IN THE SUPREME COURT OF THE UNITED STATES

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DERRICK KIMBROUGH, :

Petitioner :

v. : No. 06-6330

UNITED STATES :

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Washington, D.C.

Tuesday, October 2, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

MICHAEL S. NACHMANOFF, ESQ., Federal Public Defender, E. District of Virginia Alexandria, Va.; on behalf of the Petitioner.

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

C O N T E N T S

P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in case 06-6330, Kimbrough versus United States.

Mr. Nachmanoff.

ORAL ARGUMENT OF MICHAEL NACHMANOFF

ON BEHALF OF THE PETITIONER

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

Derrick Kimbrough's case is about what a district court may consider when imposing sentence in conformity with section 3553(a).

That statute directs sentencing courts to do exactly what Judge Jackson did in this case. He properly calculated and considered the advisory guideline range, the Sentencing Commission's reports, Mr. Kimbrough's personal history and background, and the offense itself, as directed by the statute. He then made case-specific findings to impose an appropriate sentence, and he did not make any categorical determinations.

The Fourth Circuit reversed, applying a per se rule prohibiting disagreement with the crack cocaine guideline. The government, on the other hand, argues that Congress has implicitly directed sentencing

courts to adhere to the crack guideline.

Both of these positions are wrong.

With respect to the Fourth Circuit, the Fourth Circuit applied a rigid rule that prohibited any disagreement with the crack guideline, which is determined solely by drug type and quantity. They then prohibited the imposition of any sentence outside the Guideline range, either above it or below it, unless the court identified facts specific to the defendant or the offense.

This ruling is inconsistent with the Court's holdings in Cunningham and Rita, which hold that the courts must be free to disagree with policies.

Finally, the Fourth Circuit required that those facts be atypical, which mirrors the exact language that was excised in 3553(b)(1).

JUSTICE KENNEDY: Could the Congress have mandated the result and the rationale that the Fourth Circuit used here?

MR. NACHMANOFF: Your Honor, Congress can certainly speak explicitly through its statutes to impose further refinements on the penalty structure that is set out in 841.

Section 841, on its face, does no more than set mandatory minimums and maximums at two triggering

quantities. If Congress wanted to specify further triggering quantities which would cabin the discretion of sentencing courts, they could do so, but they have not done so and there is no canon of statutory construction that the government identifies or that I'm aware of that would justify the notion of the implicit, binding directive.

JUSTICE ALITO: If Congress made a finding that crack and cocaine are equally dangerous and passed a statute that said, for sentencing purposes, every district judge shall treat cases involving these two substances exactly the same, would there be a Sixth Amendment problem with that? Or do you think every district judge gets the right to make that policy decision individually?

MR. NACHMANOFF: Justice Alito, Congress certainly can cabin the discretion of judges. But once they set a floor and a ceiling, pursuant to this Court's remedial holding in Booker, judges must be free to consider the entire range of punishment. And Booker relies on the notion that the Guidelines are now fully advisory and, therefore, judges without having to identify specific facts have to have the discretion to disagree with policies or identify things unique to the case in order to fashion an appropriate punishment.

JUSTICE SOUTER: Well, what's your answer simply to the very simple argument that because the floor was set on the assumption of a 100 to 1 ratio, and it was set by Congress, that any other sentencing assumption, regardless of the particular justifications in a given case, is simply incoherent with the statutory scheme and for that reason should be regarded as unreasonable?

MR. NACHMANOFF: Yes, Your Honor.

JUSTICE SOUTER: It is the coherence problem that is bothering us.

MR. NACHMANOFF: Yes. There are several answers to that question, Justice Souter. The first is that this Court has recognized with the same statute which has the same structure that the government argues can only logically be understood one way, that with regard to the weight for LSD in the case of Neal versus United States, it is perfectly appropriate for there to be two different methods of calculating weight for purposes of punishment. The Guidelines calculate weight based on a presumed weight of the combination of the LSD and the blotter paper or the carrier medium. And the statute defines the method for calculating the mandatory minimum by the combined weight of the LSD and the blotter paper, regardless of whether it is heavy or whether it is light.

JUSTICE SOUTER: But is that an argument for saying, well, in the LSD case, you approved of incoherence and irrationality, therefore, you want to do it across the board? I mean, there is still an argument here on the merits regardless of Neal that there is an incoherence between the minimum and the kind of discretion that you're talking about.

MR. NACHMANOFF: Well, Your Honor, I think what Neal reflects is that there's no implicit binding policy directive in 841 itself that requires either the Commission or sentencing courts to follow in lock step on a graduated proportionate scheme, whatever it is that Congress decided with respect to two specific triggers should be the case.

JUSTICE SOUTER: Did we have the cliff problem in the LSD case?

MR. NACHMANOFF: Yes, Your Honor. The Court recognized that, in fact, cliffs are the inevitable results of mandatory minimums.

JUSTICE SOUTER: So we are in the same boat, then, you say with Neal in that respect, too?

MR. NACHMANOFF: Yes, and Your Honor, if I could also point out that there really is a myth here with regard to the 100 to 1 ratio as it stands now and as the Commission created it in 1987. The 100 to 1

ratio describes the relative weight of crack cocaine and powder cocaine with regard to the levels in the sentencing table; so that if you compare, for example, the 10-year mandatory minimum trigger, 50 grams of crack, that gets you to a level 32 in the sentencing table and it requires 5 kilos of powder cocaine or 5,000 grams. That's the 100 to 1 ratio.

And it is true that if one compares the low end of that table -- 5 kilograms to 50 grams, you end up with the same punishment, or likewise, if you compare the top of the range, 15 kilos to a 150 grams.

But the way the Guidelines have been written, there are a multitude of ratios that get applied right now and were applied in the pre-Booker guidelines scheme.

In other words, 14.9 kilos of powder compared to 51 grams of crack results in a 292 to 1 ratio. You get the exact same punishment, it is a level 32.

Likewise if you flip it, and you compare 149 grams of crack to 5 kilos of powder cocaine, you are still within a level 32, and it is a 34 to 1 ratio.

JUSTICE SCALIA: Maybe that was wrong. Maybe the Sentencing Commission should have, in order to be faithful to the congressional determination, should

have done it quite proportionately. I mean, I'm not hung up on what the Sentencing Commission said. I'm hung up on what the courts should do now.

MR. NACHMANOFF: I agree, Justice Scalia. And of course, the Sentencing Commission taken to the ultimate extreme would have had to have a proportionate sentencing table by gram or fraction of a gram in order to preserve the 100 to 1 ratio, which simply points out in combination with Neal the fact that this was a choice made by the Commission, a choice, by the way, not grounded on any empirical evidence or any other reason other than what 841 originally indicated.

It could have been done differently. It is done differently with regard to other drugs in 841, such as LSD or such as marijuana plants, which have a different method for calculation under the Guidelines as they do for purposes of mandatory minimums. And, of course, what that means is that there is no implicit directive, which is the only rational --

JUSTICE SOUTER: That just goes back to Justice Scalia's point. There may very well be an implicit congressional directive that the Commission did not follow.

MR. NACHMANOFF: Well -- Your Honor, Congress has a method --

JUSTICE SOUTER: It did not reject them, you are saying? So, therefore, in effect, there was a congressional ratification?

MR. NACHMANOFF: Well, Congress did not reject the original table that was created by the Commission in 1987. That is correct. But Congress also did not at any time in section 994, which is where it has given other explicit directions to the Commission to fashion guidelines in a particular way, say anything about how to fashion the punishment for crack cocaine or any of the other drugs in section 841.

So Congress understands if it wants to give further guidance to the Commission how to do it.

JUSTICE GINSBURG: Mr. Nachmanoff, in the absence of anything further from Congress, and accepting your argument that there's no -- that the Guidelines did not have to adopt the ratio that is applicable to the mandatory minimums, could a district judge then say, I see that this disparity is untenable, but I think drugs are a very bad thing, so I'm going to sentence for powder as high as for crack?

MR. NACHMANOFF: Justice Ginsburg, our rule certainly contemplates the fact that there may be circumstances in which district judges may come to conclusions about the appropriate sentence, taking into

consideration the purposes of sentencing and the parsimony provision --

JUSTICE GINSBURG: But if we throw out the 100 to 1, what is the range open to the district judge -- can he say -- 100 to 1 is okay, but I have to use the -- I'm going to use the crack for both? Or say there is a difference between the two, so I'm going to set it at 20 to 1 and another judge 5 to 1.

What is -- are all those reasonable within the position that you take in this case? Will all those have to pass muster at the court of appeals level?

MR. NACHMANOFF: Well those certainly are positions that judges could take. In this particular case, the judge was presented with information that led the court to conclude that reducing the sentence for crack based on the Commission's overwhelming empirical evidence and penological evidence and the statistical evidence that was submitted was relevant to the various factors in 3553(a), in particular the purposes of sentencing. And that the Guidelines would not be appropriate and, therefore, a lower sentence would be appropriate.

JUSTICE ALITO: What if the Fourth Circuit sees a number of absolutely identical cases exactly like Mr. Kimbrough's, and it is apparent that in one, the

sentencing judge either explicitly or implicitly has used a 1 to 1 ratio, and the next one used 20 to 1, the next one has used 50 to 1, the next one has used 80 to 1, and the next one has used 100 to 1, what is it to do under reasonableness review?

MR. NACHMANOFF: The court of appeals has been given explicit instruction by this Court that it is to review all of those sentences under an abuse of discretion, which means that its job is not to substitute its judgment for the lower court.

And if those sentencing courts have articulated reasons and have relied on relevant and reliable information --

JUSTICE ALITO: They're absolutely -- the cases are absolutely identical. Everything is absolutely identical about them, except for the sentences. Can't introduce any new variables. What is the court of appeals to do?

This is not a hypothetical situation, really. This is what courts of appeals who have to see dozens of these cases have to do. There's a policy question there. How severely should crack be treated? What is the substantive review that the court of appeals is supposed to provide in that situation?

MR. NACHMANOFF: Justice Alito, sentencing

courts now are free to consider the full range of punishment and to consider the purposes of sentencing in both issue-specific to the defendant and the offense and also general policy issues. That is the clear holding of the Booker remedial opinion and reaffirmed in Cunningham and in Rita. When judges have that full discretion to consider the Guidelines and follow the mandates of 3553(a), but then impose a sentence that meets the purposes of sentencing and is consistent with the parsimony provision, there may well be judges that come to different conclusions, as your hypothetical posits, about what people with similar or even identical records and identical circumstances may -- may do.

I would say that the reality is in the lower courts no two cases are alike, and so there are always reasons for judges to make reasoned distinctions in imposing sentences, even where, for example, the drug type and quantity is identical.

JUSTICE ALITO: Well, I take it your answer is that all or most of those cases would be affirmed under reasonableness -- under abuse-of-discretion review?

MR. NACHMANOFF: If -- yes.

JUSTICE SOUTER: If you were representing the one who got the 80 to 1 ratio you would file an

amicus brief, no error judge?

MR. NACHMANOFF: Well, Justice Souter, if the court followed the procedural requirements of 3553(a), if the information was subjected to the adversarial process, and if the court imposed a sentence consistent with the parsimony clause, it would be hard to imagine the basis upon which to object.

JUSTICE BREYER: The basis is that that would be the end of the Guidelines. I mean, that -- every judge has his own view of policy and there is a vast range. No point having advice -- I mean, fine, but I don't think this Court said it, and I think that the test is supposed to be reasonableness, and I think 3553(a) does have a lot of instructions, and one of the major thrusts is follow the Guidelines. It doesn't make them mandatory. But they're in there.

All right, so the problem for me is just what Justice Alito was saying: Is there a path here between saying, well, judge, leaving everything special about your case out of it -- we're only talking about a judge who says there's nothing special about my case -- I disagree with the policy of the Commission.

In such a case, is there a choice between saying that no matter what the Commission says, the court of appeals must insist that their district judges

follow it in terms of a policy; and the opposite, which is to say they don't have to do anything that the Commission says, because the Commission is always choosing among reasonable choices. Very rarely -- maybe you have one in this case -- but very rarely is it totally unreasonable.

How do we thread the channel?

MR. NACHMANOFF: Justice Breyer, the Booker remedial opinion makes it crystal clear that to avoid the Sixth Amendment problem with the mandatory Guidelines, judges must be free to disagree with the Guidelines.

JUSTICE BREYER: To the extent that it's reasonable, and where we're talking about individual cases we've already said, given the history of our legal system, it's very reasonable to give lots of discretion to the district judge.

Now we're talking about what's reasonable in the context of 3553(a); and I don't think Booker says one way or the other on that, nor do I believe Rita says one way or the other.

MR. NACHMANOFF: Your Honor, 3553(a) is driven by the purposes of sentencing.

JUSTICE BREYER: Driven by a Congress that wrote guidelines; and at the last minute, in a separate

matter that we've taken out and wasn't put in the initial draft added the word "mandatory." So the history of 3553(a) is a history of a statute that is seeking uniformity through guidelines.

At least that's my view of it. And for purposes of the question, which is an important question to me, let's assume that.

MR. NACHMANOFF: Well, Your Honor, the appellate courts still have a role to play and that role is to ensure that the sentencing courts have followed the mandate of 3553(a), and that --

JUSTICE SCALIA: Indeed, it may be quite impossible to achieve uniformity through advisory guidelines, which is why Congress made them mandatory.

(Laughter.)

MR. NACHMANOFF: That very well may be, Justice Scalia. In this Court, even in the remedial opinion in Booker recognized that uniformity as it was understood in the pre-Booker days would be reduced, and that there might be more sentences that have different results --

JUSTICE BREYER: In other words, I'm assuming now you have not -- you don't have a good answer to my question. You're saying either we have to make it unconstitutional, which I don't think they are,

or you have to say anything goes, and that my question has no answer in your view?

MR. NACHMANOFF: Well, Justice Breyer, your question certainly is a difficult one. Let me say this: With regard to uniformity, Congress has the power to make sentences more uniform. They can do it in a variety of ways and they have done it where they've thought it was important. They haven't done it with regard to the 100 to 1 ratio beyond the mandatory minimums or the statutory maximums.

JUSTICE SCALIA: And you don't say -- you don't say anything goes. I mean, the hypothetical that Justice Alito gave is -- is easy, only because Congress has created the 100 to 1 ratio as presumably reasonable. If Congress enacted it as a statute, it has to be reasonable.

So that enables you to say anything from 1 to 1 to 100 to 1 is reasonable. But your position is not anything goes. It's anything that's reasonable goes.

MR. NACHMANOFF: That is correct, Justice Scalia. And --

JUSTICE KENNEDY: And is "reasonable" defined as an appropriate interpretation of the congressional intent, or does "reasonable" mean

something else, like a just sentence? What -- how do we define "reasonableness"?

MR. NACHMANOFF: Well, Your Honor, I think that this has to --

JUSTICE KENNEDY: Whether or not the Commission and then the district judge reasonably interpret the congressional intent, and if the Commission reasonably interprets the congressional intent is the district court allowed to disregard that?

MR. NACHMANOFF: Sentencing courts must be able to disagree with the Commission's conclusions about congressional intent.

JUSTICE KENNEDY: Assuming the Commission was reasonable, can they still disagree?

MR. NACHMANOFF: Yes, Your Honor. I think that is the essence of the Booker remedial holding, that in order to cure the constitutional problem with mandatory guidelines, judges must be free to reject, must be free to reject those guidelines. And in fact Cunningham makes that clear, that in the California determinate sentencing area it was the inability of judges to impose a higher sentence based on the general objectives of sentencing, as opposed to particular factors or circumstances in aggravation, that made it unconstitutional. So whether the Commission concluded

that the congressional intent was to import the 100 to 1 ratio or not -- and clearly there is no statutory construction that can be inferred or understood from 841 by itself. It is not explicit and the government concedes that.

JUSTICE KENNEDY: So in your case you ask us to establish the proposition that in any case, a sentencing judge must always be free to disregard a reasonable interpretation of the Commission, a reasonable interpretation of a congressional statute?

JUSTICE STEVENS: May I interrupt before you answer? The question isn't whether they can justify a reasonable one, it's whether they can justify not following one that creates unwarranted disparities within the meaning of the statute.

MR. NACHMANOFF: That's -- that's correct, Justice Stevens.

JUSTICE KENNEDY: You would go further -- you would go further and -- and submit to us the proposition that I -- that I just stated?

MR. NACHMANOFF: Well, Your Honor, if -- if I understood it correctly, the question is whether or not when the Commission concludes this is what Congress intended --

JUSTICE KENNEDY: Reasonably.

MR. NACHMANOFF: -- reasonably -- does it somehow imbue that particular guideline with some special, binding nature. And my response would be that the Booker remedial opinion makes it clear that the Guidelines as a whole must be viewed as advisory. The government tries to argue that if some Guidelines are special and are binding, and others are advisory, there's no Sixth Amendment problem. But that ignores the fundamental principle of the Booker remedial hearing -- holding, which is that the Guidelines as a whole must be advisory and judges must be able to disagree with them. And of course here is perhaps the paradigmatic example of a time when the Commission's original guidelines got it wrong, didn't further the purposes of sentencing; and, of course, they themselves have made that conclusion, and for sentencing judges --

JUSTICE KENNEDY: But -- and I take it your submission is that the district court must be able to make the determination that the Commission's policy is to be disregarded in every case to come before the court?

MR. NACHMANOFF: Well, Your Honor, 3553(a) requires individualized sentencing. There's no question that judges are required to follow in every case the mandates of 3553(a) and to calculate the advisory

Guidelines correctly.

Now, there is no reason why judges cannot in a certain class of cases conclude that the Guideline gets it wrong; that it overstates the seriousness of the offense; that it creates an unwarranted disparity; and that they are going to impose a sentence outside of that Guideline range.

That does not in any way remove the requirement that they subject every sentencing to the adversarial process to give the parties the opportunity to convince them that the Guidelines should be followed, or not followed, or to be reconsidered.

JUSTICE GINSBURG: But Mr. Nachmanoff, I think that you are agreeing, although you don't want to come right out and say it, with Justice Scalia's point; that is, anything from a hundred to one down to one to one is open to the district judge; and within that range, there is no abuse of discretion.

MR. NACHMANOFF: Your Honor, I certainly agree that that full range is available to the sentencing court.

JUSTICE SCALIA: Only because Congress has said 100 to 1. That strikes me as utterly unreasonable. But if Congress has said it, it can't be unreasonable. That's what makes that an easy hypothetical, but that

would not be the normal case, that a 100 to 1 disparity wouldn't be -- would not be unreasonable.

MR. NACHMANOFF: Yes, Your Honor.

JUSTICE GINSBURG: In any case, your answer is anything from what Congress has said, down to one to one, would be a reasonable sentence that would be -- that would pass muster on appeal because it is not an abuse of discretion.

MR. NACHMANOFF: Well, if I can be clear, Justice Ginsburg, sentencing courts must have available to them the full range of punishment as defined by Congress. And that range, for purposes of 841, are broad ranges based on triggering quantities at 5 grams and 50 grams for crack cocaine. Within those ranges, as long as the court follows the requirements of 3553(a), considers all the purposes of sentencing, engages in an individualized sentencing process, and relies on relevant and reliable information, there would be no basis under an abuse-of-discretion review to reverse the sentencing court in that instance.

JUSTICE GINSBURG: But you've given me a bunch of hand holds that, quite frankly, are quite easy for a district judge to say: Here's my laundry list; and I'm going to go through every one of them; but in the end I think the ratio should be 20 to 1; and that's

what I'm going to impose.

MR. NACHMANOFF: Well, again, Your Honor, Congress certainly has the power to cabin that discretion. They just need to do it explicitly, and they have not done so.

JUSTICE GINSBURG: So -- Congress not having done that, then the range is open to the district judges, 100 to 1 to 1 to 1.

MR. NACHMANOFF: That's correct, Your Honor. If I may reserve the remainder of my time for rebuttal.

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

ORAL ARGUMENT BY MICHAEL R. DREEBEN

ON BEHALF OF THE RESPONDENT

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

The question in this case is essentially, can a district court reasonably disagree with the judgment of Congress concerning the ratio between the quantity-based sentences for crack and powder?

JUSTICE STEVENS: Mr. Dreeben, can I ask a question right at the outset that is critical for me? I think this case may well be controlled by the decision in Neal against the United States, which is not cited in the government brief and wasn't cited in the blue brief.

But there the Court held that a policy judgment by Congress fixing mandatory minimums on the basis of the weight of the carrier rather than the drug did not justify guidelines based on that ratio -- based on the same principle -- if that would produce unwarranted disparities.

And, as I understand the facts of this case, the Commission has told us actually in some of its reports that the 100 to 1 ratio does produce unwarranted disparities. Therefore, we should disregard the entire Guideline as we did in Neal, and the reason that Neal seems to me is controlling in this case.

MR. DREEBEN: Justice Stevens, let me start with the Neal decision, because I think Neal is fundamentally unlike this case. In Neal this Court had to determine whether its prior construction of a statute, section 841, survived the Commission's decision --

JUSTICE STEVENS: But that is a construction of what Congress intended, and for purposes of decision we assumed that Congress intended what we held the statute meant.

MR. DREEBEN: Justice Stevens, the only question presented in Neal was, did the Commission's weight guideline for LSD require this Court to change

its interpretation of section 841? And the Court held no.

There was no question before the Court about whether the Sentencing Commission had legitimately adopted a different formula than the mixture or substance rule that this Court had held governed the statute.

The LSD guideline was not in play in Neal. The government never challenged it. Its rationality was not at issue. All the Court had to hold was that whatever the Sentencing Commission did --

JUSTICE STEVENS: The case does hold that a guideline that does not conform with a congressional judgment merely expressed in a mandatory minimum is a guideline that would survive.

MR. DREEBEN: Well, I disagree with that, Justice Stevens, because no one challenged the Guideline in Neal. There was nothing at issue in the Court to decide about whether that Guideline was valid. But even if the Court thought that Neal does involve some sort of a principle that the Sentencing Commission has greater freedom to vary from the procedures laid out in a mandatory minimum sentencing statute, Neal does not control this case, because there is more data about what Congress intended the ratio between crack and powder to

be, and because Congress changed the basic, organic statute that governs the Sentencing Commission's --

JUSTICE STEVENS: Yes, but there's also more data that the Commission has reflected on all this and still concludes that the 100 to 1 ratio creates an unwarranted disparity which is contrary to the statute.

MR. DREEBEN: Well, the statute itself, section 841, establishes the ratio of a 100 to 1. When the Commission first considered creating drug guidelines --

JUSTICE STEVENS: It establishes the ratio for mandatory minimum purposes only, is what Neal held.

MR. DREEBEN: Well I disagree with that, Justice Stevens, and I'm trying to explain why the legal context is different from the legal context in Neal.

Let me start with a couple of points about this. First of all, when the Commission promulgated the drug Guideline initially, it conformed it to the 100 to 1 ratio that existed under the mandatory minimum sentencing statute, because it recognized -- and these were the Commission's words -- that a logical and coherent sentencing scheme required that there be consistent proportionality throughout the sentencing process.

When the Commission later studied the

crack-powder ratio and concluded that Congress had gotten it wrong and, therefore, the Commission, itself, had gotten it wrong by conforming to what Congress did, it proposed a Guideline that would have changed the ratio for Guideline's purposes only to one to one between crack and powder.

And Congress, for the first time in the history of its review of Guidelines amendments, rejected that proposal; and it did so with legislation that made clear that it believed that if the Commission wanted to come back with something new, it should propose something that would change both the Guidelines and the sentencing statutes so that they would continue to work in tandem, that it would preserve a higher ratio of punishment for crack than powder because it believed that crack was more serious, and that it believed that any ratio should apply consistently across the Guidelines and the sentencing statute.

CHIEF JUSTICE ROBERTS: And if -- you're talking about Public Law 104-38?

MR. DREEBEN: That's correct.

CHIEF JUSTICE ROBERTS: Well, they also said, quote, "The sentence imposed for trafficking in crack cocaine should generally exceed the sentence for powder cocaine."

MR. DREEBEN: Correct.

CHIEF JUSTICE ROBERTS: Well, that's fine, but that's pretty far from 100 to 1. "Generally exceed," it suggests to me that Congress itself, in terms -- you are relying on this implicit directive from Congress. And that's the latest expression of congressional implicit direction, and it just says "generally exceed." So, you know, two to one.

MR. DREEBEN: This, Mr. Chief Justice, is what Congress instructed the Commission to consider in making recommendations to change the existing state of the law.

We don't dispute --

CHIEF JUSTICE ROBERTS: Well I know, but you are relying on an implicit directive anyway. So if you are looking at that vague direction, it seems to me that their last expression on what they wanted the Commission to do is more probative than a much older pre-existing 100 to 1 ratio.

MR. DREEBEN: But they have never changed the 100 to 1 ratio. And what I think is significant about this statute is what it continues to say, and this is on page 24a of the government's brief -- that "the recommendations concerning an appropriate change to the ratio that the Commission might believe is warranted

shall apply both to the relevant statutes and to the Guidelines." This is on the carryover sentence on pages 24-A to 25-A.

And what I think that this reflects is Congress's recognition that, so long as the mandatory minimum statutes are pegged at 100 to 1, the Guidelines need to follow suit. Now if they're going to change, that's fine. But they should change in a manner that's consistent so as to avoid unwarranted disparities between defendants who are governed by the literal mandatory minimum statute and defendants who are not.

The alternative is you end up with various serious cliff effects which the Commission itself was trying to avoid, where a defendant who has 50 grams of crack is sentenced to a minimum of 10 years. But if you drop the ratio to one to one, a defendant who has 49.9 grams --

JUSTICE STEVENS: But those are the same cliff effects that are the product of Neal, precisely the same.

MR. DREEBEN: But this Court didn't consider whether those cliff effects were legally valid in Neal because it had no guideline before it. And I did want to get to the other point that I think distinguishes the legal context in Neal from the legal context today, and

that is, in 2003, Congress amended the organic statute that governs the Sentencing Commission's promulgation of Guidelines to require that the Commission make its Guidelines consistent with all pertinent provisions of the United States Code.

At the time of Neal, that statute only required the Commission to be consistent with Title 18 and Title 28, and the drug statute is found in Title 21. And the legislative evolution of this provision reflects that there was concern that the Commission did not have to honor --

JUSTICE STEVENS: In response to that statute, did the Commission revise the Guideline that was involved in Neal?

MR. DREEBEN: It did not, and the government --

JUSTICE STEVENS: Shouldn't it have done it?

MR. DREEBEN: I think it should have, and I think that the Commission's decoupling of its guidelines from the mandatory minimums that Congress has provided produces an irrational disconnect between Guideline sentencing and sentencing --

JUSTICE BREYER: Well, that's because of the cliff. But the cliff is undoubtedly a negative, but the cliff is not as important as sometimes suggested, for

the numbers after all, which relate punishment to amounts of drug, reflect, (a), more seriousness than what you have -- I mean more people likely to take it -- but also the role that the person is likely to play in the organization, high or low, and the likelihood that he is or this -- these groups of people are big deal offenders or not, and many other things.

Therefore, a system that really is basically flat or only rises slowly until you get to the cliff, and then it again rises slowly to the next one, is not an irrational system. It depends on what those other correlations are. I say that because suppose a judge, noticing the horrendous effects of this -- that the Commission itself has listed and understanding that cliffs are not the end-all and the be-all of Guidelines that are rough correlations, suppose a judge said: My system, which we have before us, which doesn't have the absolute numerical progression, is far more reasonable than the Commission's system. There it is. He's reviewed the Commission's policy.

Well, Rita says sometimes courts could. And so what is the law that forbids the judge from doing that, at least on occasion?

MR. DREEBEN: Justice Breyer, as a general matter, the government accepts that the sentencing judge

can revisit, challenge the Sentencing Commission's policy determinations as an intrinsic feature of an advisory guideline system. It's not because we welcome that result, but because we think that it followed from this Court's decision in Cunningham and then was expressly stated in Rita.

But this is not an area where the sentencing courts would be merely second-guessing a commission judgment. They would be second-guessing a judgment of Congress itself.

JUSTICE BREYER: No, because Congress has nowhere said that you can't have cliffs.

You see, Congress could say, our rough judgment is that 5 Gs of hard -- of crack really is kind of a correlation with a medium-level gang, and 50 Gs is probably a correlation with a fairly high-level gang. And what has Congress actually thought about this? Nothing. They never thought about it.

So I can't find an instruction there that tells the Commission that they can't do it this way.

MR. DREEBEN: But, Justice Breyer, the one time when the Commission tried to do that --

JUSTICE BREYER: They wanted to abolish the whole thing.

MR. DREEBEN: They wanted to make it one to

one, and Congress recognized that that would produce severe cliffs and said not appropriate; if you want to change the sentencing statutes and Guidelines in tandem, that's fine, make a recommendation. And so the government's fundamental position here is that Congress has made a judgment that until it says otherwise, sentencing ratios of 100 to 1 are appropriate to reflect the increased harms of crack.

JUSTICE SOUTER: Isn't your answer also to Justice Breyer's question the post-Neal amendment to the statute which in effect says, you know, make your Guidelines consistent with the statute?

MR. DREEBEN: Yes, it --

JUSTICE SOUTER: Quite -- quite apart from the specific rejection of the proposal they came up with.

MR. DREEBEN: The two of them work together in tandem, I think.

JUSTICE BREYER: Why? Why? That's my question. Everyone's assuming that "consistent with the statute" means a sentencing system that's smooth without cliffs. And I'm sure every mathematician would agree with you, but I'm not at all certain that prosecutors and defendants who have actual experience in this would agree with you, because there are lots of arguments that

it's perfectly consistent with the objective of the statute to have a few cliffs.

MR. DREEBEN: Well, I think I want to rely on what the Sentencing Commission itself did before it concluded that it disagreed with the 100 to 1 ratio in the statute. And this is set forward -- forth at page 50A of the same brief, the Kimbrough brief. This was the Commission's original commentary where it explained, in the first full paragraph, how it set the base offense levels for drug crimes. And it said that it set them because they were either provided directly by section 841 of Title 21 or, quote, "are proportional to the levels established by statute," and it said, further refinement of the drug amounts beyond those mandatory minimums was essential to provide a logical sentencing structure for drug offenses. And I think what the Commission --

JUSTICE SCALIA: Well, that's fine, and the 1993 statute that you said, that you referred to, did indeed require the Guidelines to track the -- the statutory prescriptions for sentencing.

MR. DREEBEN: It's 2003, I believe.

JUSTICE SCALIA: Pardon me?

MR. DREEBEN: 2003. I'm sorry. I misspoke.

JUSTICE SCALIA: 2003.

But -- but the fact remains that the

Guidelines are only guidelines and that still doesn't -- doesn't convert to an obligation for the district courts to follow that scheme so long as that scheme is only reflected in the Guidelines. The Guidelines themselves are still just advisory.

MR. DREEBEN: What distinguishes this area, Justice Scalia, I believe, from other guidelines is that the backdrop for sentencing for drug crimes is a mandatory minimum statute that goes directly to the sentencing court. It's not subject to the Commission's intervention and it's not subject to a district court's power to disagree with. The sentencing court must use a 100 to 1 ratio in applying the mandatory minimums.

JUSTICE SCALIA: Well, why don't you just skip the Guidelines and say that the effect of the sentencing statute is to make it unreasonable for a sentencing judge -- never mind the Guidelines -- to do anything other than follow the 100 to 1 prescription that Congress has established?

MR. DREEBEN: Well, I'm happy to do just --

JUSTICE SCALIA: I don't know what the Guidelines add to -- to your game except another -- another stage.

MR. DREEBEN: Well, if -- if it's sufficient for the Court that section 841 itself establishes the

100 to 1 ratio and that's something that's off-limits for the district courts to disagree with, I'm content.

I think there is additional data that indicates that Congress vetoed attempts by the Sentencing Commission to vary from that range and made it clear that the Guidelines formulations and the statute worked in tandem, which together expresses a notion of quantity proportionality tied to the 100 to 1 ratio.

JUSTICE SCALIA: Well, I would say that that statute reflects Congress's desire that sentencing, whether it's through the Commission or not, be based on the 100 to 1 ratio.

MR. DREEBEN: And I agree with that, Justice Scalia. And the upshot of disagreeing with that, which is what various district courts have done but no court of appeals has endorsed, is that every district court could come up with its own ratio and that that ratio would have to be accepted as reasonable so long as there is a cogent, logical data support for it. And here --

JUSTICE STEVENS: But is it not true that that only affects about 20 percent of the crack cocaine cases, because they say -- maybe I'm wrong on this -- that 80 percent of the sentences are actually fixed by the mandatory minimum?

MR. DREEBEN: There's a floor in the mandatory minimum, but I think that there are quite a few sentences that are above the mandatory minimum and there are sentences that are below the mandatory minimum. And in those cases --

JUSTICE STEVENS: I was -- and correct me if I'm wrong. I was under the impression that 80 percent of the sentences that are actually imposed are at the mandatory minimum.

MR. DREEBEN: I didn't get that out of my attempt to plumb the data, Justice Stevens. The Sentencing Commission's most recent report has a chart that didn't, to my mind, break down adequately the figures so I could answer your question.

But I do think that, even if it's true, even if 80 percent were at the mandatory minimums, that would mean that as to those 20 percent that are not governed by a mandatory minimum, you could have one district judge say, I'm going to use one to one, like the Commission proposed in 1995. Another could say I'm going to use five to one, like the Commission proposed in 1997. A third could use 20 to 1, as the Commission proposed in 2002. And each one of those would have a reasonable --

JUSTICE STEVENS: Isn't there another

alternative? If the district judge concluded, as some scholars have, that the 100 to 1 ratio itself creates unwarranted disparities, could not a district judge sentence by just disregarding the guideline for this particular substance? And then use just ordinary principles, what's appropriate sentencing in this case.

MR. DREEBEN: I don't think so, because I think here we're talking about a matter of statutory construction. Because the courts of appeals are reviewing sentences for reasonableness.

JUSTICE STEVENS: You have a conflict in the statute. One says follow -- await the guideline. Another says avoid unwarranted disparities.

MR. DREEBEN: No. That wasn't the two statutes I was thinking of. What I was thinking of is that Congress itself has said a 100 to 1 disparity --

CHIEF JUSTICE ROBERTS: No, Mr. Dreeben, your office used to argue that when Congress wants to do something, there's a way to do it. They pass a law through both houses, and then the President signs it. And that's the only way they can give legal effect to their intent.

But now you are arguing that there's some binding intent simply because they set mandatory minimums and mandatory maximums that carry beyond that.

I'm wondering how that's consistent with the positions the office has taken before.

MR. DREEBEN: Our position here, I think, is consistent with our view that you read statutes both for what they say and for what they mean. And here we are not relying just on section 841, although I'm certainly happy if members of the Court believe that 841 alone dictates a proportionality rule, I'm also relying on the fact that Congress vetoed the Commission's attempt to break apart the Guidelines and the sentencing statute --

CHIEF JUSTICE ROBERTS: So we should read a negative pregnant in the Congress's vetoing of what the Commission wanted to do?

MR. DREEBEN: At least the Court should do this much, that when a court of appeals is reviewing for reasonableness a sentence imposed by a district judge, the court of appeals should refract the section 3553(a) factors through Congress's existing judgment that a 100 to 1 ratio is warranted.

JUSTICE BREYER: If Congress passes a statute that says a mandatory minimum sentence of eight years for possessing a 12-inch shotgun unlawfully, does that mean it wants four years for a 6-inch shotgun?

(Laughter.)

MR. DREEBEN: It doesn't. But, Justice

Breyer, that's, for two different reasons, not an apt analogy for this. First of all, Congress applied the 100 to 1 ratio at two different points in the sentencing spectrum. And I think --

Then if there was a rational basis for viewing shotgun culpability as turning on the length of the barrel, then perhaps there would be a better analogy. But I think here what Congress was focused on was the relative culpability of crack offenders and powder offenders.

JUSTICE BREYER: At the cliff. But, of course, I've been through -- I hope not being hypnotized by numbers myself -- that these numbers reflect underlying realities that are far closer to the shotgun case than you are prepared to admit.

MR. DREEBEN: No, but I think that Congress doesn't view the Guidelines quantity determinations as being independent from its mandatory minimum determinations. And that's why it vetoed the Commission's unilateral attempt to impose a one to one ratio for guidelines --

JUSTICE GINSBURG: Mr. Dreeben, then are you saying that either the Guidelines are out of it and the statute controls, the ratio is 100 to 1, or that Congress has, in effect, made a particular guideline -- the one setting

the drug quantities -- made that mandatory? That guideline -- I mean, it sounds to me that if you must adhere to the 100 to 1, then that's a mandatory guideline.

MR. DREEBEN: They do come down to the same thing, Justice Ginsburg, in the sense that the Guideline as it exists today incorporates the 100 to 1 ratio. And I believe that Congress well understood that it was preserving a guideline that maintained fidelity and consistency with its sentencing statute while sending the Commission back to the drawing board and saying if we're going to change this scheme, let's change it in a consistent, coherent way. And every district court does not get the power to say we're going to change what Congress has prohibited the Commission from changing, even though we can't change the mandatory minimum statute.

That set Congress's policy. We are going to have to apply that in cases at the mandatory minimum. But in cases that aren't at the mandatory minimum, the position of Petitioner is basically district judges can say to Congress, you're completely wrong. And our position is that under a sympathetic attempt to construct reasonableness review that is consistent with congressional intent, a district court can't do that.

CHIEF JUSTICE ROBERTS: Why doesn't Congress -- why didn't Congress, in fact, do what you say they implicitly did explicitly? They could impose the 100 to 1 ratio throughout as opposed to simply as a minimum and a maximum. And they did not do that.

MR. DREEBEN: Because they had no reason to do it. Until this Court decided Booker, the Guidelines were mandatory. And they fully understood that by leaving in place a crack guideline that mirrored the statutory --

CHIEF JUSTICE ROBERTS: Congress has legislated in this area after Booker. They have not imposed the 100 to 1 ratio throughout the -- other than as the mandatory minimum and maximum.

MR. DREEBEN: I'm not aware that they have legislated in this area after Booker, Mr. Chief Justice. And I think that since all the courts of appeals have agreed with the single position that district courts are not free to substitute their own ratios for the 100 to 1 ratio, Congress would not have had a great deal of reason to intervene in this area.

And what this case will tell Congress and sentencing courts is within an advisory guidelines regime, can Congress make certain policy judgments and place certain limits on what a district court can do that it otherwise would have freedom to do in an

advisory range.

JUSTICE SOUTER: But that, as you say, in effect, makes a certain element mandatory. And why doesn't that come up against the same Sixth Amendment judgment that we made in Booker?

MR. DREEBEN: The only requirement, I believe, that exists under Booker is that a judge not in all cases be required to find a fact in order to exceed the guidelines range that would be based on the jury verdict alone or the admission of guilt alone.

Booker did not say that Congress had to tolerate every single policy judgment that individual district courts might make to vary upward. For example, socioeconomic status. If a particular judge felt in my courtroom college students and white collar professionals deserve an automatic bump up in their sentences above what I would give anyone else because they betrayed the advantages that they have, I think Congress could come along and say that's not right. We don't want socioeconomic status to be a variable that affects how long someone goes to prison.

JUSTICE SCALIA: It seems to me that the gap in your argument is that whatever Congress legislated, it did not legislate the manner in which you transfer this 100 to 1 ratio onto the sentencing chart.

And as your opponent points out, it isn't done proportionately. It could have been done in a lot of different ways.

MR. DREEBEN: It is done in a logically proportional manner, Justice Scalia.

JUSTICE SCALIA: Maybe. But there are other logically proportional manners of doing it. Why would the district court be bound to the particular one that the Sentencing Commission chose?

MR. DREEBEN: The Sentencing Commission at least started where Congress did, and said that --

JUSTICE SCALIA: That's fine. I'm granting that they got a start where Congress did. I'm assuming that. But why do they have to follow it through the way the Sentencing Guidelines did?

MR. DREEBEN: I don't think they do have to follow it through exactly the way the Sentencing Commission did it, because they don't -- sentencing courts today which are sentencing under advisory guidelines need not use exactly the same base offense levels when they come down to final sentencing after they've considered what the Commission has done. But what they cannot do, I submit -- and it is more of a negative -- they cannot say fundamentally the Commission has pointed this out and Congress has enacted, but the

crack and powder guidelines are way out of whack. I think that they're wrong.

I think Congress was wrong. And I'm going to do everything I can to try to eliminate that degree of disparity. And I may not be able to do everything I want to. This judge here was limited by the 120 months that was the mandatory minimum. But essentially, he, as I read the sentencing transcript, thought it was crazy for Congress to treat crack and powder differently. For a judge to say Congress is crazy, I think, is a sort of textbook example of an unreasonable sentencing factor.

The ultimate sentence will turn on how the judge applies all of the facts of the case to the particular --

JUSTICE STEVENS: Is it not a fact that this Guideline is also unique in that it was not based on a history of other similar crimes like all the other -- most of the Guidelines were? There's no expert interpretation of the history of sentencing in this particular area?

MR. DREEBEN: True. But this is an area where I don't think that Congress chose to rely on the administrative expertise of the Commission. It made its own policy judgment on crack.

JUSTICE STEVENS: Right. I understand. This

guideline is pretty much unique in that regard. It is not based on experience in sentencing in comparable cases.

MR. DREEBEN: Well, the drug guideline was based on the fact that Congress --

JUSTICE STEVENS: The 100 to 1 ratio is not based on history?

MR. DREEBEN: No. But entire drug --

JUSTICE STEVENS: Therefore, none of the guidelines relating to crack are based on history.

MR. DREEBEN: They are based on the fact that Congress made a supervening policy judgment. And in our system, the policy judgments ultimately pertaining to sentencing belong to Congress.

JUSTICE STEVENS: So there is really an entirely different rationale for defending these guidelines than any other guidelines in the system?

MR. DREEBEN: Well, there are some other guidelines where Congress has directly intervened, but my fundamental point here is that so long as Congress has made a determination that it has not changed, that it wants 100 to 1 at the mandatory minimum set points, district courts should not be free to say I think Congress got it wrong, I'm going to sentence on a different paradigm. The Commission didn't think that

was appropriate when it promulgated the original drug guideline, which is why that guideline is not based on the same sorts of empirical data that other guidelines might be deemed to be responsive to. But that only reflected that the Commission in its original guideline respected that its role was to carry out congressional policy, not to disagree with or supplant congressional policy, and so long as the Commission was operating in that vein -- which I think was correct -- it follows a fortiori that sentencing courts should do the same thing.

JUSTICE KENNEDY: Does the Guidelines supersede the parsimony provision, because the parsimony provision is general and the Guidelines -- the ratio is specific?

MR. DREEBEN: Well, I would put it differently, Justice Kennedy. I would say that Congress has made a legislative judgment that for crack purposes, this ratio is what is needed to have a sufficient sentence, and the Congress that decided that might be wrong. And if the present-day Congress decides to change that, a new policy will be established, but I think that reading the two statutes together, section 3553(a) and section 841, produces the conclusion that this is a legislative judgment of reasonableness; and

even if every judge in the Federal system holds a different personal view, that doesn't mean that the statute has validated their position over the one that Congress has expressed in Title 21, in a manner that binds sentencing courts irrespective of how the Commission sorts out its policy judgments.

JUSTICE KENNEDY: Suppose experience shows that the ratio is not consistent with the parsimony provision -- we find that over a course of time?

MR. DREEBEN: Well, I don't think that the Court can interpret Congress in section 3553(a) to make unreasonable what Congress did in section 841. I think reading all of the statutes together would produce the conclusion that Congress deemed this was the way to achieve the purposes of sentencing.

Crack is more corrosive in the inner cities. It has different kinds of problems than powder. They should be addressed in this more severe sentencing manner, and if that's a policy judgment that warrants being revisited, the appropriate body to do it is Congress, not each individual sentencing judge, formulating his or her own ratio, subject to blanket affirmance by the court of appeals.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you,

Mr. Dreeben.

Mr. Nachmanoff, you have three minutes remaining.

REBUTTAL ARGUMENT BY MICHAEL S. NACHMANOFF
ON BEHALF OF THE PETITIONER

MR. NACHMANOFF: Thank you, Mr. Chief Justice.

If I can respond, Justice Stevens, I think -- you asked about the percentage of cases in crack that are at the mandatory minimum or near it. I would point the Court to page 33, footnote 10 of our opening brief. It is approximately 70 percent or just over that that hit at the mandatory minimum or just one or two levels above that.

So the large majority of cases involving crack cocaine end up being subjected to the mandatory minimum.

With regard to the government's argument regarding section 994(a) and the fact that direction was given to the Commission to be consistent with pertinent statutes, of course, that's reflected in section 5(g) which says that mandatory minimums trump the Guidelines, and the Commission recognizes that and of course sentencing judges recognize that, and Judge Jackson recognized it here.

To suggest that Judge Jackson concluded that Congress was crazy, I think is unfair. What Judge Jackson did was, in a very reasoned opinion, explained that the information from the Sentencing Commission, which has been persuasive not just to Judge Jackson, but to judges across the country and to many others, was that the 100 to 1 ratio overstates the seriousness of the offense, and he understood that Congress had spoken clearly with regard to mandatory minimums, and he honored them.

Finally, Mr. Chief Justice, you point out the heart of the problem with the government's case. Congress has not spoken explicitly in the way the government suggests. They are --

CHIEF JUSTICE ROBERTS: But I was wrong that they legislated after Booker.

MR. NACHMANOFF: Well, Your Honor, Congress has failed completely to address this particular problem, and they have understood since Booker that if they wanted to address the issue of the discretion that sentencing courts must have with regard to the advisory guidelines, they have a way of fixing the problem. They can change the statute. And so long as they then require the government to include in the indictment and prove to the jury beyond a reasonable doubt the specific

drug type and drug quantity over and above the current mandatory minimum and maximums, they're free to do that, and there would no Sixth Amendment problem and there would no problem with the advisory guidelines.

In other words, right now, the government simply alleges that a person engaged in the distribution of either 5 grams or 50 grams of crack cocaine -- that's what they have to do to meet the thresholds for the 5-year and the 10-year mandatory minimum -- in virtually every case the government will present evidence or a court will find under relevant conduct that there was some greater quantity. And if the government's theory were to be accepted, those guidelines would be mandatory, and it would be in direct conflict with the remedial holding in Booker to require courts to adhere to that, absent the procedural protections which are not currently in place.

Judge Jackson did it right in this case. He imposed a sentence consistent with the parsimony provision and the purposes of sentencing and all of the factors in 3553(a).

He imposed a long sentence, 15 years, but he honored Congress's explicit mandates, and we would ask the Court to reverse the court of appeals and affirm the district court.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Nachmanoff. The case is submitted.

(Whereupon, at 12:06 p.m., the case in the above-entitled matter was submitted.)