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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Case 06-7949, Gall v. United States.

Mr. Green.

ORAL ARGUMENT OF JEFFREY T. GREEN

ON BEHALF OF THE PETITIONER

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

When Judge Robert W. Pratt of the Southern District of Iowa sentenced Brian Michael Gall on May 27, 2005, he found Mr. Gall to be an individual who had fully rehabilitated himself by having voluntarily withdrawn from a conspiracy five years earlier, by remaining crime-free throughout that period, by having rid himself of his addictions, by having graduated from college, by having learned a trade, by having built a successful and thriving business.

Judge Pratt carefully weighed the Section 3553(a) factors and in a ten-page sentencing memorandum set forth cogent reasons why a sentence of probation would better fit the purposes and factors specified in Section 3553(a) than a sentence of incarceration.

The Eighth Circuit Court of Appeals reversed that judgment on the basis of the extraordinary

1 circumstances test that we would ask the Court to
2 overturn today.

3 The Eighth Circuit substituted its judgment
4 for that of Judge Pratt, saying that Judge Pratt had
5 placed too much weight on Mr. Gall's voluntary
6 withdrawal from the conspiracy and in so doing had not
7 satisfied or overcome the extraordinariness barrier.

8 JUSTICE KENNEDY: If it had been the other
9 way around and the district court had said what
10 appellate court said and the appellate court had said
11 what the district court said, what would you be arguing?

12 MR. GREEN: Certainly, Justice Kennedy, I
13 would probably be arguing something of the reverse.

14 (Laughter.)

15 MR. GREEN: It is -- it is an abuse of
16 discretion --

17 JUSTICE KENNEDY: Well, you can see the
18 systemic concern. I mean, it's just not always going to
19 be the case that the district judge is the one to give
20 more leniency.

21 MR. GREEN: Yes, that's certainly true, but
22 in this instance an abuse of discretion standard
23 applies.

24 JUSTICE ALITO: I thought it was your
25 argument that if any rational judge could impose the

1 sentence that's imposed, then that sentence has to be
2 sustained. So you're saying that either the district
3 court or the Eighth Circuit here was irrational?

4 MR. GREEN: No. I wouldn't say -- well, let
5 me -- the district court was certainly not irrational in
6 our view.

7 JUSTICE ALITO: No. But in answer to
8 Justice Kennedy's question, you hesitated in saying
9 that, if the district court had taken the approach of
10 the court of appeals, that would also have to be
11 sustained. But under your analysis wouldn't it have to
12 be unless you're going to argue --

13 MR. GREEN: Yes.

14 JUSTICE ALITO: -- that that approach is
15 irrational?

16 MR. GREEN: It would have to be. I
17 hesitated because there -- there might be instances in
18 which, as indeed the government admits in its brief,
19 that the reasons and the facts and circumstances don't
20 logically cohere with the sentence that's given.

21 In other words, if all of the circumstances
22 and facts point a certain way -- in this instance, for
23 example, they point to a downward departure -- and
24 suddenly the judge goes up to the statutory max, that
25 might be an instance in which a court of appeals could

1 say no reasonable judge would have imposed that
2 sentence. There doesn't seem to be a reason for doing
3 so.

4 JUSTICE GINSBURG: What about the Eighth
5 Circuit, laying aside the extraordinary circumstances
6 test, saying the judge, the sentencing judge gave credit
7 for his leaving the conspiracy, but he didn't blow the
8 whistle, so the conspiracy continued. He could have
9 stopped the conspiracy.

10 And, similarly, yes, he rehabilitated
11 himself, but he earned some 30 to \$40,000 in the drug
12 business, and that aided his rehabilitation, and maybe
13 there's some kind of obligation to pay back.

14 So could a court of appeals try to instruct
15 district judges and say: Now, in this factor, leaving a
16 conspiracy, we want district judges to be aware of the
17 difference between one who leaves and blows the whistle
18 and one who lets it continue; and, similarly, one who
19 uses the ill-gotten gains to set himself up in business.

20 MR. GREEN: Justice Ginsburg, when someone
21 leaves the conspiracy and blows the whistle, typically,
22 that individual is not charged. The Department of
23 Justice, for example, in its Antitrust Division says
24 that if a corporation or individual comes to it and
25 blows the whistle on, say, a price-fixing conspiracy,

1 that individual is never charged to begin with.

2 CHIEF JUSTICE ROBERTS: Well, I'm sure
3 that's not always true. I mean, if the leader of some
4 vast conspiracy is the one who blows the whistle, I
5 suspect he may well be charged anyway.

6 MR. GREEN: That's true, Your Honor. There
7 are instances in which --

8 JUSTICE SCALIA: Lex Luthor might.

9 (Laughter.)

10 MR. GREEN: Yes, but the point is that
11 blowing the whistle is -- is not only a voluntary
12 withdrawal, but also something so far beyond the bounds
13 of what prosecutors typically see that that individual,
14 typically or generally is the individual that receives
15 immunity or amnesty in the case.

16 To respond to the second part of your
17 question, with respect to the amount of money that
18 Mr. Gall made, he did not use it, and there's no
19 information in the record that indicates that he built
20 his business on the basis of the use of that money.

21 JUSTICE GINSBURG: There is no indication
22 that he gave it back, or there was no fine attached to
23 it.

24 MR. GREEN: No, there was not, and in part
25 because, as the sealed volume of the appendix

1 demonstrates, Mr. Gall did not at that point have money
2 to pay a fine.

3 Remember that he was -- he left the
4 conspiracy in September of 2000. He was not approached
5 by agents until late 2003. He was not charged until
6 2004 and was not sentenced until 2005.

7 JUSTICE SCALIA: Well, you don't -- you
8 don't have to answer all of these things for your case,
9 do you?

10 MR. GREEN: No.

11 JUSTICE SCALIA: You're not saying that a
12 reasonable person couldn't have found the opposite.
13 You're just saying that a reasonable person could have
14 found what this district judge found.

15 MR. GREEN: That's exactly right, Justice
16 Scalia.

17 JUSTICE SCALIA: So why don't you just
18 swallow all these things and say, yeah, I suppose the
19 court of appeals could say that, but --

20 MR. GREEN: I -- I --

21 JUSTICE SCALIA: -- but my point stands?

22 MR. GREEN: Yeah, well, I'm happy to swallow
23 in that sense.

24 (Laughter.)

25 MR. GREEN: There's no doubt about the fact

1 --

2 CHIEF JUSTICE ROBERTS: Well then, what's
3 left of the appellate review? I mean, under your theory
4 is there any substantive review for the appellate court
5 or is it all just procedural under -- putting aside your
6 logical coherence point, which --

7 MR. GREEN: There is -- there isn't much
8 left besides the fact that it is abuse of discretion
9 review. That there is no robust substantive component
10 to -- to reasonableness review of sentences, is really a
11 complaint about abuse of discretion review.

12 JUSTICE SOUTER: And that's the problem.

13 CHIEF JUSTICE ROBERTS: In a typical abuse
14 of discretion review, you still have -- for example, if
15 you have a judge in -- well, let's say you have a judge;
16 in one case he says because this is a -- a young
17 defendant, I'm going to give him a lighter sentence; and
18 in the next case says, you know, I don't think age is a
19 factor that I should consider in the case; in the next
20 case he says it is and then not. Each -- all of those
21 cases, I take it, are upheld under your view on
22 appellate review.

23 MR. GREEN: Not necessarily. I think if --
24 if a judge --

25 CHIEF JUSTICE ROBERTS: So there can be

1 substantive review for consideration of age?

2 MR. GREEN: Not necessarily for
3 consideration of age, but a court of appeals could say
4 to -- to such a judge -- and I am sure that one of the
5 parties would point this out, would say you considered
6 it last time; you didn't consider it. You've been
7 seesawing back and forth on this. The court of appeals
8 could say --

9 CHIEF JUSTICE ROBERTS: Okay, so at the same
10 time --

11 MR. GREEN: -- explain why --

12 CHIEF JUSTICE ROBERTS: But if you have two
13 district judges in the same courthouse and the one says,
14 when I have a young defendant I always -- I forget
15 whether the term is "vary" or "depart" -- but I always
16 go down, and the next judge says, I never consider age.
17 Those -- both of those are upheld under your view, I
18 take it?

19 MR. GREEN: Yes, both -- both would be
20 upheld.

21 JUSTICE SOUTER: Now, why --

22 MR. GREEN: If somebody said --

23 JUSTICE SOUTER: Why wouldn't the judge in,
24 as it were, the second case give some consideration, be
25 required under abuse review to give some consideration,

1 to what is sort of the norm in that circuit so that he
2 doesn't stand out as either a "let-them-loose" judge or
3 a hanging judge? Doesn't abuse of discretion at least
4 require a broader view than simply the -- literally the
5 case before the court?

6 MR. GREEN: Well, it does require a broader
7 view, and certainly a judge could --

8 JUSTICE SOUTER: And wouldn't there be at
9 least under the Chief Justices's hypothetical, wouldn't
10 there be a possibility of looking to those other cases
11 rather than just automatically affirming on -- on abuse
12 review?

13 MR. GREEN: There would be.

14 JUSTICE SOUTER: Okay.

15 MR. GREEN: And I was about to add --

16 JUSTICE ALITO: Would the judge have to
17 consider the cases from the judge's district or from the
18 circuit or from the whole country?

19 MR. GREEN: I would -- I would imagine a
20 judge would want to look at -- at cases from the whole
21 country.

22 CHIEF JUSTICE ROBERTS: Isn't that exactly
23 --

24 MR. GREEN: Certainly they have --

25 CHIEF JUSTICE ROBERTS: Isn't that exactly

1 what the Sentencing Commission did in establishing the
2 Guidelines?

3 MR. GREEN: It did in establishing the
4 Guidelines. There are disputes about whether the
5 commissioners actually modified the guidelines on the
6 basis of what judges have actually done.

7 JUSTICE SCALIA: It looked at them. It
8 didn't necessarily follow them.

9 MR. GREEN: Exactly.

10 JUSTICE SCALIA: With white collar crime,
11 for example, it went vastly higher than what had been
12 the practice.

13 MR. GREEN: That's -- that's exactly right,
14 Justice Scalia. So there is a component to this in
15 which a judge might want to look through legal database,
16 for example, or even a blog or something like that, and
17 look and see --

18 JUSTICE KENNEDY: Going back to the Chief
19 Justice's hypothetical and the colloquy you had with him
20 with the hypothetical, the two different judges in the
21 statement district or the same circuit that treat age
22 differently, if the Congress saw that would the Congress
23 be able to say anything about that, do anything about
24 that to stop the disparity?

25 MR. GREEN: Certainly.

1 JUSTICE KENNEDY: Consistently with the
2 Sixth Amendment?

3 MR. GREEN: Certainly. And one of our
4 responses, Justice Kennedy, to the issue of there not
5 being a robust component of substantiveness -- or --
6 excuse me -- of substantive review of sentences if that
7 Congress can fix that.

8 JUSTICE GINSBURG: How?

9 MR. GREEN: If the unwarranted --

10 JUSTICE GINSBURG: How can it fix the --

11 JUSTICE STEVENS: One question. Why
12 couldn't, if there is some kind of substantive standard
13 of reasonableness, why couldn't a court of appeals in a
14 particular circuit say that -- if one judge relies on
15 age, 19, and the other judges do not, why couldn't the
16 court of appeals say that one of those two positions is
17 unreasonable?

18 MR. GREEN: A court of appeals could, yes, I
19 think it could that. They could ask an explanation.

20 JUSTICE STEVENS: There could be a common --
21 sort of a common law of reasonableness developed through
22 the public process?

23 MR. GREEN: I think that's correct. A
24 common law --

25 JUSTICE SCALIA: And another circuit would

1 develop the opposite. I mean, this circuit would say
2 that 17 is unreasonable. The other circuit would say
3 that 19 is unreasonable. And we would have to sort out
4 all those things ultimately, right?

5 MR. GREEN: That's -- that's correct Your
6 Honor.

7 JUSTICE SCALIA: In kind of a sentencing
8 review court?

9 MR. GREEN: Yes. Yes, and that is -- that
10 is one danger of the extraordinary circumstances test.
11 In fact, there's two dangers in that --

12 JUSTICE ALITO: Could Congress pass a
13 statute that says age is not relevant in sentencing
14 except in extraordinary circumstances? Would that be a
15 violation of the Sixth Amendment?

16 MR. GREEN: I believe that Congress could
17 pass such a statute, yes. But -- but -- I hesitate to
18 add that, to the extent that there is a constitutional
19 grounding for individualized sentencing and age is a key
20 factor with respect to individualized sentencing, I -- I
21 want to hesitate and I want to waver. I'm not sure --

22 JUSTICE GINSBURG: But you said -- you said
23 before that, and very definitely, that Congress could
24 fix the case of where one judge said, I'm always lenient
25 on 17-year-olds and the other said, I throw the book at

1 him. You said yes, Congress could fix that. Well, how
2 other than in the way that Justice Alito just proposed?

3 MR. GREEN: Well, in response to that
4 question and your earlier question, Justice Ginsburg,
5 certainly Congress could, to fix the entire problem
6 here, could adopt the solution that we proposed in
7 Booker and in Fanfan that to say that -- that in order
8 to enhance a sentence at all, that has -- it has to be a
9 fact found by the jury, what's so-called Blakelyizing of
10 the Guidelines. That's one way to do it.

11 Congress could also, as has been suggested
12 and I believe legislation has been introduced on this,
13 they could make the Guidelines essentially topless, so
14 that there -- so that there was complete --

15 JUSTICE ALITO: If Congress can pass a
16 statute without violating the Sixth Amendment saying age
17 is ordinarily not relevant, then could Congress delegate
18 to an expert agency the authority to make that decision
19 without violating the Sixth Amendment?

20 MR. GREEN: No, I don't think that it could.
21 Any time Congress --

22 JUSTICE ALITO: Based on what? Why could it
23 -- why can't it delegate the authority if it can do it
24 itself?

25 MR. GREEN: Well, it could delegate the

1 authority. There's no doubt about it. And this Court
2 has said it's all right for Congress to delegate the
3 authority to the commission. But the problem, Justice
4 Alito, comes whenever we limit the statutory continuum
5 from zero to the statutory maximum sentence, if we
6 overlay a consideration. If on the extraordinary
7 circumstances test we make the Guidelines the benchmark
8 and we tether or we measure from the Guidelines, we have
9 then set a kind of statutory range.

10 If Congress says to a commission, we want
11 you to develop a kind of mini-guideline based upon age,
12 we think that there might be departure in some
13 circumstances but not other circumstances, that might be
14 an instance where we are setting a kind of ceiling and a
15 floor and a range within the otherwise broader statutory
16 continuum. That's --

17 CHIEF JUSTICE ROBERTS: Mr. Green, I
18 understood you to respond to Justice Souter's question
19 that courts of appeals could consider a broader range of
20 cases in deciding whether it's an abuse of discretion in
21 a particular case.

22 MR. GREEN: Certainly.

23 CHIEF JUSTICE ROBERTS: Now, if they can
24 consider a broader range of cases, what's so bad about
25 suggesting that if a particular case is way out of what

1 their broad review shows, if the broad review shows that
2 in most cases this type of defendant gets 5 years and in
3 this particular case, the judge gave him 30 years or
4 gave him zero, what's wrong with suggesting that that is
5 a factor they should at least start with in saying
6 something's unusual about this case, we ought to take
7 closer look?

8 MR. GREEN: In that instance, though, we run
9 into the problem that Justice Scalia identified and that
10 problem is we start to get limitations based upon
11 certain factors, and the courts of appeals --

12 CHIEF JUSTICE ROBERTS: Well then, what's
13 the point of looking at the broad range of cases if they
14 can't do anything about it?

15 MR. GREEN: To see whether -- the point is
16 to see whether or not the reasons that are offered in
17 those cases turn out to be valid, cogent --

18 CHIEF JUSTICE ROBERTS: So is it right to
19 say if the broad range shows that most of these
20 defendants get a sentence of 10 years in jail and in
21 this case the person got probation, that the court
22 should look for some reasons to explain what the
23 difference, to justify the difference?

24 MR. GREEN: Certainly the court should look
25 at the reasons and should look to see whether or not the

1 reasons are rationally grounded in Section 3553(a). But
2 our position is once they are, that's -- that's the end
3 of the matter.

4 JUSTICE SCALIA: Of course, all these
5 questions only -- only apply to departures downward from
6 the Guidelines, and if you ask the same question with
7 regard to departures upward you do run into
8 constitutional problems when the -- when courts of
9 appeals begin to establish certain facts that have to be
10 found in order to move upward or -- yes, certain facts
11 that justify moving upward.

12 So you end up with a quite skewered system
13 in which there is -- there is vigorous hearty review of
14 departures downward, but -- but very, very slight review
15 of departures upward.

16 MR. GREEN: That -- that's correct, and
17 that's essentially the kind of system that we've got
18 now. This is not a fulsome abuse of discretion review
19 throughout the range of sentencing.

20 What we have now is a -- on this
21 extraordinary circumstances test is a -- and this case
22 is a perfect example of substitution of judgment.

23 JUSTICE GINSBURG: What in your view would
24 be -- would fail the abuse of discretion test? If we
25 have a sentence of -- what was the guideline range?

1 MR. GREEN: 30 to 37 months, Justice
2 Ginsburg.

3 JUSTICE GINSBURG: And the judge gives no
4 prison time, three years probation. What would it take
5 to be -- describe what an abuse of discretion would be?

6 MR. GREEN: Well, there are a couple of
7 examples out there. One, this case Poynter out of, out
8 of the Sixth Circuit, where the judge went all the way
9 up to the absolute statutory max in a child
10 pornography -- or rather, a child molestation case, on
11 the ground that, first, the statutory max will take care
12 of any unwarranted disparity. That's not -- that's not
13 really a cogent reason and that would be an abuse of
14 discretion.

15 We have another case out of the -- recently
16 out of the Eleventh Circuit, Valdes, in which -- in
17 which the court departed upwards on the ground of the
18 fact that the check that had been written that -- the
19 fraudulent check that had been written, had been written
20 to the district court. And so the court was angry that
21 its own court had been -- or the neighboring court had
22 been duped.

23 JUSTICE SCALIA: You think that's
24 unreasonable?

25 MR. GREEN: I do think that's unreasonable,

1 Your Honor. I'll go that far. I'll admit that much.
2 Certainly that's not like the famous Yankees and Red Sox
3 example. That's not rationally grounded in Section
4 3553(a) factors.

5 JUSTICE STEVENS: May I ask, we've been
6 talking about a lot of hypotheticals. Is there any
7 dispute, any claim that any of the facts on which the
8 district judge relied in this case were improper --

9 MR. GREEN: No.

10 JUSTICE STEVENS: -- that they were out of
11 harmony with what's done throughout the country?

12 MR. GREEN: No, none whatsoever, Your Honor.
13 In fact, we pointed at the end of our merits brief, page
14 35 and 36, we point to other cases where courts have
15 given lenient sentences because of a voluntary
16 rehabilitative effort by the defendant. And the Eighth
17 Circuit Court of Appeals said in no way -- or indicated
18 in no way did Judge Pratt rely on improper factors in
19 deciding the sentence. It had a complaint about his
20 reliance on age, but really that was a --

21 JUSTICE BREYER: What in your opinion is
22 supposed to happen if we have Guidelines, a part of
23 3553(a), a part of it -- voluntary or not, they're
24 referred to, so -- and I understand how you would deal
25 with this. If the district judge's sentence rests upon

1 his view of the facts, the appeals court is supposed to
2 say it's the district judge that counts here.

3 MR. GREEN: That's right.

4 JUSTICE BREYER: I can understand if it's a
5 question of judgment, a matter of judgment about this
6 case the court of appeals is supposed to say: District
7 judge, it's your view that matters here.

8 Now, the difficult matter is, suppose that
9 this district judge says: I don't approve of the way
10 Guidelines treat a certain class of people and I am
11 going to have a different sentence because I don't like
12 what they do. And now there are several situations:
13 one, different from his fellow judges in the same court;
14 two, different from other judges across the country;
15 three, different from what the Guidelines did initially;
16 four, different from what the Guidelines say after the
17 commission has over and over and over reconsidered the
18 same matter.

19 All right, that I find difficult and I'd
20 like your view.

21 MR. GREEN: I would find such an absolute
22 policy disagreement difficult as well, Justice Breyer.
23 And the reason why it's difficult is because it is not
24 sentencing in accordance with Section 3553(a). Section
25 3553(a) requires consideration of the individual

1 characteristics of the defendant and the facts and
2 circumstances surrounding the crime.

3 In Koon, this Court --

4 JUSTICE BREYER: Wait, wait, wait, wait.

5 I think what you're saying is that -- which
6 is the subject of the next case, really --

7 MR. GREEN: Exactly.

8 JUSTICE BREYER: But I want to know your
9 view of it. Too. I want to know your view of it, too,
10 because what I want to figure out here by the end of
11 today is what are the words that should be written in
12 your opinion by this Court that will lead to
13 considerable discretion on part of the district judge
14 but not totally, not to the point where the uniformity
15 goal is easily destroyed.

16 That's what I'm asking your view on, and I'd
17 like your view and the SG's view and everyone else who's
18 arguing today.

19 MR. GREEN: The words should be these with
20 respect to policy judgments: The district court may
21 consider policy disagreements with the Sentencing
22 Guidelines or may disagree with the policies stated in
23 the Sentencing Guidelines or underlying those
24 Guidelines, as long as that disagreement is rationally
25 or reasonably grounded in the facts of the case, that it

1 fits the circumstances of the case.

2 And in so doing --

3 JUSTICE SCALIA: Excuse me. You're saying
4 they can't disagree with the policy. They can only --
5 only say there are special facts in this case that were
6 not taken into account in the policy. But you're saying
7 they are bound by the policy set forth in the
8 Guidelines. That's not my understanding of either
9 Apprendi or Booker.

10 MR. GREEN: Yes and no. The yes part is --

11 JUSTICE SCALIA: Which yes and which no?

12 MR. GREEN: Okay. The yes -- the yes part
13 is that -- that it is in accordance with the -- the
14 majority opinion in Rita and other cases, there is an
15 invitation to district courts to reconsider if they
16 find -- if they so find it necessary, the facts -- or
17 rather, excuse me, the policies as articulated in the
18 Sentencing Guidelines. They are free to do that.

19 But under Section 3553(a), Justice Scalia,
20 that has to be rationally grounded in the case before
21 them. This --

22 JUSTICE SCALIA: It has to be relevant to
23 the case, Of course.

24 MR. GREEN: Certainly.

25 JUSTICE SCALIA: Of course.

1 MR. GREEN: Relevance and rational --

2 JUSTICE SCALIA: I don't know what you mean
3 by rationally grounded in the case before them. Let's
4 take the question of whether you should give higher
5 sentences for crack cocaine than for powder cocaine.
6 Why can't the district court simply disagree with the
7 fact that the Guidelines said you should give a 100
8 times more for the one than for the other? Why can't
9 the district court just say, that seems to me a very
10 erroneous judgment by -- by the Sentencing Commission?

11 MR. GREEN: If the district court applied
12 that as a policy across all cases that come before it
13 involving crack or powder cocaine, Justice Scalia, that
14 is an abdication of the district court's duty under
15 Section 3553(a). And under this Court's opinion --

16 JUSTICE SCALIA: I see. It must follow the
17 Guidelines,

18 MR. GREEN: No, no, I'm not, I'm not saying
19 that.

20 JUSTICE SCALIA: It just has to consider
21 them. It did consider them and said: I disagree with
22 that judgment of the Guidelines.

23 MR. GREEN: Yes, it has to -- it does not
24 have to follow the Guidelines and it can disagree, but
25 it has to tie that disagreement to the facts of the

1 case.

2 JUSTICE SCALIA: This case involves cocaine.

3 JUSTICE SOUTER: You're saying -- you're
4 saying two things. You're saying it's got to follow the
5 Guidelines -- it can depart from the Guidelines, but
6 it's got to do so based on the facts of this case or in
7 some way relevant to the facts of this case. And when
8 you put that latter criterion in there, what you're
9 saying, and I think this was Justice Scalia's concern,
10 you're really saying you've got to find that this case
11 is somehow an outlier to the broad range of cases so
12 that the policy does not fit. And that's a different
13 thing from a general disagreement with the policy
14 itself.

15 Isn't that what you are saying?

16 MR. GREEN: No, because I don't think a
17 district judge would have to find that the case was
18 somehow an outlier.

19 JUSTICE SOUTER: Then what is it in the
20 facts of this case that is crucial to the appropriate
21 determination?

22 MR. GREEN: Well, the facts of a case where
23 there's a disagreement with a policy might be, for
24 example, the policy might be -- let's take embezzlement
25 because I don't want to tread on my colleague's

1 argument. Let's take embezzlement --

2 JUSTICE ALITO: Maybe you could take age.
3 What is there about the age of this defendant? He was a
4 21-year-old college student? Now maybe age is generally
5 a factor that should be considered as a basis for
6 leniency. Maybe it's not. But it's a policy question.
7 What is there about the facts of this case that -- that
8 changes that?

9 MR. GREEN: Age is a good example. Justice
10 -- or, excuse me -- Judge Pratt in his sentencing
11 memorandum, said -- cited studies that show that young
12 people's risk inhibition behavior is not quite as well
13 developed as people later on, and that recidivism drops
14 remarkably as you move forward into your 20s.

15 Now, he did not rely on that argument in
16 order to impose the sentence he did. He used that as a
17 contrast to say this where is Brian Gall was when he was
18 a member of this conspiracy and look at where he has
19 gotten to, having fully rehabilitated himself.

20 So that is a means by which a judge can say,
21 you know, the policy of the Guidelines may be that age
22 should be a discouraged factor, but it could be relevant
23 in cases.

24 JUSTICE SOUTER: Sure. But if the reasoning
25 that you just articulated is reasoning that should be

1 accepted, it's reasoning that should be accepted in
2 every case. And it -- i.e., the mind is less -- the
3 brain is less developed in the case of everyone under a
4 certain age.

5 And that amounts, in effect, to a rejection
6 of the policy for a certain swath of individuals,
7 relatively young individuals, for whom the judge is
8 saying age is relevant, the policy says age is not.

9 That's rejection of the policy.

10 MR. GREEN: But not necessarily, because a
11 district judge who is looking the defendant in the eye,
12 and is the best placed judicial actor to make that
13 decision, may say I see a 21-year-old in front of me who
14 is uniquely mature. That is a -- that is a
15 quintessential multifarious, pleading, narrow, shifting
16 fact; the district judge may make the decision.

17 JUSTICE SOUTER: You're saying that if a
18 judge disagrees as a general matter of policy, once in a
19 while he could make an exception to his disagreement.
20 But it's still, it seems to me, on your reasoning, that
21 he has rejected the policy with respect to a certain
22 class of defendant.

23 MR. GREEN: Well, he -- he may have rejected
24 it -- if -- I wouldn't even -- dare say that in a
25 multiplicity of cases. He may have rejected it in this

1 particular case and said, I see a defendant in front of
2 me who is immature, as mature as the other defendants,
3 and this study backs me up.

4 And I'd like to reserve the remainder of my
5 time for rebuttal.

6 CHIEF JUSTICE ROBERTS: We'll give you
7 rebuttal time, Mr. Green, but I just have one question.

8 I think we've gotten off the track a little
9 bit. The question presented is about the extraordinary
10 circumstances test and proportionality review. We've
11 been talking a lot about what district court judges can
12 do. What's wrong with, whatever you want to call it,
13 saying if something is out of the norm, you ought to
14 have some good reason for being out of the norm?

15 MR. GREEN: I --

16 CHIEF JUSTICE ROBERTS: That's the only
17 question presented in this case.

18 MR. GREEN: Because it -- because it sets a
19 presumptive sentence and that presumptive sentence is
20 exactly like -- is the Guideline sentence. And it says
21 to the district court: You must overcome a presumption
22 against a sentence that is some unspecified distance
23 from -- from the Guidelines. We don't know because we
24 can't estimate exactly how far it's from.

25 But what happens, and what will quickly

1 happen, is that there's going to be a kind of -- maybe
2 in the Eighth Circuit it's one standard deviation; maybe
3 in the Second Circuit it's two standard deviations. But
4 pretty soon we are going to have a kind of Guidelines
5 with a penumbra beyond which you can't go.

6 It is, as was indicated in the Rita opinion,
7 a presumption of unreasonableness. It says to the
8 district court, you're making a risk if you go outside
9 the Guidelines.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Green.

12 MR. GREEN: Thank you.

13 CHIEF JUSTICE ROBERTS: Mr. Dreeben.

14 ORAL ARGUMENT OF MICHAEL R. DREEBEN,
15 ON BEHALF OF THE RESPONDENT

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

18 Appellate courts confronted with the task of
19 conducting reasonableness review need some benchmarks
20 for how to distinguish between sentences that are
21 outside the Guidelines and reasonable and sentences that
22 are outside the Guidelines and are not.

23 The question presented here is whether an
24 appellate court can reasonably decide that it should
25 take a harder look at a case that is significantly or

1 extraordinarily outside the Guidelines and look to see
2 whether that sentence is supported by --

3 JUSTICE STEVENS: Excuse me, may I ask this
4 question because it comes up throughout your brief, and
5 you've used percentages to decide when a case is
6 sufficiently outside the Guidelines to justify a special
7 hard look. You used the term "dramatically" in your
8 brief. At what percentage point is the threshold that
9 this standard of review kicks in?

10 MR. DREEBEN: Justice Stevens, we don't have
11 a fixed percentage. We don't endorse that kind of
12 analysis.

13 I think that the appropriate way to look at
14 it is to see all different factors converging in order
15 to determine whether it warrants this harder look. It
16 could be a different type of sentence. Here you have a
17 probation sentence as opposed to a prison sentence when
18 the Guidelines call for up to three years of
19 imprisonment.

20 It could be couched in the number of levels
21 that the judge has --

22 JUSTICE STEVENS: So you do not rely on a
23 percentage as kind of the magic basic test?

24 MR. DREEBEN: I don't. But I would say --

25 JUSTICE STEVENS: I think some of the courts

1 of appeals seem to.

2 MR. DREEBEN: The courts of appeals have
3 generally relied on a "I know it when I see it" kind of
4 approach, which I think is reasonable in this area of
5 the law, because you see sentences that are simply out
6 of kilter with what the Guidelines range is, and it
7 raises a question in the court's mind, why?

8 If you saw a judge who said the Guidelines
9 range here is 30 to 37 months for petitioner and I'm
10 going to sentence him to 24 months and the judge gives
11 the same reasons as he gave here, no court of appeals is
12 going to think this requires a particularly hard look or
13 any greater justification than what the judge did. The
14 court will understand that that's what abuse of
15 discretion review means in an advisory system.

16 JUSTICE SCALIA: What if -- what if the
17 sentencing judge simply disagrees with the Guidelines?
18 He just simply disagrees with the severity of the
19 sentence that the Guidelines impose? He's free to do
20 that, isn't he?

21 MR. DREEBEN: He is, Justice Scalia.

22 JUSTICE SCALIA: And so long as that
23 disagreement is reasonable, so long as another
24 sentencing commission might indeed have imposed a lower
25 sentence -- for antitrust violations, if indeed all the

1 Federal Courts before -- before the Guidelines came into
2 effect were rarely imposing any prison sentences, how
3 could you say it would be unreasonable for a district
4 judge to say, I simply agrees with what the
5 Guidelines -- with what the Sentencing Commission did,
6 and I agree with all of those sentencing courts before
7 then, which thought -- which thought only in a rare case
8 should there be jail time? How could you possibly say
9 that that's unreasonable?

10 MR. DREEBEN: Because, Justice Scalia, I
11 start with a fundamentally different concept of
12 reasonableness review than merely is it possible to
13 articulate a reasoned basis for sentencing the defendant
14 that way.

15 I start with the proposition that this Court
16 adopted reasonableness review in Booker as a means of
17 helping to achieve Congress's objective of increased
18 uniformity without attempting to attain the degree of
19 uniformity that had prevailed under the mandatory --

20 JUSTICE SCALIA: But we also made it very
21 clear that the Guidelines are advisory, and there is --
22 there is no way to a maintain that with the -- with the
23 kind of approach that you're offering. They aren't
24 advisory. They're pretty much mandatory. You depart
25 too much and you'll be called to account.

1 MR. DREEBEN: I think there's a difference,
2 Justice Scalia, from saying that the Guidelines are
3 advisory and therefore a court can give a different
4 sentence than what the Guidelines call for, and saying
5 that basically advisory guidelines means the judge can
6 do whatever policy judgment the judge wants, without
7 regard to what degree of variance you achieve. From --

8 JUSTICE SCALIA: You cannot disagree on
9 policy with the Guidelines, then, at least not
10 fundamentally?

11 MR. DREEBEN: No, you can disagree
12 fundamentally, and I think at one level every variance
13 is a disagreement with the sentence that the Guidelines
14 would produce.

15 JUSTICE SCALIA: I don't know how that --
16 that fits in with your prior statement.

17 MR. DREEBEN: It fits in with my prior
18 statement because what'S at issue in a case like this is
19 not whether the judge can disagree with the judgment of
20 the Guidelines and say youth matters, but whether the
21 judge can do so to such an extent that the result is
22 unwarranted disparity beyond what needs to be tolerated
23 in order to achieve a system that complies with the
24 Sixth Amendment.

25 JUSTICE SOUTER: You're saying that there's

1 a fairness component to the Guidelines in reasonableness
2 review.

3 MR. DREEBEN: I'm saying that --

4 JUSTICE SOUTER: When you start talking
5 about disparity, you're talking about a fairness across
6 a range of sentencing that is actually imposed.

7 So you're saying -- I think you're saying,
8 there's got to be a kind of substantive fairness
9 component to it.

10 MR. DREEBEN: There has to be a substantive
11 fairness component, Justice Souter, and I think that
12 there has to be a substantive excessiveness component.
13 In other words --

14 JUSTICE SOUTER: Well, that's kind after
15 subset, isn't it?

16 MR. DREEBEN: I actually view it as the
17 broader category but I think the two of them work
18 together.

19 JUSTICE SOUTER: Okay.

20 MR. DREEBEN: This is the fundamental
21 difference that I think exists between what Petitioner
22 is offering and what the government is offering. We all
23 agree that irrational sentences and procedurally
24 defective sentences are to be set aside on
25 reasonableness review. But where we disagree, I think,

1 is whether a judge on a court of appeals panel can look
2 at the results reached by the district judge and
3 conclude, this is an excessive sentence on the facts of
4 this case.

5 We think that the judge can do that on a
6 court of appeals and that in order to determine whether
7 a sentence is excessive, a starting point is to compare
8 what the judge did to what the Guidelines range does.

9 JUSTICE SCALIA: Well, then -- then you're
10 just blowing smoke when you say that the Guidelines are
11 advisory. What you're saying is the criterion for
12 fairness is the Guidelines and if you go too far one
13 side or the other of the Guidelines, you're not being
14 fair. That -- that's not -- that's not advisory.
15 That's the Guidelines as a criterion of sentencing.

16 MR. DREEBEN: Unless, Justice Scalia, the
17 judge offers sufficiently cogent, persuasive reasons so
18 that the court of appeals concludes that this is indeed
19 a reasonable sentence, given the reasons that the judge
20 has articulated as a matter of policy and the facts
21 before him.

22 JUSTICE SCALIA: Well, he did that here. He
23 said, you know, I think a young person like this --
24 other people may feel differently, but I think somebody
25 at 21 really is -- is not -- his brain isn't fully

1 formed and we should give him another chance.

2 MR. DREEBEN: He -- he did say that Justice
3 Scalia. But appellate review is conducted through the
4 lens of 3553(a) and 3553(a) directs the judge to
5 consider a variety of things in addition to the history
6 and characteristics of the defendant, which is where
7 youth comes in. It also directs the court to consider
8 the severity of the offense and the need for just
9 punishment. It directs the court to consider deterrence
10 considerations, and it directs the court to consider the
11 need to avoid unwarranted disparities between similarly
12 situated defendants, and that's where this court fell
13 down.

14 It's not that what the court said was wholly
15 unreasonable, although in one respect, I think, with the
16 emphasis on withdrawal for the reasons that Justice
17 Ginsburg mentioned, the judge did overstate the point.
18 But the judge lost sight of the fact that this is a
19 defendant who over a 7-month period engaged in a
20 sustained drug conspiracy at age 21, not as an
21 adolescent, and made 30 to \$40,000 for that.

22 And the result is that this judge
23 concluded that defendant --

24 JUSTICE STEVENS: Mr. Dreeben, do you think
25 there are any facts that would have justified probation

1 for this particular crime?

2 MR. DREEBEN: Yes. I think that there are
3 cases throughout the Federal system that have resulted
4 in probation for defendants who committed similar crimes
5 to this, maybe not as severe as this defendant. I'm not
6 sure --

7 JUSTICE STEVENS: What is the difference
8 between the facts in this case and the ones which you
9 would find acceptable?

10 MR. DREEBEN: Well, the ones that, I think,
11 have been the most appealing for probation sentences are
12 cases in which the defendant's culpability is very low.
13 The defendant played a minor role in the offense,
14 perhaps assisting a boyfriend or a friend --

15 JUSTICE STEVENS: I'm asking about whether
16 in cases exactly involving the crime we have here,
17 whether any such cases would justify probation, where
18 the culpability was exactly the same as there was here.

19 MR. DREEBEN: The only cases that I can
20 think of -- and I was trying to get to this point,
21 Justice Stevens -- are ones in which courts conclude
22 there are compelling family circumstances where
23 individuals will be very badly hurt in the defendant's
24 family if no one is available to take care of them, and
25 the defendant has really devoted his activities to doing

1 that, and there's no replacement; and the costs to
2 society would be too high in those circumstances, courts
3 have concluded, to justify a sentence of imprisonment.

4 I'm not saying that Petitioner is the most
5 culpable defendant that could be sentenced under this
6 statute. This is a statute that carries a range --

7 JUSTICE BREYER: This is exactly the kind of
8 case, though, that I think would give tremendous
9 discretion to the district judge. Because, as I just
10 listened to you, you are listing a whole lot of features
11 of it that are very case-specific, that require thorough
12 knowledge of fact and thorough knowledge of the kind of
13 judgment, a kind of individualized judgment, that
14 sentencing judges are supposed to do.

15 And that's what's worrying me about the test
16 that the circuit court gives here. It lumps together
17 things like what you just talked about with other things
18 like: I don't agree with the policy of the guideline,
19 itself. And this is a typical case and, therefore, I
20 think we should look to try to find ways to unpack the
21 sentence that it used, the statement -- you know, the
22 worse it is, the worse the harder you look, et cetera,
23 because that doesn't tell us much at all.

24 It suggests a proportionate test,
25 mathematical, which must be wrong. It must be wrong

1 because the same degree of departure could result from a
2 view of an abuse of a vulnerable victim as could result
3 from a total misunderstanding of what robbery is about.

4 Now, it's not the percentage there that
5 matters. It's the rationale. It is what the judge did.
6 And can you unpack it? We just did in the last
7 discussion try to unpack that, and we continue in the
8 next case to try to do it.

9 What we want -- I think what we want -- is
10 to interpret that word "reasonable" so that we get back
11 to a situation where judges do depart when they have
12 something unusual and maybe occasionally when they think
13 the guideline wasn't considered properly, and then the
14 iterative process takes over, going back to the
15 commission. Now, how do we get there?

16 MR. DREEBEN: Let me try to draw one
17 distinction and make a point about proportionality that
18 I think is not encompassed within what you said.

19 There is a distinction between a judge
20 forming a view based on the defendant's character and
21 behavior in front of the court and the history as
22 revealed in the presentence report where the judge has
23 an institutional advantage over an appellate court for
24 obvious reasons. And this was recognized in Koon versus
25 United States. It hasn't changed today.

1 On the other hand, a district court has a
2 disadvantage, really, in formulating broad policy as
3 compared to the Sentencing Commission. Because the
4 Sentencing Commission has the ability to absorb vast
5 amounts of data and to consider the views of all
6 segments of the criminal justice community and to
7 respond to Congress. And it is really the component of
8 the sentencing process where you would expect broad
9 policy to be, as an initial matter, best formulated.
10 Now --

11 JUSTICE SCALIA: We should probably make
12 them mandatory.

13 MR. DREEBEN: As I said to Justice Scalia,
14 they're not mandatory, and the judge does have the
15 freedom to challenge the judgment that the Sentencing
16 Commission has drawn. But on appellate review, the
17 normal factors that go into which institutional actor is
18 best situated to decide a question tilts in favor of a
19 more rigorous form of review for pure policy
20 disagreements for not only the reason that the
21 Sentencing Commission is better, but for the reason that
22 if you license all district courts to come up with their
23 own broad, abstract policies, you end up with 474
24 sentencing commissions who are operating --

25 JUSTICE BREYER: So, on that ground I

1 understand perfectly, and were we to write that into a
2 paragraph in the opinion, this case still, would it not,
3 be the strongest case imaginable for discretion to the
4 district judge?

5 MR. DREEBEN: I hope not, Justice Breyer.
6 And I hope to --

7 JUSTICE BREYER: You did, but I wanted to
8 know what you were going to say.

9 MR. DREEBEN: As I said, the Section 3553(a)
10 process is a holistic one. There are seven different
11 factors listed in Section 3553(a); and the commission,
12 when it formulated the Guidelines, looked at the same
13 sorts of factors and attempted to balance them.

14 This judge here did not devote particularly
15 significant consideration at all to the fact that
16 Petitioner sold 10,000 ecstasy pills, which have the
17 potential for causing significant harm.

18 And he earned a great deal of money out of
19 it. He didn't give the money back. He may have
20 invested it in the house that he bought.

21 JUSTICE GINSBURG: I'm sure that the
22 prosecutor argued that, and the judge heard it, and he
23 listed what thought were the key factors.

24 You made a distinction between a sentence
25 could be rational but not reasonable. And I'm

1 accustomed to understanding rationality review as
2 equivalent to reasonableness review, but you made a
3 distinction between those two. So I get your idea of
4 rationality passes the lunatic test. What is
5 reasonableness?

6 MR. DREEBEN: Reasonableness requires more
7 of a balance of the policies and a consideration of the
8 overall goal of the system of achieving uniformity.

9 And I think perhaps the best way to
10 illustrate the point is through a hypothetical similar
11 to the one that Justice Kennedy posed. Suppose that a
12 district judge, confronting Petitioner, said: You were
13 a college student. You had every advantage in life.
14 You were 21; you weren't a kid. You made \$40,000 over
15 seven months. And when it suited you, you pulled out,
16 and you did nothing to disrupt the conspiracy.

17 Now, I have a statutory range here of zero
18 to 20. And, although the guidelines call only for 30 to
19 37 months, I think you should go to jail for 15 years.

20 I don't see Petitioner as really offering a
21 court of appeals or the criminal-justice system as a
22 whole a way for someone to step in and say that's
23 excessive. It doesn't leave room to make reasoned
24 distinctions among the kinds of defendants who violate
25 this statute, and it doesn't provide any check on

1 aberrant or outlier outcomes.

2 JUSTICE SCALIA: We're trying to development
3 a rule here that can be applied sensibly by all the
4 courts of appeals when they are reviewing the
5 innumerable sentences of federal district judges.

6 And you have -- you haven't given me a rule.
7 I have no idea -- if I were sitting on the court of
8 appeals, I would have no idea when I can do it and when
9 I can't do it.

10 The notion of reasonableness, you know,
11 whether a reasonable person could have given a sentence
12 of this sort despite the fact that it is not what the
13 Sentencing Commission did, that's -- that's something
14 you can work with, but I don't understand what your rule
15 is.

16 MR. DREEBEN: Justice Scalia, the competing
17 rule of mere rationality or the judge did something
18 that's reasonable is pretty much a one-way ticket to
19 disparity. Because it means that every district judge
20 would get the opportunity to say: I've seen the
21 guidelines, but I don't agree; and, as a result, I'm
22 giving the 15-year sentence to Mr. Gall versus all the
23 way down to probation, and the courts of appeals would
24 have to affirm both.

25 Now, I am trying --

1 JUSTICE SCALIA: I wouldn't say -- I
2 wouldn't say that. There are -- there are certain --
3 certain limits where you would -- the example you gave
4 of that kind of an acceleration of the penalty, and I
5 can see giving this person no jail time whatever would
6 be extreme.

7 But if you are trying to get a narrow range
8 of sentences out of the guidelines, it seems to me
9 you're just working in opposition to what our opinions
10 have said which is that the guidelines are advisory.
11 And they're not mandatory.

12 MR. DREEBEN: Well, the question I think
13 here is how advisory do they have to be in order to
14 comply with this Court's Sixth Amendment jurisprudence
15 and the remedial opinion in Booker, as I understand it,
16 answered that question by saying they're not mandatory,
17 but the features of the appellate review and continued
18 existence of the sentencing commission are going to work
19 significantly to achieving Congress's objectives of
20 increased uniformity. And the nine courts of appeals
21 that have adopted proportionality review, even if they
22 may have used slightly different words to express it,
23 are -- I think, responding to a fundamental intuition,
24 which is how do I know if the sentence in front of me is
25 likely to be significantly outside the norm.

1 And second, if it is, should I not look for
2 more to sustain it than a sentence that's co-extensive
3 with the guidelines sentence.

4 I think this case is really the counterpart
5 case to the Rita case that the Court decided last term
6 when that judgment of the sentencing court and the
7 district judge -- the sentencing commission and the
8 district judge coincide, courts of appeals can assume
9 it's likely, although not definitely true -- but likely
10 that the sentence is a reasonable one. But when the
11 sentence is significantly outside what the guidelines
12 would call for on an average case of that type --

13 JUSTICE STEVENS: Mr. Dreeben, you are
14 saying that you admit there's no presumption of
15 unreasonable merely because it is outside but there is a
16 presumption of reasonable if it dramatically or
17 significantly is outside and you don't define
18 dramatically or significantly?

19 MR. DREEBEN: I am not able to give the
20 Court a rigid definition of it.

21 JUSTICE STEVENS: You are not able to give
22 any definition. You disavow a percentage. You just
23 come up with nothing else. Just the word dramatically.
24 You do say it is a presumption at that point by --

25 MR. DREEBEN: I don't treat what I'm arguing

1 for as a presumption, but if the Court wants to conclude
2 that it does function like a presumption, I would still
3 submit it is a perfectly valid presumption under these
4 circumstances.

5 It is not that the court of appeals --

6 CHIEF JUSTICE ROBERTS: Well, you should --
7 I'm sorry. But I mean -- the only purpose of the
8 presumption under your view is to trigger some inquiry
9 into the reasons.

10 MR. DREEBEN: Correct.

11 CHIEF JUSTICE ROBERTS: Under 3553(a),
12 district courts have to provide reasons anyway, right.

13 MR. DREEBEN: They do.

14 CHIEF JUSTICE ROBERTS: So if there is no
15 explanation of the reasons it is going to be invalid
16 under the statute, quite apart from any presumption of
17 unreasonableness.

18 MR. DREEBEN: Well, the presumption of
19 unreasonableness goes a little bit farther than that,
20 Mr. Chief Justice, because it allows the court of
21 appeals to take notice that this is a sentence that if
22 upheld holds the potential for unwarranted disparity.
23 And it may be that the sentence doesn't pose that risk
24 at all. But the reasons that the judge gave to justify
25 that sentence should be somewhat commensurate or

1 proportionate to the degree of the variance, otherwise
2 you're basically back to a system where so long as the
3 judge can go through the facts of the case and give a
4 rational explanation of why a sentence should be at that
5 level, there's nothing for the appellate court to do but
6 to affirm.

7 JUSTICE BREYER: Why isn't that always true?
8 A judge should always give reasons commensurate with the
9 problem. So what if we added by saying remember give
10 reasons commensurate with the problem? I see something
11 we've lost. What we've lost is we've sort of pulled
12 across the screen here a rather murky curtain called
13 "something of a presumption," which we can't quite
14 define, which will lead to lawyers making endless
15 arguments about whether this murky curtain -- they're on
16 one side of it or the other. So let's sweep its aside.
17 Let's get to the underlying facts.

18 MR. DREEBEN: What you'd be doing I think,
19 Justice Breyer, is sweeping aside the approach that nine
20 circuits have taken.

21 JUSTICE BREYER: That's correct.

22 MR. DREEBEN: Which have usefully
23 facilitated their appellate review. They didn't select
24 the standard because they drew it out of an opinion from
25 this Court. They selected the standard because they

1 considered it essentially a rule of reason. The rule
2 being that under an advisory guideline system, we must
3 accept that there will be considerably less uniformity
4 than under a mandatory system. That's appropriate. But
5 we don't have to accept the proposition that materially
6 outlier sentences that are not supported by an adequate
7 explanation should stand. And if the courts of appeals
8 are told, you go back to the drawing board now, you
9 can't use any kind of proportionality test, I think
10 unless the Court gives them something that will allow
11 them to distinguish between a materially out of
12 guideline sentence that is reasonable and one that is
13 not, the ultimate result will be every district judge
14 knowing that in their courtroom, they can decide
15 whatever they like about the fundamental policies of
16 sentences, and it will stand.

17 The reason why the sentencing guidelines
18 system was originally adopted was to eliminate each
19 district judge operating purely on that judge's
20 philosophy.

21 JUSTICE BREYER: We were making progress? I
22 thought our last discussion -- we were making progress
23 on this very point, where we have the judgmental
24 matters, the fact finding matters, and the pure policy
25 matters, and we distinguished the latter from the first

1 two?

2 If you were a district judge, wouldn't you
3 find it more enlightening to talk in those terms?

4 MR. DREEBEN: No. I think that what the
5 district judges need to understand is that they're not
6 bound by the guidelines, but the guidelines remain
7 something that is a reference point, that if deviations
8 or variances are warranted, they should be explained,
9 and they should be explained in a way that's consistent
10 with the degree of the variance. Because the
11 alternative of wholesale abdication to the district
12 judge to assess the individual facts of the case means
13 that one district judge can conclude that a defendant
14 like Mr. Gall warrants probation, and another one can
15 conclude that he warrants 10 or 15 years, and there'll
16 be no remedy on appeal because it will all be very
17 case-specific. It won't be policy driven disagreements.
18 Most of what goes on in Federal sentencing is not
19 fundamentally a deep-rooted policy disagreement of the
20 nature of the kind that Justice Scalia and I were
21 discussing, about whether white collar defendants should
22 go to jail at all.

23 Most of it is about how do the particular
24 features of this individual defendant match up with the
25 policy considerations --

1 JUSTICE STEVENS: Mr. Dreeben, can I ask
2 another question? I go back to percentages for just --
3 to illustrate the point. You say that the justification
4 has to be responsive to the extent of the departure.
5 And you -- you kind of disavow percentages that trigger
6 -- you say substantial. But how do you measure the
7 strength of justifications? For example in this case,
8 there were four or five justifications -- withdrawal
9 from a conspiracy, youth, that he got over alcoholism,
10 so forth. Is the judge supposed to put a percentage
11 value on each of those justifications and see if they
12 add up to the percentage? And if not, aren't you
13 comparing oranges and apples?

14 MR. DREEBEN: It is more of a wholistic and
15 judgmental process than a mathematical one, Justice
16 Stevens. And I am reluctant to offer percentages
17 because I don't want to be mistaken for saying there is
18 some litmus test with superguidelines, ranges -- but I
19 can say that courts of appeals that find a variance to
20 warrant a substantial or extraordinary justification are
21 typically looking at 40 to 50 to 60 percent away from
22 the guidelines range, not sentences that --

23 JUSTICE STEVENS: Does that call for a 40 to
24 50 percent justification?

25 MR. DREEBEN: It calls for one that makes

1 sense given the degree of the various --

2 JUSTICE STEVENS: But don't you read the
3 court of appeals opinions as in effect saying we've got
4 to get a percentage that matches the percentage of
5 departure?

6 MR. DREEBEN: Linguistically, the words used
7 are, you need a compelling reason for an extraordinary
8 departure -- an extraordinary reason for an
9 extraordinary departure or variance. So in that sense,
10 I agree with you. But the court of appeals have not
11 attempted to create a mathematical grid, because such an
12 exercise would be both contrary to the notion of
13 advisory guidelines, and also one that is inherently
14 arbitrary. And that's why I said that it is
15 unfortunately more in the nature of, I know it when I
16 see it, but I don't think that this is as bad as the
17 predicament the Court found itself in in obscenity
18 cases, because it really isn't that hard to tell the
19 difference between a variance that is a few months
20 outside the range or even a variance in the facts of
21 this Gall case, say down to 15 months, and a sentence
22 that just wipes out all prison time altogether.

23 I don't think the Court should have any
24 difficulty saying that if a judge is just going to wipe
25 out all prison time --

1 JUSTICE STEVENS: Can I ask you -- if it
2 wipes it out entirely, does that make this case
3 different or like a case in which the maximum was say --
4 was 30 years instead of 30 months? Are they both to be
5 judged by the same standard on the justification?

6 MR. DREEBEN: Well, in this case, because
7 the government believes that the guidelines provide a
8 reference point for proportionality review, a sentence
9 --

10 JUSTICE STEVENS: Supposing the guidelines
11 provided 30 years? Would the justification for
12 probation in that case have to be just as strong as in
13 this case?

14 MR. DREEBEN: Stronger, I would say, because
15 if the guidelines --

16 JUSTICE STEVENS: Because the percentage is
17 really irrelevant --

18 MR. DREEBEN: Excuse me.

19 JUSTICE STEVENS: It would -- then the
20 percentage is irrelevant, if you said it has to be
21 stronger in that case.

22 MR. DREEBEN: Yes, I think that -- that's
23 why I don't think you can confine it to percentage. I
24 think if the guidelines are calling for a very
25 substantial period of imprisonment, and a judge says, I

1 just don't think the culpability of white collar
2 offenders ever warrants sending them to jail, I think
3 the better approach is you have them go out and make
4 speeches to fellow potential defendants about how
5 terrible their experience was, that is something that's
6 going to produce a very widespread potential for
7 disparity.

8 JUSTICE SCALIA: Mr. Dreeben, you're --
9 you're arguing hereby in a case where the departure was
10 downward, but you're -- the principle you apply, you
11 would apply for upward departures as well?

12 MR. DREEBEN: Yes.

13 JUSTICE SCALIA: Doesn't there get to be a
14 constitutional problem where -- where the court which is
15 establishing these -- these ranges that you want has
16 held, after a series of decisions, that basically you
17 cannot get 30 percent over -- over the guideline range
18 unless particular facts exist? And it has specified
19 those -- those facts in prior decisions. At that point,
20 in order to go 30, you know, 30 percent above the
21 guidelines, that fact becomes necessary for the
22 conviction and -- or for the sentence, and, therefore,
23 you would need the jury to find it.

24 MR. DREEBEN: No, Justice Scalia. I don't
25 think that courts of appeals conducting reasonableness

1 review should in effect construct their own guidelines
2 system. They should respond to the reasons and the
3 facts that are before them.

4 JUSTICE SCALIA: That's what common law
5 adjudication always amounts to. By trial and error, one
6 case, the next case, you eventually end up knowing what
7 is necessary in order to give 30 -- 30 percent over.

8 Unless you're accomplishing that, I don't
9 know what you're accomplishing.

10 MR. DREEBEN: Well, I -- I think you're not
11 accomplishing that kind of a common law system in
12 reasonableness review for many of the reasons that the
13 Court has already identified in describing why an
14 abuse-of-discretion approach is warranted. The court of
15 appeals will not be saying that this is the maximum
16 sentence you could give on these facts. It would say
17 these -- this is an unreasonable or a reasonable
18 sentence based on the policy considerations that the
19 judge articulated and the facts that he relied on.

20 JUSTICE SCALIA: He said this fact is okay.
21 You can go 30 percent above with this fact. So then in
22 the next case, the district judge says, I find that this
23 fact exists and therefore you get 30 percent above the
24 max, and the court of appeals affirms, but the jury has
25 never found that fact.

1 MR. DREEBEN: Well, Justice Scalia, I think
2 that the fundamental question of whether there is
3 substantive reasonableness review for excessiveness was
4 settled in the Rita an opinion in which -- Rita
5 recognized that Booker contemplated --

6 JUSTICE SCALIA: It left open -- it left
7 open case-by-case adjudication. It left -- application
8 review. And I'm saying that in the application review
9 of that case, you'd have to say you needed a jury
10 finding.

11 MR. DREEBEN: Well, my response -- and if I
12 could answer Mr. Chief Justice -- is that the
13 fundamental point of this Court's Apprendi line of cases
14 is that, so long as the statutory maximum is legally
15 available to the judge, the judge can find facts within
16 that range that justify the sentence, and that's all the
17 Booker remedial opinion authorizes judges to do.

18 Thank you.

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

21 Mr. Green, you have a minute remaining. Why
22 don't you take three?

23 REBUTTAL ARGUMENT OF JEFFREY GREEN.

24 ON BEHALF OF THE PETITIONER

25 MR. GREEN: Thank you, Mr. Chief Justice.

1 Most bluntly, an I-know-it-when-I-see-it
2 test or a holistic test is not likely to generate much
3 in the way of warranted uniformity either.

4 Justice Scalia, you pointed out, in your
5 question about whether this sentence was excessive or
6 not on the basis of the -- of the facts, that the
7 government is blowing smoke with respect to its
8 statement that the guidelines is purely advisory. Well,
9 it's not only doing that; it's removing the exercise of
10 discretion by the district judge.

11 It's saying to the district judge, you must
12 demonstrate to us facts. You must come to us with facts
13 that not only consist of explanations of reasons but are
14 sufficiently persuasive or compelling to overcome our
15 natural resistance to an outside-the-guidelines
16 sentence.

17 That I submit is, as articulated earlier,
18 making the guidelines presumptive. And it imposes a
19 fact-finding requirement that is in violation of the
20 Sixth Amendment.

21 Justice Ginsburg, you asked about whether
22 the prosecutor had, in fact, heard all of the evidence
23 with respect to -- or stated all the evidence to the
24 district court with respect to Mr. Gall. The answer to
25 that question is he most certainly did. And I agree

1 with my colleague that this case is the mirror of Rita.
2 In Rita, the district judge was presented with a wealth
3 of facts about Mr. Rita's prior good works, his military
4 service, et cetera.

5 Here, the district judge was again presented
6 with a wealth of facts with respect to Mr. Gall's
7 voluntary rehabilitation, with respect to his having
8 grown, developed, and established a business and rid
9 himself of crime and drugs. And this district judge
10 exercised his discretion to go down on the basis of
11 those facts and imposed a sentence of probation.

12 And, Justice Stevens, the Eighth Circuit,
13 even before the Guidelines, even before the Booker case,
14 in 1993, in 1999, in cases called One Star and Decora
15 respectively, went down from even higher levels to
16 probation based upon the particular facts of the case.

17 We would ask the Court to overturn the
18 judgment of the Eighth Circuit and abandon the
19 extraordinary circumstances test.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you Mr. Green.
22 The case is submitted.

23 (Whereupon, at 11:04 a.m., the case in the
24 above-entitled matter was submitted.)

25

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