IN THE SUPREME COURT OF THE UNITED STATES

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BRIAN MICHAEL GALL, :

Petitioner :

v. : No. 06-7949

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 10:03 a.m.

APPEARANCES:

JEFFREY T. GREEN, ESQ., Washington, D.C.; on behalf of the Petitioner.

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

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P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Green.

ORAL ARGUMENT OF JEFFREY T. GREEN

ON BEHALF OF THE PETITIONER

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

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 Gall to be an individual who had fully rehabilitated himself by having voluntarily withdrawn from a conspiracy five years earlier, by remaining crime-free throughout that period, by having rid himself of his addictions, by having graduated from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

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

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

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

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

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

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

(Laughter.)

MR. GREEN: It is -- it is an abuse-of-discretion standard, to be certain.

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

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

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

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

MR. GREEN: No. I would say -- well, let me -- the district court certainly was not irrational in our view.

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

MR. GREEN: Yes.

JUSTICE ALITO: -- that that approach is irrational?

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

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

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

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

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

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

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

that individual is never charged to begin with.

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

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

JUSTICE SCALIA: Lex Luthor might.

(Laughter.)

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

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

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

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

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

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

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

MR. GREEN: No.

JUSTICE SCALIA: I mean, you're not saying that a reasonable person couldn't have found the opposite. You're just saying that a reasonable person could have found what this district judge found.

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

JUSTICE SCALIA: So why don't you just swallow all these things and say, yes, I suppose a court of appeals could say that, but --

MR. GREEN: I -- I --

JUSTICE SCALIA: -- but my point stands?

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

(Laughter.)

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

--

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

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

JUSTICE BREYER: That's the problem.

CHIEF JUSTICE ROBERTS: No, in a typical abuse of discretion review, you still have -- for example, if you have a judge in -- well, let's say you have a judge; in one case he says because this is a -- a young defendant, I'm going to give him a lighter sentence; and in the next case says, you know, I don't think age is a factor that I should consider in the case; in the next case he says it is and then not. Each -- all of those cases, I take it, are upheld under your view on appellate review.

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

CHIEF JUSTICE ROBERTS: So there can be

substantive review for consideration of age?

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

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

MR. GREEN: -- explain why --

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

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

JUSTICE SOUTER: Now, why --

MR GREEN: If somebody said --

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

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

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

JUSTICE SOUTER: Then wouldn't you -- wouldn't there be at least under the Chief Justice's hypothetical, wouldn't there be a possibility of looking to those other cases rather than just automatically affirming on -- on abuse review?

MR. GREEN: There would be.

JUSTICE SOUTER: Okay.

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

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

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

CHIEF JUSTICE ROBERTS: Isn't that exactly --

MR. GREEN: Certainly they have --

CHIEF JUSTICE ROBERTS: Isn't that exactly

what the Sentencing Commission did in establishing the Guidelines?

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

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

MR. GREEN: Exactly.

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

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

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

MR. GREEN: Certainly.

JUSTICE KENNEDY: Consistently with the Sixth Amendment?

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

JUSTICE GINSBURG: How?

MR. GREEN: If the unwarranted --

JUSTICE GINSBURG: How can it fix the --

JUSTICE STEVENS: May I ask this quick question? Why couldn't, if there is some kind of substance to the standard of reasonableness, why couldn't a court of appeals in a particular circuit say that -- if one judge relies on age, at 19, and the other judges do not, why couldn't the court of appeals say that one of those two positions is unreasonable?

MR. GREEN: Or a court of appeals could -- yes, I think it could do that if they ask for an explanation.

JUSTICE STEVENS: And isn't there a possibility that there'd be a common -- some sort of a common law of reasonableness developed through the public process?

MR. GREEN: I think that's correct. A

common law --

JUSTICE SCALIA: And another circuit would develop the opposite. I mean, this circuit would say that 17 is unreasonable. The other circuit would say that 19 is unreasonable. And we would have to sort out all these things ultimately, right?

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

JUSTICE SCALIA: Be kind of a sentencing review court?

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

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

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

JUSTICE GINSBURG: But you said -- you said

before that, and very definitely, that Congress could fix the case of where one judge said, I'm always lenient on 17-year-olds and the other said, I throw the book at him. You said yes, Congress could fix that. Well, how other than in the way that Justice Alito just proposed?

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

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

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

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

JUSTICE ALITO: Based on what? Why could it

-- why can't it delegate the authority if it can do it itself?

MR. GREEN: Well, it could delegate the authority. There's no doubt about it. And this Court has said it's all right for Congress to delegate the authority to the Commission. But the problem, Justice Alito, comes whenever we limit the statutory continuum from zero to the statutory maximum sentence, if we overlay a consideration. If on the extraordinary circumstances test we make the Guidelines the benchmark and we tether or we measure from the Guidelines, we have then set a kind of statutory range.

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

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

MR. GREEN: Certainly.

CHIEF JUSTICE ROBERTS: Now, if they can consider a broader range of cases, what's so bad about suggesting that if a particular case is way out of what their broad review shows, if the broad review shows that in most cases this type of defendant gets 5 years and in this particular case, the judge gave him 30 years or gave him zero, what's wrong with suggesting that that is a factor they should at least start with in saying something's unusual about this case, we ought to take a closer look?

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

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

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

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

difference -- to justify the difference?

MR. GREEN: Certainly the court should look at the reasons and should look to see whether or not the reasons are rationally grounded in Section 3553(a). But our position is once they are, that's -- that's the end of the matter.

JUSTICE GINSBERG: When were they --

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

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

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

What we have now is a -- on this extraordinary circumstances test is a -- and this case

is a perfect example of substitution of judgment. Here the --

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

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

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

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

We have another case out of the -- recently out of the Eleventh Circuit, Valdes, in which -- in which the court departed upward on the ground of the fact that the check that had been written that -- the fraudulent check that had been written, had been written to the district court. And so the court was angry that

its own court had been -- or the neighboring court had been duped.

JUSTICE SCALIA: You think that's unreasonable?

MR. GREEN: I do think that's unreasonable, Your Honor. I'll go that far. I'll admit that much. Certainly that's not like the famous Yankees and Red Sox example. That's not rationally grounded in Section 3553(a) factors.

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

MR. GREEN: No.

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

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

JUSTICE BREYER: What in your opinion is supposed to happen if we have -- Guidelines are part of 3553(a), a part of it -- voluntary or not, they're referred to, so -- and I understand how you would deal with this. If the district judge's sentence rests upon his view of the facts, the appeals court is supposed to say it's the district judge that counts here.

MR. GREEN: That's right.

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

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

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

MR. GREEN: I would find such an absolute policy disagreement difficult as well, Justice Breyer. And the reason why it's difficult is because it is not sentencing in accordance with Section 3553(a). Section 3553(a) requires consideration of the individual characteristics of the defendant and the facts and circumstances surrounding the crime.

In Koon, this Court --

JUSTICE BREYER: Wait, wait, wait, wait.

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

MR. GREEN: Exactly.

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

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

MR. GREEN: The words should be these with respect to policy judgments: The district court may

consider policy disagreements with the Sentencing Guidelines or may disagree with the policies stated in the Sentencing Guidelines or underlying those Guidelines, as long as that disagreement is rationally or reasonably grounded in the facts of the case, that it fits the circumstances of the case.

And in so doing --

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

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

JUSTICE SCALIA: Which yes and which no?

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

But under Section 3553(a), Justice Scalia, that has to be rationally grounded in the case before

them. This --

JUSTICE SCALIA: It has to be relevant to the case, of course.

MR. GREEN: Certainly.

JUSTICE SCALIA: Of course.

MR. GREEN: Relevance and rational --

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

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

JUSTICE SCALIA: I see. It must follow the Guidelines.

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

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

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

JUSTICE SCALIA: This case involves cocaine.

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

Isn't that what you are saying?

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

JUSTICE SOUTER: Then what is it in the

facts of this case that is crucial to the appropriate determination?

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

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

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

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

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

JUSTICE SOUTER: Sure. But if the reasoning that you just articulated is reasoning that should be accepted, it's reasoning that should be accepted in every case. And it -- i.e., the mind is less -- the brain is less developed in the case of everyone under a certain age.

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

That's rejection of the policy.

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

JUSTICE SOUTER: You're saying that if a judge disagrees as a general matter of policy, once in a while he could make an exception to his disagreement.

But it's still, it seems to me, on your reasoning, that he has rejected the policy with respect to a certain class of defendants.

MR. GREEN: Well, he -- he may have rejected it -- if -- I wouldn't even dare say that in a multiplicity of cases. He may have rejected it in this particular case and said, I see a defendant in front of me who is immature, as mature as the other defendants, and this study backs me up.

And I'd like to reserve the reminder of my time for rebuttal.

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

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

MR. GREEN: Because --

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

MR. GREEN: Because it -- because it sets a presumptive sentence and that presumptive sentence is

exactly like -- is the Guideline sentence. And it says to the district court: You must overcome a presumption against a sentence that is some unspecified distance from -- from the Guidelines. We don't know because we can't estimate exactly how far it's from.

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Green.

MR. GREEN: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN,

ON BEHALF OF THE RESPONDENT

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

Appellate courts confronted with the task of conducting reasonableness review need some benchmarks

for how to distinguish between sentences that are outside the Guidelines and reasonable and sentences that are outside the Guidelines and are not.

The question presented here is whether an appellate court can reasonably decide that it should take a harder look at a case that is significantly or extraordinarily outside the Guidelines and look to see whether that sentence is supported by --

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

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

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

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

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

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

JUSTICE STEVENS: I think some of the courts of appeals seem to.

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

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

JUSTICE SCALIA: What if -- what if the sentencing judge simply disagrees with the Guidelines? He just simply disagrees with the severity of the

sentence that the Guidelines impose. He's free to do that, isn't he?

MR. DREEBEN: He is, Justice Scalia.

JUSTICE SCALIA: And so long as that disagreement is reasonable, so long as another sentencing commission might indeed have imposed the lower sentence -- for antitrust violations, if indeed all the Federal courts before -- before the Guidelines came into effect were rarely imposing any prison sentences, how could you say it would be unreasonable for a district judge to say, I simply agrees with what the Guidelines -- with what the Sentencing Commission did, and I agree with all of those sentencing courts before then, which -- which thought only in a rare case should there be jail time? How could you possibly say that that's unreasonable?

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

I start with the proposition that this Court adopted reasonableness review in Booker as a means of helping to achieve Congress's objective of increased uniformity without attempting to attain the degree of

uniformity that had prevailed under the mandatory system.

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

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

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

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

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

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

JUSTICE SOUTER: You're saying that there's a fairness component in the Guidelines in reasonableness review.

MR. DREEBEN: I'm saying that --

JUSTICE SOUTER: When you start talking about disparity, you're talking about a fairness across a range of sentencing as it is actually imposed.

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

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

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

MR. DREEBEN: I actually view it as the

broader category but I think the two of them work together.

JUSTICE SOUTER: Okay.

MR. DREEBEN: This is the fundamental difference that I think exists between what Petitioner is offering and what the government is offering. We all agree that irrational sentences and procedurally defective sentences are to be set aside on reasonableness review. But where we disagree, I think, is whether a judge on a court of appeals panel can look at the results reached by the district judge and conclude, this is an excessive sentence on the facts of this case.

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

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

MR. DREEBEN: Unless, Justice Scalia, the

judge offers sufficiently cogent, persuasive reasons so that the court of appeals concludes that this is indeed a reasonable sentence, given the reasons that the judge has articulated as a matter of policy and the facts before him.

JUSTICE SCALIA: Well, he did that here. He said, you know, I think a young person like this -- other people may feel differently, but I think somebody at 21 really is -- is not -- his brain isn't fully formed and we should give him another chance.

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

It's not that what the court said was wholly unreasonable, although in one respect, I think, with the emphasis on withdrawal for the reasons that Justice

Ginsburg mentioned, the judge did overstate the point. But the judge lost sight of the fact that this is a defendant who over a 7-month period engaged in a sustained drug conspiracy at age 21, not as an adolescent, and made 30 to $40,000 for that.

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

JUSTICE STEVENS: Mr. Dreeben, do you think there are any facts that would have justified probation for this particular crime?

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

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

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

JUSTICE STEVENS: I'm asking about whether in cases exactly involving the crime we have here,

whether any such cases could justify probation, where the culpability was exactly the same as there was here.

MR. DREEBEN: The only cases that I can think of -- and I was trying to get to this point, Justice Stevens -- are ones in which courts conclude that there are compelling family circumstances where individuals will be very badly hurt in the defendant's family if no one is available to take care of them, and the defendant has really devoted his activities to doing that, and there's no replacement; and the costs to society would be too high in those circumstances, courts have concluded, to justify a sentence of imprisonment.

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

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

And that's what's worrying me about the test that the circuit court gives here. It lumps together

things like what you just talked about with other things like: I don't agree with the policy of the guideline, itself. And this is a typical case and, therefore, I think we should look to try to find ways to unpack the sentence that it used, the statement -- you know, the worse it is, the worse the harder you look, et cetera, because that doesn't tell us much at all.

It suggests a proportionate test, mathematical, which must be wrong. It must be wrong because the same degree of departure could result from a view of an abuse of a vulnerable victim as could result from a total misunderstanding of what robbery is about.

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

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

MR. DREEBEN: Let me try to draw one

distinction and then make a point about proportionality that I think is not encompassed within what you said.

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

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

JUSTICE SCALIA: We should probably make them mandatory.

MR. DREEBEN: As I said to Justice Scalia, they're not mandatory, and the judge does have the freedom to challenge the judgment that the Sentencing Commission has drawn. But on appellate review, the

normal factors that go into which institutional actor is best situated to decide a question tilts in favor of a more rigorous form of review for pure policy disagreements for not only the reason that the Sentencing Commission is better, but for the reason that if you license all district courts to come up with their own broad, abstract policies, you end up with 474 sentencing commissions who are operating in each district.

JUSTICE BREYER: So, on that ground, which I understand perfectly, and were we to write that into a paragraph in the opinion, this case still, would it not, be the strongest case imaginable for discretion to the district judge?

MR. DREEBEN: I hope not, Justice Breyer. And I hope to persuade the Court why --

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

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

This judge here did not devote particularly significant consideration at all to the fact that

Petitioner sold 10,000 ecstasy pills, which have the potential for causing significant harm.

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

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

You made a distinction between a sentence could be rational but not reasonable. And I'm accustomed to understanding rationality review as equivalent to reasonableness review, but you make a distinction between those two. So I get your idea of rationality passes the lunatic test. What is reasonableness?

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

And I think perhaps the best way to illustrate the point is through a hypothetical similar to the one that Justice Kennedy posed. Suppose that a district judge, confronting Petitioner, said: You were a college student. You had every advantage in life. You were 21; you weren't a kid. You made $40,000 over seven months. And when it suited you, you pulled out,

and you did nothing to disrupt the conspiracy.

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

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

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

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

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

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

Now, I am trying --

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

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

MR. DREEBEN: Well, the question I think here is how advisory do they have to be in order to comply with this Court's Sixth Amendment jurisprudence and the remedial opinion in Booker, as I understand it,

answered that question by saying they're not mandatory, but the features of appellate review and continued existence of the sentencing commission are going to work significantly to achieving Congress's objectives of increased uniformity. And the nine courts of appeals that have adopted proportionality review, even if they may have used slightly different words to express it, are -- I think, responding to a fundamental intuition, which is how do I know if the sentence in front of me is likely to be significantly outside the norm.

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

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

JUSTICE STEVENS: Mr. Dreeben, you are saying that you admit there's no presumption of

unreasonableness merely because it is outside but there is a presumption of reasonableness if it dramatically or significantly is outside and you don't define "dramatically" or "significantly"?

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

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

MR. DREEBEN: I don't treat what I'm arguing for as a presumption, but if the Court wants to conclude that it does function like a presumption, I would still submit it is a perfectly valid presumption under these circumstances.

It is not that the court of appeals should --

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

MR. DREEBEN: Correct.

CHIEF JUSTICE ROBERTS: Now, under 3553(a), district courts have to provide reasons anyway, right?

MR. DREEBEN: They do.

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

MR. DREEBEN: Well, the presumption of unreasonableness goes a little bit farther than that, Mr. Chief Justice, because it allows the court of appeals to take notice that this is a sentence that if upheld holds the potential for unwarranted disparity. And it may be that the sentence doesn't pose that risk at all. But the reasons that the judge gave to justify that sentence should be somewhat commensurate or proportionate to the degree of the variance, otherwise you're basically back to a system where so long as the judge can go through the facts of the case and give a rational explanation of why a sentence should be at that level, there's nothing for the appellate court to do but to affirm.

JUSTICE BREYER: Why isn't that always true? A judge should always give reasons commensurate with the problem. So what if we added by saying remember give reasons commensurate with the problem? I see something we've lost. What we've lost is we've sort of pulled across the screen here a rather murky curtain called "something of a presumption," which we can't quite

define, which will lead to lawyers making endless arguments about whether this murky curtain -- they're on one side of it or the other. So let's sweep its aside. Let's get to the underlying facts.

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

JUSTICE BREYER: That's correct.

MR. DREEBEN: Which have usefully facilitated their appellate review. They didn't select the standard because they drew it out of an opinion from this Court. They selected the standard because they considered it essentially a rule of reason. The rule being that under an advisory guideline system, we must accept that there will be considerably less uniformity than under a mandatory system. That's appropriate. But we don't have to accept the proposition that materially outlier sentences that are not supported by an adequate explanation should stand. And if the courts of appeals are told, you go back to the drawing board now, you can't use any kind of proportionality test, I think that unless the Court gives them something that will allow them to distinguish between a materially out-of-guideline sentence that is reasonable and one that is not, the ultimate result will be every district judge

knowing that in their courtroom, they can decide whatever they like about the fundamental policies of sentencing, and it will stand.

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

JUSTICE BREYER: We were making progress? I thought our last discussion -- we were making progress on this very point, where we have the judgmental matters, the factfinding matters, and the pure policy matters, and we distinguished the latter from the first two.

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

MR. DREEBEN: No. I think that what the district judges need to understand is that they're not bound by the guidelines, but the guidelines remain something that is a reference point, that if deviations or variances are warranted, they should be explained, and that they should be explained in a way that's consistent with the degree of the variance. Because the alternative of wholesale abdication to the district judge to assess the individual facts of the case means that one district judge can conclude that a defendant

like Mr. Gall warrants probation, and another one can conclude that he warrants 10 or 15 years, and there'll be no remedy on appeal because it will all be very case-specific. It won't be policy driven disagreements. Most of what goes on in Federal sentencing is not fundamentally a deep-rooted policy disagreement of the nature of the kind that Justice Scalia and I were discussing, about whether white collar defendants should go to jail at all.

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

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

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

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

MR. DREEBEN: It calls for one that makes sense given the degree of the variance --

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

MR. DREEBEN: Linguistically, the words used are, you need a compelling reason for an extraordinary departure -- an extraordinary reason for an extraordinary departure or variance. So in that sense, I agree with you. But the courts of appeals have not attempted to create a mathematical grid, because such an exercise would be both contrary to the notion of advisory guidelines, and also one that is inherently

arbitrary. And that's why I said that it is unfortunately more in the nature of "I know it when I see it," but I don't think that this is as bad as the predicament that the Court found itself in obscenity cases, because it really isn't that hard to tell the difference between a variance that is a few months outside the range or even a variance in the facts of this Gall case, say down to 15 months, and a sentence that just wipes out all prison time altogether.

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

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

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

JUSTICE STEVENS: Mr. Dreeben, but supposing the guidelines provided 30 years? Would the -- a justification for probation in that case have to be just as strong as in this case?

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

JUSTICE STEVENS: Because the percentage is really irrelevant --

MR. DREEBEN: Excuse me.

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

MR. DREEBEN: Yes, I think that -- that's why I don't think you can confine it to percentage. I think if the guidelines are calling for a very substantial period of imprisonment, and a judge says, I just don't think the culpability of white collar offenders ever warrants sending them to jail, I think the better approach is you have them go out and make speeches to fellow potential defendants about how terrible their experience was, that is something that's going to produce a very widespread potential for disparity.

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

MR. DREEBEN: Yes.

JUSTICE SCALIA: Doesn't there get to be a

constitutional problem where -- where the court which is establishing these -- these ranges that you want has held, after a series of decisions, that basically you cannot get 30 percent over -- over the guideline range unless particular facts exist? And it has specified those -- those facts in prior decisions. At that point, in order to go 30, you know, 30 percent above the guidelines, that fact becomes necessary for the conviction and -- or for the sentence, and, therefore, you would need the jury to find it.

MR. DREEBEN: No, Justice Scalia. I don't think that courts of appeals conducting reasonableness review should in effect construct their own guidelines systems. They should respond to the reasons and the facts that are before them.

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

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

MR. DREEBEN: Well, I -- I think you're not accomplishing that kind of a common law system in reasonableness review for many of the reasons that the Court has already identified in describing why an

abuse-of-discretion approach is warranted. The court of appeals will not be saying that this is the maximum sentence you could give on these facts. It would say these -- this is an unreasonable or a reasonable sentence based on the policy considerations that the judge articulated and the facts that he relied on.

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

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

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

MR. DREEBEN: Well, my response -- and if I could answer Mr. Chief Justice -- is that the fundamental point of this Court's Apprendi line of cases

is that, so long as the statutory maximum is legally available to the judge, the judge can find facts within that range that justify the sentence, and that's all the Booker remedial opinion authorizes judges to do.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Dreeben.

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

REBUTTAL ARGUMENT OF JEFFREY GREEN.

ON BEHALF OF THE PETITIONER

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

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

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

It's saying to the district judge, you must demonstrate to us facts. You must come to us with facts that not only consist of explanations of reasons but are

sufficiently persuasive or compelling to overcome our natural resistance to an outside-the-guidelines sentence.

That I submit is, as articulated earlier, making the guidelines presumptive. And it imposes a factfinding requirement that is in violation of the Sixth Amendment.

Justice Ginsburg, you asked about whether the prosecutor had, in fact, heard all of the evidence with respect to -- or stated all the evidence to the district court with respect to Mr. Gall. The answer to that question is he most certainly did. And I agree with my colleague that this case is the mirror of Rita. In Rita, the district judge was presented with a wealth of facts about Mr. Rita's prior good works, his military service, et cetera.

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

And, Justice Stevens, the Eighth Circuit, even before the Guidelines, even before the Booker case,

in 1993, in 1999, in cases called One Star and DeCora respectively, went down from even higher levels to probation based upon the particular facts of the case.

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

Thank you.

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

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

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