1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARIO CLAIBORNE, :

4 Petitioner :

5 v. : No. 06-5618

6 UNITED STATES. :

7 - - - - - - - - - - - - - - - - - - x

8 Washington, D.C.

9 Tuesday, February 20, 2007

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:19 a.m.

14 APPEARANCES:

15 MICHAEL DWYER, ESQ., Assistant Federal Public Defender,

16 St. Louis, Mo.; on behalf of Petitioner.

17 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,

18 Department of Justice, Washington, D.C.; on behalf of

19 Respondent.

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

2 [11:19 a.m.]

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 next in 06-5618, Claiborne versus United States.

5 Mr. Dwyer.

6 ORAL ARGUMENT OF MICHAEL DWYER

7 ON BEHALF OF PETITIONER

8 MR. DWYER: Mr. Chief Justice, and may it

9 please the Court:

10 The district court's 15-month sentence,

11 combined with 3 years of supervised release conditioned

12 on drug treatment and the acquisition of a GED, was a

13 reasonable sentence. In the uniform and constant

14 tradition of Federal criminal sentencing, the district

15 judge in this case treated Mario Claiborne as an

16 individual. She considered the guidelines and after

17 doing so turned to the judgment that 3553(a) demands in

18 every case. She issued a sentence to avoid unwarranted

19 disparity, to impose just punishment, and to ensure that

20 deterrence did not throw away Mario Claiborne's chances

21 to resume his responsibilities to himself, to his

22 family, and to his community.

23 The court of appeals, in contrast to the

24 district court's careful attention to the 3553(a)

25 factors, focused solely on the guidelines. The court of

1 appeals applied its extraordinary circumstances rule.
2 That rule retethers sentencing to the guidelines.
3 JUSTICE GINSBURG: What would be your test
4 of reasonableness for appellate review?
5 MR. DWYER: I think a sentence would be
6 reasonable if a reasonable judge on the facts and
7 circumstances of that case would find that the sentence
8 imposed was sufficient but not greater than necessary to
9 satisfy 3553(a) standards.
10 JUSTICE KENNEDY: It seems to me that gives
11 very little weight to the goal, which I think is the
12 congressional goal, of nationwide consistency in
13 eliminating the disparities in a sentencing system
14 which cause great disrespect to the justice system.
15 MR. DWYER: I think that the statute speaks
16 of unwarranted disparity and does not speak in terms of
17 uniformity. And there is necessarily a tension between
18 the individualized sentencing that 3553(a) requires and
19 concerns about nationwide uniformity.
20 But I think that what distinguishes
21 sentencing under the advisory guidelines system from the
22 pre-Sentencing Reform Act system are several. One is now
23 we explicitly have purposes of sentencing and factors
24 the judge must consider. 3553 didn't exist before that
25 time.

1 Secondly, in every case, as a practical
2 matter, the guidelines are going to exert a
3 gravitational weight because they are there. They must
4 be considered as part of the statute.
5 JUSTICE KENNEDY: Can I substitute
6 "substantial" for "gravitational" without offending your
7 position -- affecting your position?
8 MR. DWYER: I don't -- my position would be
9 that 3553(a)(4) is the correct place for consideration
10 of the guidelines. It's just one of seven factors. As
11 a practical matter, I think it's going to get a lot of
12 consideration --
13 JUSTICE KENNEDY: Kind of a weak law of
14 gravity like the Moon. It's only at one-seventh.
15 (Laughter.)
16 MR. DWYER: As a legal matter weak. As a
17 practical matter, I think unfortunately it's going to be
18 very strong. And I think one of the real dangers of an
19 advisory guideline --
20 JUSTICE KENNEDY: Well, I guess the question
21 is how strong should we say or can we say that it is, or
22 can Congress say that it?
23 MR. DWYER: I think that the strength should
24 be no more than one of the 3553(a) factors, because I
25 think the danger, particularly after 20 years of

1 guideline sentencing, is that courts will routinely and
2 mechanistically apply the guidelines instead of
3 exercising their discretion, which now runs to the full
4 limit of 3553(a).
5 JUSTICE KENNEDY: But it seems to me that
6 to accomplish the goal that you want to accomplish in
7 this case, you almost remove the appellate courts from
8 the process.
9 MR. DWYER: I think the appellate courts
10 are -- I think Booker considered a very deferential
11 standard of review. The cases that the Booker Court
12 cited to illustrate the standard of review of
13 reasonableness were all highly deferential decisions
14 regarding revocations following supervised release,
15 affirming sentences that were many times what the
16 chapter 7 policy guidelines would require. The court of
17 appeals necessarily must be deferential or I think it
18 pushes the system back into a mandatory --
19 JUSTICE ALITO: Well, suppose the court of
20 appeals had done exactly what it did in this case, but
21 it said, we're not giving any special weight whatsoever
22 to the guidelines, we're basing this just on our own
23 evaluation of the sentencing factors that are set out in
24 the Sentencing Reform Act. Would there be a problem
25 there?

1 MR. DWYER: I think there would,
2 Justice Alito, because I don't think that the role of
3 the appellate court is to substitute its judgment for
4 the application and weight applied to the 3553(a)
5 factors for the district court.
6 JUSTICE ALITO: That's a principle that you
7 derive from what? From the Sixth Amendment? From the
8 Sentencing Reform Act? From where?
9 MR. DWYER: Well, I think it derives in part
10 from the Sentencing Reform Act, which contemplated
11 individualized sentencing.
12 JUSTICE ALITO: The Sentencing Reform Act
13 required, as enacted by Congress, required trial judges
14 to apply the guidelines, to follow the guidelines. And
15 you're saying that the Sentencing Reform Act now
16 precludes appellate review of -- it gives the trial
17 judges unlimited discretion or extremely broad
18 discretion?
19 MR. DWYER: Certainly extremely broad
20 discretion, and --
21 JUSTICE ALITO: How do you get that out of
22 a statute that was enacted to narrow their discretion?
23 MR. DWYER: Even under a mandatory
24 guidelines system that this Court considered in Koon, it
25 recognized that the Sentencing Reform Act also had an

1 important goal of individualized sentencing. And the
2 Court in Koon recognized that district courts in their
3 institutional position have a special competence to
4 determine what's ordinary in a case, what's unusual in a
5 case. The court of appeals lacks that special
6 competence. It sees only a tiny fraction of the number
7 of guideline cases. It doesn't have --
8 CHIEF JUSTICE ROBERTS: So one of the guides
9 for reasonableness review is what's ordinary in a
10 particular type of case?
11 MR. DWYER: I think that what guides the
12 court of appeals on reasonableness review is to look to
13 the particular case and determine if the reasons on the
14 record in that case, the district court's --
15 CHIEF JUSTICE ROBERTS: It's impossible to
16 do in the abstract. If you're just looking at a
17 particular case, you have no idea whether 5 years is
18 reasonable or not. There has to be a background to it
19 so that you know that in this type of case, people
20 usually get a sentence of 3 years or they usually get a
21 sentence of 10 years. And it seems to me that what's
22 ordinary is going to be a judge -- a driving fact in
23 determining what's reasonable.
24 MR. DWYER: I think the court of appeals'
25 job is to ensure that the district judge provides

1 reasoned elaboration of its judgment on the facts of
2 that case that establish that the district court has
3 complied with 3553(a), and on the facts of that case,
4 selected a sentence which is sufficient but not greater
5 than necessary.
6 I don't believe that it is the court of
7 appeals' job, as was remarked earlier, to become a
8 Sentencing Commission and begin to reexamine and reweigh
9 district courts' decisions.
10 CHIEF JUSTICE ROBERTS: Even if you're
11 looking at not just the number, but the reasons. In
12 other words, the question I asked earlier, you've got
13 nine district judges, they all say we do not depart
14 downward for military service, and you've got one
15 district judge that says we do. It seems to me that if
16 the court of appeals can't review that to bring about
17 some uniformity in the factors that are appropriate to
18 consider, then it's essentially a lawless system.
19 MR. DWYER: I think it is not lawless in the
20 sense that courts of appeals need to determine whether
21 in a particular case, the differences it finds are
22 warranted on the facts and circumstances of that case,
23 whether the district judge has consulted the guidelines,
24 has looked at the history and characteristics of that
25 defendant, has looked at the nature and circumstances of

1 the crime. And if those reasons satisfy the court that
2 a reasonable judge looking at those facts --
3 CHIEF JUSTICE ROBERTS: On my particular
4 case, what's the right answer for the court of appeals?
5 They've got two cases before them. One, the judge
6 departs three years because of military service. The
7 prosecutor appeals. The other, the judge refuses to
8 depart because of military service and the defendant
9 appeals.
10 Should those -- what should happen with
11 those two cases?
12 MR. DWYER: I think the same process of
13 review applies to each. And it may result -- and that
14 process of review is on the record in that case, would a
15 reasonable judge have arrived at that sentence?
16 And that review may result in both cases
17 being reversed, one, or the other, or neither being
18 reversed.
19 JUSTICE BREYER: Where does that come from
20 as a matter of law? That is, suppose -- now you can say
21 I -- if you want, say my hypothesis is wrong, but if I
22 start with an assumption that Congress did want the
23 court of appeals to try to create greater uniformity in
24 sentencing, and it wanted cooperation between the courts
25 of appeals and the Sentencing Commission, indeed the

1 Sentencing Commission itself is an effort to copy a
2 system that exists in Britain where courts of appeals
3 create a degree of uniformity.
4 Suppose I start with that assumption and say
5 that's what the guidelines were about and the reason
6 that number 4 is in 3553, is not just one factor among
7 many. After all, it was attached to a bill that was the
8 guideline bill.
9 And indeed, the part we excised was a floor
10 amendment that came along later to make it even tougher.
11 So if I start with the assumption that's what Congress
12 wanted, not that I wanted it, Congress wanted it, now is
13 there something in the Constitution that forbids it?
14 That's where I start -- I am starting
15 personally with that question in mind, always, if this
16 is what Congress wanted, we should try to do it unless
17 there's something in the Constitution that forbids it.
18 And is there something in the Constitution that would
19 forbid the court of appeals to do what on page 91 they
20 did here, leaving the word "extraordinary" out of it?
21 Now, just going through the different
22 elements of this case and coming to the conclusion that
23 what the district judge did was unreasonable?
24 MR. DWYER: I think there is a
25 constitutional problem with that. And it is that it

1 reinstitutes the mandatory guidelines system. And I
2 think if there is to be an effectively advisory system,
3 sentencing cannot center on the guidelines. The
4 district judge needs to be free to accept or reject that
5 advice and 3553(a), instead of the guidelines, becomes
6 the focal point for sentencing.
7 JUSTICE BREYER: It's not mandatory. It
8 says the district, the court of appeals judge says, now,
9 let's think here. We have 8 -- 7 people on the
10 Sentencing Commission that have really looked into that.
11 And they think that in an ordinary case with this
12 small amount of drug, the person ought to get so many
13 months. That reflects a lot of thought. Seems
14 reasonable to us. And here the district judge has given
15 him half that or 40 percent of that without a good
16 reason that we can find.
17 The judge said he did it because it was just
18 one little episode and we think there were many
19 episodes. And that's basically their reason.
20 Now, now -- what -- the Sixth Amendment
21 forbids that?
22 MR. DWYER: Of course, the court of appeals
23 did not adhere to your hypothetical in this case. In --
24 JUSTICE BREYER: Yes --
25 MR. DWYER: The Eighth Circuit in this case

1 simply said it is not a guidelines sentence, it is an
2 extraordinary variance and we are reversing. The
3 district court has to consider the sentencing guidelines
4 and generally that must be part of the reasoned
5 elaboration of judgment, so they will necessarily be
6 considered on appeal.
7 But the notion somehow that simply because a
8 sentence is in the guidelines, all disparity problems
9 have been resolved, is clearly not true. As the amici
10 briefs, as our brief have pointed out, even under a
11 mandatory guidelines system, racial disparity increased,
12 regional disparity increased. It's disparity that
13 individualized sentencing, the judicial discretion
14 necessary to do that kind of individualized sentencing,
15 can counteract. And that is genuine uniformity.
16 As -- as you pointed out in the Koon
17 decision, or the Koon pointed out borrowing your
18 language from Rivera, the district court's special
19 competence to determine what is ordinary and unusual is
20 exactly the kind of information the sentencing
21 commission needs to determine whether a guideline works
22 or doesn't work.
23 JUSTICE SOUTER: Aren't you really saying
24 that the most weight that the guideline can be given,
25 or guidelines can be given -- is -- I apologize for my

1 voice -- the most weight the guidelines can be given is,
2 is the weight of necessary advertence? The guidelines,
3 in effect, are at odds with the rest of 3553(a). The
4 rest of them say individualized sentencing. The
5 guidelines, in effect, says, no, sentencing by the
6 guidelines.
7 Therefore, in order to -- to break this, in
8 effect, logical incommensurateness, on your view, I
9 think the most that you can concede is that before a
10 district judge sentences finally, he must show that he
11 has considered the value of uniformity as something
12 different from individualized sentencing, but that's as
13 much as he can be required to do.
14 Is that a fair statement of your position?
15 MR. DWYER: Yes. And I think 3553(a), in
16 fact -- I expect Mr. Dreeben to say this -- talks about
17 uniformity, twice, in the sense that both 3553(a)(4),
18 which requires consideration of the guidelines, and
19 3553(a)(6) talks about unwarranted disparity.
20 JUSTICE SOUTER: Yes. I stand corrected.
21 MR. DWYER: But I agree with you that it is
22 a consideration -- and I'm not talking about a check
23 list. I'm not saying that we just use a list and that's
24 enough. There has to -- I think sentencing under an
25 advisory system requires reason and judgment. We tried

1 to stress in our brief that judgment is somehow
2 different. It may involve factfinding but is not the
3 determinant, the automatic jury kind of finding that the
4 guidelines require.
5 JUSTICE KENNEDY: Well, as one of the themes
6 that you advance, you indicate that if your approach is
7 followed that the guidelines will then be adjusted over
8 time.
9 I assume they would be adjusted to be more
10 precise, but then we are right back where we started
11 because you want to give the guidelines very little
12 effect. It seems to me, in a way, you're arguing
13 against yourself.
14 If your view is accepted and the result is
15 considerable disparity, I suppose all that Congress can
16 do is have mandatory minimums.
17 MR. DWYER: I don't believe that, that the
18 results are going to be considerable disparity.
19 Certainly no more disparity than existed under the
20 mandatory guidelines which wasn't being addressed
21 particularly.
22 I think indeed there may be more
23 non-guideline sentences, but less true disparity,
24 because it really is kind of idle to talk about
25 disparity unless you are measuring it against something.

1 And 3553(a) provides those purposes, and true disparity
2 is measured --
3 JUSTICE KENNEDY: Do you think it is idle to
4 talk about disparity before the Sentencing Reform Act
5 was adopted? You remember those days.
6 MR. DWYER: I do remember those days. And I
7 think there are two significant points about that. One,
8 judges sentenced in the pre-Sentencing Reform Act,
9 knowing that their sentence wasn't the real time served.
10 So that a judge may say 20-year sentence knowing that it
11 was a (b)(2) sentence and the defendant was immediately
12 eligible for parole and was going to get out sooner.
13 The real number was parole eligibility
14 sentencing. So that looking at just the actual sentence
15 imposed did not tell you very much about disparity. And
16 none -- in the study that the Sentencing Commission in
17 its amicus cited -- that study explicitly said that none
18 of the studies looking at pre-Sentencing Reform Act
19 interjudge disparity considered actual sentences served
20 as opposed to actual sentences imposed.
21 JUSTICE BREYER: Yes, yes. But there --
22 you know, we can go back into that, but there was a
23 whole history with people testifying, tremendously, no
24 opposition, virtually none, that you needed a judge
25 wheel. Why do you need a judge wheel in New York if, in

1 fact, the sentence didn't depend on the personality of
2 the judge? And why did you get different sentences
3 across the country which I don't -- I've never heard a
4 possibility of explaining that the judges didn't
5 understand what the parole commission was like. That's
6 a different issue.
7 So what -- what I'm concerned about is if we
8 followed your position literally, what we're saying is
9 that the Constitution of the United States prevents any
10 effort to create uniform sentences throughout the
11 country for people who different judges -- God doesn't
12 tell us what the right sentence is. We don't know.
13 There are reasonable sentences within vast, vast ranges
14 of possible sentences.
15 And you're saying we have to be back to
16 that. And that wasn't -- I'm looking, in other words,
17 for you to tell me something that says we don't have to
18 be back to that, but we don't have to make it that rigid
19 either. And that's what I'm looking for, to be honest
20 with you, and I haven't -- I'm not certain how to get it.
21 MR. DWYER: I don't believe that sentencing
22 under an effectively advisory system under the standard
23 of appellate review that I've described, which I think
24 is the standard Booker described, is in a sense an empty
25 exercise on appeal, and leading simply --

1 JUSTICE GINSBURG: Could you describe it
2 again? Because I'm not clear what your answer was to
3 what the appellate court stance is -- I take it the
4 appellate court would owe deference to the district
5 court's determination?
6 MR. DWYER: Yes.
7 JUSTICE GINSBURG: And no particular
8 deference to the guidelines?
9 MR. DWYER: That would -- yes, I would agree
10 with that.
11 JUSTICE GINSBURG: So what is it other
12 than -- is this arbitrary and capricious?
13 MR. DWYER: I think that the court of
14 appeals will first look to ensure that there was
15 reasoned elaboration of a judgment complying with
16 3553(a), that the district court considered all of the
17 factors and arrived at a judgment that this sentence was
18 sufficient but not greater than necessary.
19 Secondly, I think that the court of appeals
20 under that deferential standard of review that Booker
21 described would look to see if this is a sentence that a
22 reasonable judge would find sufficient but not greater
23 than necessary on those facts.
24 JUSTICE GINSBURG: But the -- one problem is
25 that two judges, both reasonable, might approach the

1 facts in this very case differently. That is, one as in
2 this case might think as she expressed it, to sentence
3 him to more than 15 months would throw away his life.
4 Another might say it's -- it's -- unreal to assume that he
5 just sold 23 grams of crack when he admitted that he had
6 been out on that same street every night for two and a
7 half weeks. So the quantity is much larger. And he was
8 in that sense a repeater, so I'm going to sentence him
9 to at least the bottom of the guidelines, nothing less.
10 Those could be reasonable determinations,
11 two different reactions that judges would have to the
12 same set of facts.
13 MR. DWYER: Yes. That is correct. And I
14 think that is what will result under an effectively
15 advisory system. But here we're talking --
16 JUSTICE SCALIA: In any case, you -- you,
17 you are not driven to the alternative that
18 Justice Breyer suggests, that there is no way to achieve
19 absolute uniformity. It would be very easy. It was
20 what the dissenters in the Booker remedial phase urged,
21 which is use facts found by the jury and you can have the
22 sentences as rigid as you like.
23 It is really only, only when you want to let
24 the facts be found by the judge that you come into the
25 difficulty that, that we're arguing about. But it's

1 certainly not decreed by logic or by heaven that there
2 is no way to achieve determinate sentencing. There
3 certainly is.
4 MR. DWYER: I agree, Justice.
5 JUSTICE BREYER: Do you agree? Because I
6 take it that that system would, in fact, give total
7 sentencing power to the prosecutor, who would determine
8 the sentence by the kind and degree of evidence that he
9 introduced and what he charges. So I agree that that
10 might produce some kind of judicial uniformity, but only
11 because the prosecutor would have total power to decide
12 what the sentence will be.
13 MR. DWYER: Well, I -- I also appreciate the
14 dialogue. And --
15 JUSTICE SCALIA: You don't -- you don't have
16 to engage in our dispute here.
17 (Laughter.)
18 JUSTICE BREYER: We're pointing out that there
19 are problems to every solution. And that's why I'm
20 still looking for the --
21 MR. DWYER: And -- and one of the serious
22 problems in the solution that Booker chose is that while
23 judicial discretion, which I think 3553(a) requires and
24 mandates, and an advisory system requires, that, too,
25 doesn't deal with the necessary exercise of

1 prosecutorial discretion which has an enormous thumb on
2 the scale, and which the district court, in the day-to-day
3 work of the criminal system in the courts, in the
4 district courts, has a far greater appreciation for,
5 than a court of appeals would.
6 JUSTICE GINSBURG: Mr. Dwyer, before we get
7 to the prosecutor, you were candid in saying a district
8 court -- different district judges could act reasonably,
9 one of them giving whatever it was, 33 months, and the
10 other giving 15 months, both of those would be
11 reasonable and could be affirmed on appeal.
12 But one of, one of the arguments that was
13 made by defense counsel here was just there was -- judge
14 there was -- there is an irrational disparity between the
15 penalty for crack and the penalty for powdered cocaine.
16 Your predecessor thought that was so wrong,
17 he thought it was unconstitutional. I think at the very
18 least you ought to take into account that if this man
19 were distributing, or possessed for distribution powdered
20 cocaine instead of crack, the sentence range, the
21 guideline sentence range would have been six months to a
22 year. Now we know that Congress wanted to retain that
23 disparity. Is a district judge free to say under
24 advisory guidelines, I am going to ignore the
25 difference, I'm going to treat this defendant as though

1 he possessed powdered cocaine?

2 MR. DWYER: I think that the judge in the

3 obligation of imposing an individual sentence must

4 consider the advice of the guidelines but must also be

5 free to shape and tailor that advice as the

6 circumstances of that case require.

7 JUSTICE GINSBURG: Well, specifically, can

8 you take into account, can he say I'm going to treat him

9 as though he possessed powdered cocaine? Can he do

10 that? Yes or no?

11 MR. DWYER: Yes. And --

12 JUSTICE GINSBURG: Even though we know that

13 Congress didn't want that to happen?

14 MR. DWYER: Yes, because I think if the

15 judge can elaborate reasons to justify that judgment in

16 that case --

17 CHIEF JUSTICE ROBERTS: That's got nothing

18 to do with that case. That's got something to do with a

19 judgment apart from the particulars of the case about

20 whether crack should be treated the same as powdered

21 cocaine. It's got nothing to do with the individual

22 case.

23 MR. DWYER: Well, I beg to differ, Chief

24 Justice Roberts, because the differences were predicated

25 on assumptions about the type of individual who would

1 engage in that. And the court in her experience could
2 look at it and say you aren't the typical crack
3 defendant, you are more like the people who come before
4 me who are involved in powdered cocaine, or you don't
5 possess the violence, the weaponry and the other things
6 that justified Congress's decision to create disparate
7 sentences for these two kinds of cocaine.
8 JUSTICE KENNEDY: Well, I think you ran away
9 from Justice Ginsburg's hypothetical just a little bit.
10 Let's assume that Congress wants to keep this
11 distinction and let's assume that there's no
12 constitutional problem with the distinction. There
13 might be, but let's assume.
14 Can the judge simply say, I ignore that
15 congressional -- congressional judgment is wrong. I'm
16 not going to do that.
17 MR. DWYER: I don't think that the district
18 judge's role is to make categorical pronouncements.
19 JUSTICE KENNEDY: Is the judge permitted --
20 JUSTICE STEVENS: May I just ask this? To
21 what extent is the Congress's purpose later than the
22 Congress that enacted the statute we're construing? The
23 statute we're construing was enacted by one Congress and
24 these expressions came later.
25 MR. DWYER: Well, I would resolve the

1 problem by saying that the district judge must consider
2 the guidelines. The district judge doesn't sit in
3 review of the policy. It has to apply it to a specific
4 person. In a particular case, as in Mario Claiborne's,
5 that policy produced a sentence that would have been too
6 great.
7 And the application had some numbers to it,
8 so she said it was more serious because it was a crack
9 cocaine case, you're going to get more than somebody who
10 was involved with powder would get, but you don't need
11 to get as much as the guidelines call for, for the
12 reasons that she expressed on the record at the
13 sentencing.
14 If I could reserve the balance of my time,
15 unless there are other questions?
16 CHIEF JUSTICE ROBERTS: Thank you, Mr.
17 Dwyer. Mr. Dreeben.
18 ORAL ARGUMENT OF MICHAEL R. DREEBEN
19 ON BEHALF OF RESPONDENT
20 MR. DREEBEN: Mr. Chief Justice, and may it
21 please the Court:
22 This Court in Booker concluded that the
23 remedial severing of the statute's provision for
24 mandatory application of the guidelines and a provision
25 governing the standards of review on appeal rendered the

1 statute constitutional. It further implied a standard
2 of review of reasonableness of guideline sentences on
3 appeal, and it did not elaborate what that
4 reasonableness requirement means.
5 The Government submits that the best
6 interpretation of a reasonableness form of review would
7 be one that conforms as closely as it can to Congress's
8 original intent of minimizing and eliminating
9 unwarranted sentencing disparities between similarly
10 situated defendants.
11 JUSTICE SCALIA: As closely as it can, and
12 the "as it can" depends upon violation of the Sixth
13 Amendment by entitling defendants to sentences
14 determined by facts found by a judge instead of a jury.
15 Suppose in this case the court of appeals
16 instead of disallowing the lower sentence, approved it?
17 And then in the next case that comes up involving what
18 was the small amount of equivalent, 5.26 grams of
19 cocaine powder rather than crack, okay? Suppose in the
20 next case it would have been 30 grams of powder. And
21 the district court judge once again departs just the way
22 the departure was here, and the court of appeals says
23 no, that departure is unreasonable.
24 You now have circuit law which says 30
25 grams, you get the guidelines sentence; 5.26 grams,

1 you're entitled to a lesser sentence. Okay?

2 Why isn't -- why haven't we fallen back into

3 the same problem that produced Booker/Fanfan? You have

4 factfinding being made by the judge. It's a judge who

5 decides whether it's 30 grams or 5.26 grams. What

6 difference does it make whether that factual difference

7 produces an entitlement to a sentence on the basis of

8 the guidelines or on the basis of an opinion by or a

9 series of opinion by a court of appeals? Isn't the

10 Sixth Amendment equally violated?

11 MR. DREEBEN: Justice Scalia, as I think we

12 talked about in the last argument, in theory it could be

13 if this Court concludes that judicial determinations on

14 appeal are equivalent to guidelines promulgated by a

15 commission or statutes. And, if what the court of appeals

16 does is essentially function as a Sentencing Commission,

17 literally prescribing particular levels of punishment

18 for recurring sets of facts.

19 The Government's submission here is not that

20 the court of appeals has to do that in order to apply a

21 proportionality principle. A proportionality principle

22 will look to all of the facts of the case and will try

23 to get a handle on, is this a reasonable sentence in

24 response to all of the facts and circumstances that the

25 judge articulated within --

1 JUSTICE SCALIA: But if you have two cases
2 that are in other respects similar, and the court of
3 appeals has held 5.26 is too little to apply the
4 guidelines, it's okay to depart downward the way this
5 judge did, it seems to me that the next case that comes
6 up, the -- defendant has an entitlement to that lower
7 sentence.
8 MR. DREEBEN: Well, he doesn't, Justice
9 Scalia, because the second defendant may not encounter a
10 judge who concludes that that quantity warrants the same
11 level of leniency or any leniency at all. That judge
12 will retain the judge's classic discretion to look at
13 the totality of the facts and conclude whether a
14 sentence that would be below the range is a reasonable
15 sentence. And unlike a situation that some of us might
16 prefer in which the court of appeals would ensure that
17 like cases are treated with reasonable consistency, the
18 system of reasonableness review on top of advisory
19 guidelines will not produce perfect levels of
20 consistency.
21 And what the defendant is entitled to under
22 the Sixth Amendment rulings of this Court is knowing
23 that if the law says if I commit this crime and these
24 are the facts that support it, my level of sentence is
25 this and no higher, that any higher sentence that's

1 produced by a factfinding gives him a jury trial
2 entitlement. That's what the Sixth Amendment entitles
3 to.
4 But no defendant who commits a crack offense
5 can say that even after a series of court of appeals
6 rulings that mark out various points of reasonableness.
7 That defendant will not know whether the judge that he
8 or she appears in front of will give the same kind of
9 weight to those facts as some other judge did who was
10 affirmed or reversed. Nor will that judge be able to
11 say what is the constellation of policy and factual
12 reasons that this particular judge will find in
13 announcing the judge's sentence.
14 So I don't think that a proportionality
15 principle runs afoul of the Sixth Amendment. And I
16 don't think that it runs afoul of anything in 3553(a) or
17 any other part of the statute. What the Court is left
18 with is the task of interpreting reasonableness, and I
19 submit it should ask the same question that it asked in
20 Booker itself: Which alternative, the Petitioner's
21 alternative in this case or the Government's, conforms
22 more closely to Congress's original aim in the
23 Sentencing Reform Act?
24 The Petitioner's version of appellate review
25 as I understand it is very light review, if at all, of

1 the substance of what the district judge does. It may
2 reach a truly extreme case such as if a judge said a
3 second degree murderer, I think probation is the
4 appropriate sentence. Perhaps the Petitioner would
5 concede that that would be arbitrary and irrational; but
6 beyond such an extreme case that it is so unlikely to
7 arise that Petitioner can feel free to give it away,
8 Petitioner gives the Court nothing, and gives the courts
9 of appeals nothing to apply standards to determine
10 whether a particular sentence is reasonable. And that
11 is what the court of appeals have been reaching for when
12 eight of them have adopted this proportionality
13 principle.
14 JUSTICE STEVENS: May I ask this question:
15 It seems to me that in sentencing there are two
16 different broad categories of decision that the judge
17 has to make, one involving the severity of the crime,
18 and the other the characteristics of the particular
19 offender.
20 And might it not be the case that you give a
21 greater presumption of following the guidelines when
22 you're talking about the severity of the offense, and a
23 greater deference to the trial judge when you're
24 evaluating the factors of the individual that might
25 affect the sentence? There might be a difference in the

1 --

2 MR. DREEBEN: I think at a high level of

3 generality, that is true. Because what the sentencing

4 commission is good at is taking paradigmatic

5 circumstances and assigning them a numerical weight that

6 will translate into a sentence. And what the strength of

7 the district judge is is looking at the defendant in

8 front of that particular judge and seeing how that

9 person's characteristics may map onto the policies of

10 sentencing.

11 But I don't agree that that distinction

12 would support a two-track form of appellate review that

13 would give the district judge great deference to take

14 personal characteristics into account and to impose

15 widely varying sentences. That is exactly the situation

16 that we had in the pre-Sentencing Reform Act era when

17 any district judge could choose whatever policies of

18 sentencing appeal to that judge, find the facts, and

19 impose a widely disparate sentence. And as the Court

20 well knows, there was no appellate review of that

21 exercise of discretion unless it could be shown that the

22 judge didn't exercise discretion at all.

23 Now it is not an exercise of discretion if a

24 judge simply says for this crime, I always give the same

25 sentence. That would not take into account the full

1 range of facts and factors that are present in the
2 sentencing court and as a result, that wouldn't be an
3 exercise of discretion.
4 But in the pre-Sentencing Reform Act era,
5 the judge had pretty much plenary reign to decide what
6 facts mattered. If we continue with that same sort of
7 deference on appeal in the Booker remedial opinion, then
8 it's hard for me to see how appellate review can serve
9 any valid purpose of channeling and ensuring some
10 consistency and uniformity in the way district judges
11 impose sentencing.
12 JUSTICE BREYER: What do you think about
13 taking some of the Rivera ideas -- I'm slightly
14 hypothesizing this -- and following up with what
15 Justice Stevens said. You'd say look, one thing a
16 district judge can't say, he can't say that I believe
17 the guideline is right for a typical case. And I think
18 this is a typical case. And I won't follow the
19 guideline. You couldn't think those three things?
20 MR. DREEBEN: I agree.
21 JUSTICE BREYER: So one big power a judge
22 has that they didn't have before, after Booker, is to
23 say the guideline itself is unreasonable. So we're --
24 let's just say -- and there if they say that, the
25 district judge could decide whether or not, the court of

1 appeals could decide is the guideline reasonable or not
2 reasonable. But leave those cases aside. I imagine
3 they'll be few and far between.
4 Now we take one they assume is reasonable.
5 And now unlike the past, the judge has to do three
6 things. One, to give the kind of thing that -- the
7 reason he's not following the guideline, which he admits
8 is reasonable for a typical case. So what's the kind of
9 thing that leads you to think yours is not typical? And
10 he says it. And then he has the evidence as to the
11 related facts. And then he has the degree of departure.
12 As to the first thing, the court of appeals
13 could review it and decide whether it is or is not the
14 kind of thing. As to the second and third, they also
15 could review it but only after giving considerable
16 weight to what the district judge thinks about the case
17 in front of him.
18 Now maybe that's -- I mean, you might not
19 have a reaction to that. I'd have to sort of think
20 about it.
21 MR. DREEBEN: Well, Justice Breyer, if the
22 system that you're describing is a replica of the system
23 that existed under Koon versus United States --
24 JUSTICE BREYER: Not quite --
25 MR. DREEBEN: -- then it runs into the same

1 problem that led to the constitutional problem in
2 Booker. Where I think I would amend Your Honor's
3 proposal is that if the judge concludes that this is a
4 typical case but the guideline really doesn't prescribe
5 what I think is a reasonable sentence and here are the
6 reasons why, in the pre-Sentencing -- in the pre-Booker
7 system, that could have been problematic legally.
8 Today, it is not forbidden. But what it should be
9 subject to is a reasonableness review check on appeal
10 that takes a look at what are the reasons that the
11 district judge articulated for that sentence.
12 JUSTICE SCALIA: Why, why do we assume that
13 the district judge cannot depart from the guideline
14 recommendation unless he thinks the guideline
15 recommendation is unreasonable? He doesn't -- does he
16 have to find it's unreasonable? There can certainly be
17 two reasonable sentences; and he's under no obligation
18 to select the guidelines sentence, is he?
19 MR. DREEBEN: That's correct.
20 JUSTICE SCALIA: So he doesn't have to
21 determine that it's unreasonable. I don't think we
22 should approach the discussion as though that's, that's
23 the situation.
24 MR. DREEBEN: I do think, though, that the
25 Court should be concerned about each district judge

1 formulating his or her own set of personal sentencing
2 guidelines and then applying them in the court to the
3 cases that appear on that judge's docket without any
4 check on appellate review to ensure that, although the
5 sentence might be in some possible world reasonable,
6 it's out of whack with what the Sentencing Commission
7 has prescribed and what other district judges are doing.
8 If there is no check on appeal, then I do think that the
9 clock has been turned back to the 1983 era before the
10 Sentencing Reform Act; and that does not seem to me a
11 reasonable interpretation of what the Booker remedial
12 opinion thought it was accomplishing. What the Booker
13 remedial opinion said that it was accomplishing was
14 providing an important mechanism that Congress itself
15 had intended, namely appellate review, in order to iron
16 out sentencing differences.
17 And our submission is that inherently means
18 some form of substantive proportionality review.
19 JUSTICE BREYER: That's the other thing I'm
20 not certain about, the proportionality, and the reason
21 I'm not certain of it is I'm not sure what it means.
22 That is, it sounds nice, as if you're saying something,
23 but proportional to what? I mean, I can think of two
24 problems. One problem, of course, is that the chart in
25 the guidelines is written on a logarithmic scale and

1 that means that if you move from one level, from 9 to
2 10, it's 3 months or 2 months; if you move from 29 to
3 30, it's 2 years.
4 Now, whether you're at 29-30 or whether
5 you're at 9 and 10 might depend upon things that just
6 have nothing to do with your reason for departure. You
7 might have added on something for having a gun and your
8 reason for being lenient might have to do with the
9 person's having a gun. So you're going to say it make a
10 difference whether you were high up or whether you were
11 low down, when your reason for departing had nothing to
12 do with whether you were high up or whether you were low
13 down? You see? It doesn't actually work, I don't
14 think, proportionality review, because it's so hard to
15 say what's proportional.
16 MR. DREEBEN: I think what is proportional
17 is a matter of common sense, and the eight circuits that
18 have been using this rule have not had a great deal of
19 difficulty in noting that you look at the extent to
20 which the sentence varies from the guidelines range, you
21 look at the absolute amount of time that's involved, and
22 have a sense of is this a significant deviation away
23 from what the guidelines would actually describe.
24 JUSTICE BREYER: Well, why use the word
25 "proportional," because the other thing is what the

1 Chief Justice brought out, is that why is it that if the
2 person has a bad reason, I mean, why should a bad reason
3 justify a little departure rather than a lot? And if he
4 has a good reason, well, why doesn't it justify a lot
5 just as much as it might justify a little?
6 MR. DREEBEN: If the sentencing court
7 articulates a bad reason, namely a reason that's
8 irrational or one that does not respond to the facts of
9 the case, then that really shouldn't justify the sentence
10 at all and what the court of appeals should do is vacate
11 it, send it back for resentencing, and allow the
12 district court to articulate the reasons why the
13 sentence that the court now chooses to impose is an
14 appropriate sentence under 3553(a).
15 JUSTICE GINSBURG: Mr. Dreeben, if we could
16 focus on the facts of this case and what the district
17 court appeared to do, she made a kind of proportionality
18 judgment, too. She said this is a young man. It's his
19 first offense. He has a good family relationship, a
20 good work record. I am making a determination that will
21 put him away for a significant amount of time. But I'm
22 trying to figure the point at which he will lose touch
23 with his family, with his work, he will be thrown away.
24 That was the judgment that she made. She
25 tried to make a sentence that would be significant, 15

1 months, but would not be so long that would put him out
2 of touch with his children and his wife and his work.
3 Now, in -- by some measures that would be
4 entirely reasonable. But on your measure, it isn't
5 reasonable.
6 MR. DREEBEN: That's right. And I think,
7 Justice Ginsburg, you've done a better job of
8 articulating a justification for the sentence than the
9 judge's own articulation, which did not focus on family
10 separation and employment to the degree that you have
11 now articulated it. What the judge did was focus on the
12 quantity of drugs and the fact that the defendant didn't
13 have any criminal history and that he qualified for the
14 safety valve.
15 She also said, without specifying any other
16 cases, that other cases that have come before my court
17 have had -- you know -- perhaps larger quantity of drugs
18 and very different sentences. When a court of appeals
19 is asked to review that line of reasoning and try to
20 decide whether the outside-the-guidelines sentence is
21 reasonable, it makes sense for the court to ask, do we
22 know anything, for example, about what this judge is
23 saying about other cases with other drug quantities?
24 There's no specifics in the record that enable a court
25 of appeals to measure the accuracy or the validity of

1 that observation. It's also relevant for the court of
2 appeals to say the guidelines range itself has taken
3 into account all of the factors that this judge has
4 previously noted and what has happened in the sentence
5 is that the judge has varied widely from the sentence
6 for reasons that the commission already took into
7 account. Now, that doesn't prohibit the judge from
8 relying on those facts, but it does mean that the
9 farther the sentence goes from the guidelines range the
10 more likely there is to be unwarranted disparity.
11 JUSTICE GINSBURG: But you did leave out
12 what -- she didn't elaborate on it, but she said, I
13 would be throwing him away. And I take it what she was
14 saying by that is it would be -- he would be
15 incarcerated beyond the point where he could reintegrate
16 into the community.
17 MR. DREEBEN: Well, this brings me to my
18 last point about this particular sentencing, which is
19 that in this very case Judge Jackson looked at the
20 defendant. She said, candidly, I don't know really very
21 much about you other than what I've learned about in the
22 presentence report and I can't tell whether you're
23 unlucky or you're stupid, and then effectively gave him
24 a sentence that reflected, you know, a tremendous
25 indulgence of a presumption that maybe this kid needs a

1 wakeup call and nothing more. What she ignored is his
2 own proffer in the safety valve that he had been on a
3 street corner for 2-1/2 months selling crack cocaine,
4 that he was arrested and placed into the State system,
5 put into a pretrial diversion program through a drug
6 court, in essence being said, here's your chance, you
7 know, straighten up, we are going to be lenient on you,
8 we're going to give you an opportunity to reintegrate
9 with your family, and what did the defendant do but get
10 caught within 6 months with 5 grams of crack.
11 And on that record -- and this is what the
12 court of appeals said -- there's a disconnect between
13 the judge's conclusion that, with little information
14 more than what she had in the PSR, the kid deserves
15 leniency versus the fact that he had already had that
16 chance and he had not taken advantage of it.
17 JUSTICE STEVENS: Yes, but didn't the court
18 of appeals draw the inference that he had been
19 distributing drugs during that 6-month period and that
20 was not supported by the record? Am I wrong on that?
21 MR. DREEBEN: Well, Justice Stevens, we're
22 not relying on the inference of the --
23 JUSTICE STEVENS: Would it have been error
24 for the court of appeals to find a fact like that that
25 was not supported by the record and didn't it do it in

1 this case?

2 MR. DREEBEN: Well, supported by the record

3 is something of a judgment call. You'd have to assume

4 that Mr. Claiborne was found by the police, 6 months

5 after he had previously been arrested for crack

6 offenses, holding a 5-gram bag of crack and that was the

7 very first time after his arrest that he had been in

8 possession of drugs, that just he got extremely

9 unlucky, the police caught him.

10 JUSTICE STEVENS: And the court of appeals

11 is willing to draw a factual conclusion that he had in

12 fact distributed during that 6-month period?

13 MR. DREEBEN: That's right. And I would say

14 that a reasonable factfinder could draw that

15 conclusion.

16 JUSTICE STEVENS: But should the court of

17 appeals act as a factfinder in that posture of the

18 case?

19 MR. DREEBEN: Not in my view. And I think

20 on this record that's not a fact that we're relying on.

21 It's not a fact that the Government --

22 JUSTICE STEVENS: Is it not possibly a fact

23 that would justify the conclusion that they committed

24 error?

25 MR. DREEBEN: This aspect of the court of

1 appeals opinion in my view is not essential to the
2 judgment that it reached, which is correct.
3 JUSTICE STEVENS: It may not have been
4 essential, but it may have contributed to their
5 judgment.
6 MR. DREEBEN: It may have, but what they did
7 not mention is an equally valid reason for concluding
8 that this is a defendant who is in effect a recidivist
9 even though he had no criminal history. He had been
10 previously arrested for crack distribution crimes. He
11 had admitted that this was not -- the occasion of his
12 arrest wasn't the first opportunity that he had to deal
13 crack. He'd been doing it for 2-1/2 months. And the
14 judge essentially turned all of those facts off. She
15 did not really factor that into her sentence at all.
16 And the court of appeals, although it may
17 have fastened on the wrong time frame in concluding that
18 this defendant was in effect a recidivist and not the
19 sort of blameless ingénue that the trial judge had
20 treated him as, the record does indeed support the court
21 of appeals' central conclusion, which is that this
22 defendant, despite his criminal history, really looks more
23 like a recidivist. And when you're talking about a
24 defendant whose mandatory minimum sentence would have been
25 5 years, but who gets out of that sentence because he

1 satisfies the safety valve which allows a defendant who is
2 a first-time offender and meets certain other
3 requirements to get a sentence under the mandatory
4 minimum, that defendant's culpability had already been
5 substantially reduced under the guidelines because of
6 the safety valve and because of his criminal history.
7 And the judge basically said: I'm going to take a
8 chance with him and give him a much lower sentence than
9 what the guidelines described.
10 Our view is the judge can look at the facts
11 she looked at, but she went down to a level that is
12 productive of unwarranted disparity.
13 JUSTICE STEVENS: May I ask just one other
14 question? I do not understand you to argue that the
15 court of appeals can apply a presumption of
16 unreasonableness just because there's a departure.
17 MR. DREEBEN: That's correct. We're not
18 arguing for a presumption of unreasonableness on appeal.
19 We're arguing for a presumption of reasonableness for a
20 guidelines sentence. For an out of guidelines sentence
21 there is no presumption that it is unreasonable, but the
22 court of appeals under a proportionality analysis would
23 look and require increasingly strong reasons with the
24 increasing degree of variance from the range.
25 JUSTICE BREYER: That's the part -- they said

1 that an extraordinary reduction must be supported by
2 extraordinary circumstances. What worries me about that
3 is one, it sounds like a slogan. Because I would think
4 an extraordinary reduction must be supported by whatever
5 reasons would justify the extraordinary reduction, period.
6 And it also sounds like you're going to
7 start getting a mechanical set of charts and things,
8 which is going to be a true nightmare, and if we really
9 were to repeat that it would take on a tremendous force
10 of generative law which would worry me quite a lot
11 because I just think it's too complex to reduce to a
12 formula. What you want is a reason that supports the
13 sentence.
14 It is --
15 MR. DREEBEN: I think you want a better
16 reason for a sentence that is farther away from some
17 mean.
18 JUSTICE BREYER: Better than what? Better
19 than justifies it?
20 MR. DWYER: Perhaps the best way to do this
21 is to give a example. Suppose that the shoe were on the
22 other foot here. Suppose that Judge Jackson had looked at
23 this defendant and said, you know, this defendant did
24 not learn from his experience. He was given leniency in
25 the State court. He didn't take advantage of that

1 opportunity. His statutory maximum is 20 years and I'm
2 going to give him, maybe not the statutory maximum, I'm
3 going to give him an 18-year sentence, or suppose she
4 said a 15-year sentence or a 10-year sentence.
5 I submit that in that circumstances the
6 Petitioner would be here saying, well, the guidelines
7 recommended a sentence of between 37 and 46 months and
8 this is a dramatic increase from that and the reason is
9 not something that's particularly unusual, it's a very
10 usual reason, and as a result, the magnitude of this
11 deviation is unreasonable.
12 And I have no problem with a petitioner
13 making that argument if that's what happens to his or
14 her client. My problem is that without that kind of
15 anchoring effect of the guidelines in a proportionality
16 review, a court of appeals has almost nothing to work
17 with.
18 JUSTICE SCALIA: But what happens when that
19 case -- it goes back down to the district court? The
20 district court says well, okay, not 10 years. Nine
21 years. Okay? It goes back up. I mean, you know, when
22 do we end this game? Or does the court of appeals take
23 over the sentencing function and specify -- you know,
24 five years?
25 MR. DREEBEN: Justice Scalia, I don't think

1 that the courts of appeals are, at least absent very
2 unusual circumstances, to act as sentencers and to specify
3 a sentence. There have been a couple of instances where
4 courts of appeals have said this is really the bottom
5 sentence that we can see that would be reasonable on
6 this particular constellation of facts. I think that
7 reflects a sense of potential impatience with a
8 ping-pong game that would occur if the court of appeals
9 says your sentence is unreasonable, Mr. District Judge,
10 and the district judge imposes a sentence that's one day
11 lower.
12 Another solution to that problem would be
13 reassignment to a different judge who would start with a
14 clean slate and could read the court of appeals' opinion
15 and apply the section 3553 factors.
16 We are not suggesting that the court of
17 appeals should assume the sentencing role here. All
18 we're suggesting is that the court of appeals needs to
19 have some intelligible legal principles that allow it to
20 identify and select unreasonable sentences versus
21 reasonable sentences; and when you have wide statutory
22 ranges as you do in the Federal system, if you don't
23 have the guidelines describing at least a benchmark,
24 if not more, then I don't think the courts of appeals
25 have a good, coherent, consistent way of fulfilling their

1 task. And if the courts of appeals can do that, can
2 look more with greater scrutiny at a sentence the
3 farther that it goes outside the guidelines range,
4 without violating the statute and without violating the
5 Constitution, then it seems to me that the only thing for
6 the Court to ask at that point is which approach, that
7 approach of proportionality, or an approach that
8 basically says appellate review is procedural only,
9 absent the most glaringly aberrant sentences, conforms
10 to Congress's intent of producing a greater degree of
11 uniformity and consistency.
12 JUSTICE SCALIA: Well, it wouldn't be, just
13 be procedural only. You -- you could say procedural
14 plus, you know, certainly review of the facts on, on
15 which the district court was -- was proceeding. So you,
16 if you could find that the determination that this was
17 just a good kid who made a mistake is, is an
18 unreasonable finding, you could reverse for that reason.
19 MR. DREEBEN: That -- that is true. But I
20 submit that -- I would like to hear what Petitioner has
21 to say. If Petitioner's client had been given 10 years
22 in this case, I have no doubt that Petitioner would be
23 arguing that that's an unreasonable sentence. But I
24 don't see how you reach that judgment assuming that the
25 court has articulated a rationale that's consistent with

1 section 3553 and a rational interpretation of the facts,
2 unless you have the guidelines as an anchor for the
3 analysis.
4 Thank you.
5 CHIEF JUSTICE ROBERTS: Thank you, Mr.
6 Dreeben.
7 Mr. Dwyer, you have two minutes remaining.
8 REBUTTAL ARGUMENT OF MICHAEL DWYER,
9 ON BEHALF OF PETITIONER
10 MR. DWYER: I believe that Justice Breyer
11 put his finger on one of the central problems with the
12 Government's proposed rule. And that is what does it
13 mean? The Government talks about substantial variances
14 in Petitioner's case. The court of appeals spoke of it
15 as extraordinary variances. And the Government doesn't
16 suggest to us that "substantial" means the same thing or
17 means something different from "extraordinary." And
18 we've already demonstrated in our brief why relying on
19 percentages as the court of appeals also did, is
20 pointless, because, one, if -- the arithmetic gets very
21 complicated at the low end and the percentages just
22 don't make any sense from a proper application of a rule
23 of law.
24 The Government's proposal, apart from having
25 no basis in the statute and no basis in Booker, is just

1 not susceptible of any kind of application because
2 nobody really knows what it means.
3 CHIEF JUSTICE ROBERTS: What about Mr.
4 Dreeben's parting challenge? What are you going to do
5 if your client gets 10 years? You're going to argue
6 that's an extraordinary departure from the guidelines,
7 right?
8 MR. DWYER: I'm certainly going to argue
9 that under the facts and the record before the Court,
10 that was not a sentence that was sufficient but not
11 greater than necessary. And I think the absence of a
12 prior record, the young man's work history, all of those
13 factors, the low amount of crack cocaine involved, his
14 age, all of the things which as Justice Ginsburg pointed
15 out that judge relied on in her sentencing decision,
16 could not possibly support a 10-year sentence.
17 And you know, it is easy to do this in a, in
18 a hypothetical sort of way. But the district judge --
19 and this was a very experienced district judge --
20 looking at the person in the eye, made a call based on
21 judgment. And that call was not treated with any
22 respect in the court of appeals. It was sloganeered
23 away as an extraordinary variance. And -- because the
24 court of appeals focused only on the guidelines.
25 The -- this Court in crafting the appellate

1 standards can't just look to determine what Congress
2 might have intended because of the constitutional
3 problem that lurks behind it. And that constitutional
4 problem is a resumption of mandatory guidelines.
5 Thank you very much.
6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 The case is submitted.
8 (Whereupon, at 12:18 p.m., the case in the
9 above-entitled matter was submitted.)
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