judge notwithstanding the agreement is  
19 still free to determine the sentence that he or she  
20 wants to determine.

21 This is a unique -- this uniquely gives a  
22 high level of certainty to the parties about the  
23 specific sentence that they negotiated.

24 JUSTICE SOTOMAYOR: I don't -- I am not in  
25 disagreement with the point you're making, but I think



1 that going back to what had bothered Justice Alito and  
2 Justice Scalia on now that the guidelines are not  
3 mandatory, is any sentence even under C really based on  
4 the agreement? Because even a C agreement has to be  
5 approved by the judge.

6 The legal consequence is not the agreement.  
7 That doesn't sentence the defendant. It is the judge's  
8 decision as to what the sentence should be which he  
9 denotes in accepting the agreement that binds.

10 And I think -- I may be making Justice  
11 Breyer's argument -- that if under the policy statement  
12 and it's clear what the judge did here, if the judge  
13 feels bound by the agreement or otherwise to calculate a  
14 sentence in the guidelines and impose one in the  
15 guidelines, how can you say that the legal effect is not  
16 the guideline sentence?

17 MR. GANNON: Well, because I think that the  
18 relevant question for purposes of both 3582(c)(2) and  
19 the policy statements that the court said in Dillon  
20 controls the -- the process of implementing 3582(c)(2),  
21 is what did the judge do at the time of imposing the  
22 sentence? And so although it is true that the judge  
23 generally will consider how the type C specific sentence  
24 that the parties have agreed upon corresponds to a  
25 guidelines analysis at the time of deciding whether to

1 accept the plea agreement, the relevant phrase in  
2 1B1.10(b)1 which is -- which is on page 8A of the  
3 government's appendix is that the judge is supposed to  
4 go back and look at what -- to only make substitutions  
5 for the corresponding guideline provisions that were  
6 applied when the defendant was sentenced.

7 And so when you have a type C plea agreement  
8 that has a specific sentence even under the terms of  
9 this agreement, the only thing that the judge considered  
10 when he decided the sentence was going to be 106 months  
11 with respect to the term of imprisonment was the binding  
12 plea agreement. That is what rule 11(c)(1)(C) required.

13 JUSTICE SOTOMAYOR: -- no. Because you're  
14 assuming that the agreement was automatically binding on  
15 the judge.

16 MR. GANNON: It was --

17 JUSTICE SOTOMAYOR: The judge was always  
18 capable of saying at the time of sentence I won't accept  
19 the 106. If he had calculated the guidelines and if it  
20 turned out that the guidelines called for 240 to 360, he  
21 could have said easily no, that is so far outside of the  
22 guideline range with no justification that I am not  
23 going to accept -- impose the sentence. You could  
24 withdraw your agreement and do whatever you're going to  
25 do.

1                   MR. GANNON: And had he not done that the  
2 proceeding would have occurred differently and it may  
3 not even have right occurred then, and -- and I think  
4 because under Rule 11 if he was rejecting the plea  
5 agreement and -- and the 106 months that the parties had  
6 agreed to, he would have to give the defendant the right  
7 to withdraw the plea at that point. So the government  
8 would have been released from its obligations; the  
9 parties -- the defendant could have gone to trial. He  
10 could have -- he could have continued to plead guilty.  
11 The parties could have come up with a type plea -- B  
12 plea agreement. The parties may have asked for time to  
13 renegotiate a different type C agreement. We do not  
14 know what would have happened in those circumstances.

15                   And as you pointed out before, Justice  
16 Sotomayor, this is not about asking the judge to step  
17 into the shoes of the parties and renegotiate what the  
18 agreement would have been had the judge decided to  
19 reject it the first time around. Instead 3582(c)(2)  
20 contemplates a limited process by which the judge will  
21 reapply those provisions of the guidelines that he  
22 applied the first time around and -- and make the  
23 substitution that is now called for by the retroactively  
24 applicable change. But here because the judge didn't  
25 actually make that application at the time of

1 sentencing, the judge did not actually have to apply the  
2 drug quantity table.

3 JUSTICE GINSBURG: I am not following that  
4 argument for this reason. It seems to me if you ask  
5 what did the judge apply at the time he imposed the  
6 original sentence, well, it has got to be the  
7 guidelines, because first the agreement provides for it;  
8 then he says I am going to wait for the probation report  
9 so I can see what the calculation is, whether I agree  
10 with it; and then he gives him a sentence that is  
11 precisely within the guidelines.

12 So if you asked me to describe what that  
13 sentence was -- of what was it, 46 to 106 days -- I say  
14 that was a guideline sentence. It was right there  
15 within the brackets that -- the guidelines. So why  
16 wasn't it a guideline sentence?

17 MR. GANNON: Because for purposes of the  
18 term of imprisonment the judge was not actually applying  
19 the guidelines at that point. He did so for purposes of  
20 the fine. He ended up actually waiving the relevant  
21 fine, but those type C plea agreement here called for  
22 the judge to apply the guidelines with respect to the  
23 fine and did not call for the judge to apply the  
24 guidelines with respect to the term of imprisonment. He  
25 knew that it was within what the PSR had calculated as

1 the guideline range and he concluded that that was the  
2 applicable guideline range which he needed to do for  
3 purposes of calculating the fine and other things, but  
4 it wasn't actually the basis for the sentence.

5 The basis for the sentence was the plea  
6 agreement that he accepted, and there it was the  
7 parties' agreement. And there are all sorts of things  
8 that went into the parties' agreement that the judge  
9 does not have the wherewithal to reconsider in  
10 retrospect.

11 JUSTICE GINSBURG: I thought one of the  
12 things in the plea agreement was that the -- that the  
13 judge would have the right to himself calculate the  
14 guideline range.

15 MR. GANNON: Yes. And that specifically  
16 contemplated in Rule 11(c) and in the guidelines, that  
17 the judge may postpone acceptance of the plea agreement  
18 until after the presentence report is prepared. And the  
19 judge did do that here. So he was aware of what the PSR  
20 recommended, but once, and had he decided that he did  
21 not like the 106 month sentence and he wanted to  
22 preserve his sentencing discretion, the option at that  
23 point was to have rejected the plea agreement, at which  
24 point the parties would have been free to do different  
25 things. And among other things, the Government could

1 then have then argued for a higher sentence within the  
2 range. Could have argued that the criminal history  
3 failed to represent the seriousness of the defendant's  
4 criminal past. Could have argued for an upward  
5 departure even, but the Defendant got the benefit of the  
6 106 month agreement of not having the Government raise  
7 any of those other arguments at that time. And now he  
8 is asking for essentially another bite of the apple and  
9 we think that because the basis for the sentence was  
10 indeed the negotiation and the agreement between the  
11 parties, that the court of appeals decision was correct.

12 If there are no further questions.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 Mr. Gannon.

15 Mr. Heft, you have three minutes remaining.

16 REBUTTAL ARGUMENT OF FRANK W. HEFT, JR.,

17 ON BEHALF OF PETITIONER

18 MR. HEFT: Thank you, Your Honor. Just a  
19 couple of points. First of all, the record here leaves  
20 no doubt that the judge based his sentence on the  
21 guidelines. The sentencing transcript specifically  
22 states that the judge and I'd like to quote this, this  
23 is at page 47 of the joint appendix and I quote, "the  
24 court will adopt the findings of the probation officer  
25 disclosed in the probation report and application of the

1 guidelines as set out therein." On page 48 of the joint  
2 appendix the judge says, having considered the advisory  
3 guidelines, he went on to impose that sentence. So it  
4 is quite clear that the judge and even in his statements  
5 of reasons on page 95 of the joint appendix, again  
6 reaffirmed that this sentence was based on the  
7 guidelines.

8               Now, the other point that I'd like to make  
9 is that the Government acknowledges that it has carved  
10 out a very small exception to its argument that C pleas  
11 regarding specific sentences and sentencing ranges are  
12 not eligible for (c)(2) relief. But it seems to me that  
13 reading, taking the Government position into account, if  
14 this plea agreement had not stated 106 months, then  
15 Mr. Freeman's under the terms of this plea agreement in  
16 the Government's view and under the Government's  
17 argument of what exception exists under the C pleas for  
18 purposes of 3582, Mr. Freeman would be eligible for the  
19 relief that was granted. And we would simply urge the  
20 Court in this case to adopt a rule that does not exclude  
21 specific sentences and C pleas for eligibility in 3582.  
22 Thank you.

23               CHIEF JUSTICE ROBERTS: Thank you, counsel.

24               The case is submitted.

25               (Whereupon, at 11:12 a.m., the case in the

1   above-entitled matter was submitted.)

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