1   IN THE SUPREME COURT OF THE UNITED STATES

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3   WILLIAM FREEMAN,   :

4   Petitioner   :

5   v.   :   No. 09-10245

6   UNITED STATES   :

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

8   Washington, D.C.

9   Wednesday, February 23, 2011

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11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 10:14 a.m.

14   APPEARANCES:

15   FRANK W. HEFT, JR., ESQ., Louisville, Kentucky; on

16   behalf of Petitioner.

17   CURTIS E. GANNON, ESQ., Assistant to the Solicitor

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

19   behalf of Respondent.

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1   C O N T E N T S

2   ORAL ARGUMENT OF   PAGE

3   FRANK W. HEFT, JR., ESQ.

4   On behalf of the Petitioner   3

5   ORAL ARGUMENT OF

6   CURTIS E. GANNON, ESQ.

7   On behalf of the Respondent   27

8   REBUTTAL ARGUMENT OF

9   FRANK W. HEFT, JR., ESQ.

10   On behalf of the Petitioner   54

11

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                                      `
14

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16

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

2   (10:14 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   first this morning in Case 09-10245, Freeman v. United

5   States.

6   Mr. Heft.

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

8   ON BEHALF OF PETITIONER

9   MR. HEFT: Mr. Chief Justice, and may it

10   please the Court:

11   William Freeman's plea agreement, his

12   presentence report, and the sentencing record all show

13   that his term of imprisonment was based on a crack

14   cocaine guideline that was retroactively lowered by the

15   United States Sentencing Commission. This case asked

16   the Court to decide whether the fact that a sentencing

17   court accepted a plea agreement under Criminal Rule

18   11(c)(1)(C) precludes eligibility for a sentence

19   reduction under section 3582(c)(2). We submit that

20   Mr. Freeman is not barred from eligibility for a (c)(2)

21   sentence reduction for several reasons.

22   First, under the ordinary definition of

23   "based upon" and in the context of this particular

24   statute, since the subsequently lowered guideline was

25   used to determine Mr. Freeman's term of imprisonment,

1   that term of imprisonment was based on the subsequently

2   lowered guideline.

3   Second, the categorical ban on eligibility

4   adopted by the Sixth Circuit and advanced by the

5   Government frustrates the purpose underlying section

6   (c)(2) and finds no support in the plain language of the

7   statute, of the rule, and under the terms of

8   Mr. Freeman's plea agreement.

9   Third, a record-based analysis that reviews

10   the plea agreement, the presentence report, and the

11   sentencing record to determine the basis of the sentence

12   is -- is best suited to correctly implement section

13   (c)(2), and it's -- that record-based analysis supports

14   the conclusion that Mr. Freeman's sentence was indeed

15   based on a retroactively lowered guideline. The -- the

16   Sixth Circuit --

17   CHIEF JUSTICE ROBERTS: If -- if we issue an

18   opinion and we analyze the statute's language, the

19   statute's purpose, and the statute's legislative

20   history, would the opinion, the judgment be based on

21   each of those or -- or not? In other words, does

22   everything that goes into the final determination, would

23   you say that determination is based on each of those

24   factors individually?

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

1   the determination certainly would be based on the

2   statute, Your Honor, but, as we've -- we've argued in

3   our brief, we've asked the Court to take what we believe

4   to be a record-based analysis and look at -- look at the

5   record in this case, look at the terms of the plea

6   agreement, look at the --

7   CHIEF JUSTICE ROBERTS: No. My --

8   MR. HEFT: I'm sorry.

9   CHIEF JUSTICE ROBERTS: I think my question

10   goes in a different direction. This plea agreement, I

11   think, could be said to be based on the sentencing

12   guidelines, but it is also based on the agreement. In

13   other words, the combination of the two of them is what

14   gives you the -- the sentence. So how can you say it's

15   based on only the sentencing guidelines when it may not

16   have been imposed in the absence of the plea agreement?

17   Probably wouldn't have been.

18   MR. HEFT: Mr. Chief Justice, we don't

19   believe that that's mutually exclusive. A sentence can

20   be a guideline -- a sentence based on the guidelines,

21   and it can be a sentence based on a C plea agreement.

22   JUSTICE ALITO: You quote one definition

23   of -- the noun "base" in your brief uses a point from

24   which something can develop, but you omit another

25   standard definition of the term, the principal element

1   or -- or ingredient of anything, considered as its

2   fundamental part. Why do you do that?

3   MR. HEFT: Well, Your Honor, I -- I think

4   the dictionary definition that we've given encompasses

5   the definition that Your Honor has just -- just

6   described. The -- and our position --

7   JUSTICE ALITO: Well, there's two -- there

8   are two different definitions. One is something that

9   provides a starting point for analysis. The other is

10   the fundamental thing on which something is -- it rests.

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

12   is --

13   JUSTICE ALITO: Now, if you use the latter

14   definition, you have to decide which is more fundamental

15   here, the agreement between the parties or the

16   sentencing guidelines, which certainly provided the

17   starting point for the analysis of the sentence by

18   the -- by the district court.

19   MR. HEFT: Justice Alito, that's correct.

20   The guidelines certainly were the starting point, but

21   they were also the principal foundation of this

22   agreement because what the agreement is --

23   JUSTICE GINSBURG: Isn't it enough for you

24   to say -- or based not in whole, but in part -- based

25   on, something could be based on several things, and one

1 of them is the guidelines that then existed?

2   MR. HEFT: Certainly. Certainly. And this

3 -- this plea agreement reflects that it was based on the

4 guidelines. If you --

5   CHIEF JUSTICE ROBERTS: Well, then are you

6 saying the plea agreement was based on the fact that he

7 was caught with -- with two guns rather than four guns?

8 Would you be willing to say that? In other words,

9 everything -- your position, it seems to me, could be

10 criticized for saying everything that contributes to the

11 final 106 months, that that sentence is based on every

12 one of those things --

13   MR. HEFT: Well --

14   CHIEF JUSTICE ROBERTS: -- which makes the

15 -- which makes the statutory language largely mute on

16 this.

17   MR. HEFT: Well, Your Honor, the -- the

18 sentence is based on a number of guidelines. Each -- no

19 sentence is based on just one guideline, as this plea

20 agreement reflects. It's based on a compilation of

21 guidelines. It's -- it's based on the crack guideline,

22 and as prior --

23   CHIEF JUSTICE ROBERTS: Well, it's also

24 based on things that are not reflected in the

25 guidelines. You've got a particular U.S. attorney who

7

1   is more lenient in prosecuting these types of crimes

2   than another one. The fact that you got the minimum

3   under the guidelines might be based on that. It's based

4   on the fact that this person felt he could handle 106

5   months in prison, and he wasn't willing to risk whatever

6   the top -- what was the top sentence under the guideline

7   calculation?

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

9   CHIEF JUSTICE ROBERTS: So he figures it's

10   better for me to get -- it's based on his decision that

11   I -- 106 months is better than the risk of 117.

12   MR. HEFT: Well, certainly there are a

13   number of factors that go into plea bargaining and

14   negotiation, but what -- I think what the court has to

15   look at is what is said in that plea agreement. And I

16   think, as Justice Ginsburg pointed out a minute ago, the

17   definition of "based on" -- if a guideline sentence

18   is -- if a sentence is based in part on the guidelines,

19   that would be adequate under the -- under section --

20   CHIEF JUSTICE ROBERTS: What sentence would

21   he have gotten if he were just sentenced under the

22   guidelines, no plea agreement?

23   MR. HEFT: He would have got the -- he would

24   have received the same sentence, Your Honor.

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

 1   we know that?

 2   MR. HEFT: Well --

 3   CHIEF JUSTICE ROBERTS: The guidelines give

 4   you a range. The judge might have given him 117 months.

 5   MR. HEFT: But -- but the plea agreement

 6   here was for the bottom of the guidelines. The parties

 7   calculated --

 8   CHIEF JUSTICE ROBERTS: No, I know. I'm

 9   putting aside the plea agreement. What would he have

10   gotten under the sentencing guidelines? We --we don't

11   know, right?

12   MR. HEFT: It would have been left --

13   left -- well, assume it depends upon the nature of the

14   plea, Your Honor. You're talking --

15   CHIEF JUSTICE ROBERTS: There's no plea. He

16   is convicted at trial.

17   MR. HEFT: It would be somewhere within that

18   guideline range. That's correct.

19   CHIEF JUSTICE ROBERTS: So how can you say

20   that this is based on the guideline range when the

21   guideline range would not have been determinative?

22   MR. HEFT: Well -- well, we're looking --

23   we're looking at the content of the plea agreement, Your

24   Honor. The -- the plea agreement says --

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

1   hypothetical is in a different context.

2   MR. HEFT: But even -- even at that, Your

3   Honor, if -- that sentence ultimately is going to be

4   based on a guideline range, and if that guideline range

5   is subsequently lowered by the Sentencing Commission,

6   then the --

7   JUSTICE SOTOMAYOR: Counsel, could you --

8   maybe it would be easier if you would describe to us the

9   situations you don't think would be based on the

10   guidelines.

11   The Solicitor General claims that since

12   every plea negotiation has to start with the guideline

13   calculation as a starting point for departure and/or

14   consideration by the judge under 6B1, that every C plea

15   agreement would be considered based on. Are you taking

16   that position?

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

18   JUSTICE SOTOMAYOR: All right. So I'll give

19   you a couple of examples, but you give me more. Would a

20   plea agreement that doesn't mention the guidelines at

21   all but picks a sentence within the actual guideline --

22   is that based on the guideline?

23   MR. HEFT: Possibly, Your Honor.

24   JUSTICE SOTOMAYOR: All right. And how

25   about one that departs or varies from the guideline, the

1   range, whichever word you want to use?

2   MR. HEFT: Your Honor, the -- the Sentencing

3   Commission, in 1B1.10 note 3, says that a

4   below-guideline sentence can be based on the guidelines.

5   JUSTICE SOTOMAYOR: So there -- the

6   Solicitor General is right; there really isn't any

7   situation that you're claiming is not based on?

8   MR. HEFT: Oh -- oh, no, Your Honor. There

9   are -- there are C pleas.

10   JUSTICE SOTOMAYOR: Give me the examples.

11   MR. HEFT: All right. Well, first of all,

12   we've cited cases in our brief where circuit courts have

13   determined that a C plea was not based on the

14   guidelines. But let me give you another example.

15   Let's just assume the guideline range is

16   something like 151 to 188 months, and then -- but the

17   parties agree to a sentence of 60 months, and they do

18   that for several reasons. First of all, maybe the

19   defendant is elderly. Maybe the defendant has serious

20   medical conditions. Maybe the defendant has -- was

21   sexually abused as a child. If those are the factors,

22   if that's the reason why the defendant got that --

23   received that 60-month sentence, that sentence is not

24   based on the guideline range.

25   JUSTICE ALITO: Well, wouldn't the

11

1   guidelines, even in that situation, provide the starting

2   point for analysis? Isn't the district court obligated,

3   and isn't the -- doesn't the presentence report have to

4   go through the guidelines calculation before the

5   sentence is imposed? So you start out with the -- the

6   guideline sentence of whatever the figure was that you

7   mentioned, and then you go from there, and maybe you

8   depart downward.

9   MR. HEFT: That -- that's true. The -- the

10   guidelines would be the starting point of any

11   negotiation, but --

12   JUSTICE ALITO: So why wouldn't that be

13   based on the guidelines? Just because there's such a

14   big downward departure?

15   MR. HEFT: It -- Your Honor, it would not be

16   based on the guidelines if those other factors were the

17   motivating reason for the imposition of the sentence.

18   JUSTICE BREYER: Sorry, I don't understand

19   that. Don't the guidelines provide for departures?

20   MR. HEFT: They do, Your Honor.

21   JUSTICE BREYER: Well -- and aren't you

22   giving a guideline sentence, if you give your reasons as

23   is required by the Sentencing Commission in 6B1.2 and

24   you say -- the judge says, I think this is a special

25   case and, therefore, I am giving a lower sentence? Just

1 as he's required to do under the guidelines in order to

2 accept a C type agreement.

3   MR. HEFT: If the parties can show that the

4 sentence is tied to the guidelines.

5   JUSTICE BREYER: Well, how could it not be?

6 Wouldn't the judge have to say it's not tied to the

7 guidelines, because I am varying and I no longer wish to

8 apply the guideline? If he doesn't say that, isn't he

9 applying the guideline?

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

11 he would be applying it.

12   JUSTICE BREYER: Whether he gives the

13 specific robbery 3-point whatever it is, 17 months, or

14 whether he says, I have a special case and I depart

15 under section 5 of the guidelines. Both of those are

16 guideline sentences, aren't they?

17   MR. HEFT: If the -- if the judge were to

18 take -- were to actually apply those guidelines and say,

19 based on that guideline, I am going to depart, that

20 sentence is based on the guidelines.

21   JUSTICE SOTOMAYOR: So from what base does a

22 judge depart downward? From the crack cocaine range or

23 from the downward departure range?

24   MR. HEFT: I think it would depend on the

25 nature of the agreement, Your Honor. It may very well

1   depend on -- the judge may depart from the crack

2   cocaine.

3   JUSTICE SOTOMAYOR: So aren't you just

4   asking us to permit district court judges to make up

5   their own C agreement, to decide what the parties would

6   have done in the absence of a higher range? And don't

7   we fall prey to sort of just asking district court

8   judges to create their own agreements?

9   MR. HEFT: No -- no, Your Honor. I don't

10   believe that's -- that's not what we are asking the

11   Court to do at all.

12   JUSTICE GINSBURG: Mr. Heft, are you relying

13   on -- this was -- this is a plea agreement that said,

14   specifically, defendant agrees to have his sentence

15   determined pursuant to the guidelines, and then the

16   judge says that he was adopting the probation report and

17   the application of the guidelines as set out therein, so

18   both the -- the defendant says, I agreed to a

19   determination pursuant to the guidelines, and the judge

20   says, I'm going to apply the guidelines in giving you

21   your sentence.

22   So the hypotheticals we're talking about are

23   quite far afield from where you have a specific

24   statement by the defendant and the sentencing judge that

25   the guidelines are being applied.

1   MR. HEFT: That is correct, Your Honor, and

2   that's why we've asked the Court not to take a

3   categorical approach to this issue, but to take either a

4   case-by-case approach or a record-based analysis, to

5   allow the district judge to determine, as Justice

6   Ginsburg pointed out, what our -- you know, what is the

7   --

8   JUSTICE KAGAN: Mr. Heft, would you require

9   those kinds of statements in the agreement or in the

10   colloquy in order to satisfy the standard? Suppose

11   those statements just didn't exist.

12   MR. HEFT: That's certainly problematic,

13   Justice Kagan. If those -- if there was nothing in that

14   plea agreement to tie the sentence to the -- the

15   sentence -- the agreed sentence to the guidelines, that

16   certainly would be problematic.

17   But that doesn't resolve the issue one way

18   or the other, because the judge would have to consider

19   the presentence report to see if there's a connection or

20   correlation between the agreed sentence and the

21   guidelines, and also the judge could look at the guilty

22   plea colloquy and sentencing transcript to see if the

23   attorneys actually expressed their intent about where

24   this sentence came from.

25   JUSTICE KAGAN: Mr. Heft, that seems very

1 complicated. You have to look at everything and you're

2 not giving us a lot of guidance as to what you do when

3 you -- when you see these things. I mean, this sort of

4 case-by-case, all-things-considered approach just seems

5 as though you're going to get a lot of inconsistent

6 decisions.

7   MR. HEFT: Respectfully, Your Honor, I

8 disagree. I think this is what district judges do all

9 the time, not just in the context of a C plea, but a B

10 plea as well. They have to look at the nature of the

11 plea agreement. They have to look at the PSR. They

12 have to look at the sentencing transcript to -- to

13 determine whether or not the defendant is -- is eligible

14 for that sentence reduction.

15   So judges are doing this routinely. They're

16 doing this --

17   JUSTICE ALITO: Well, in every case, they

18 have to go through the guidelines calculation, and the

19 parties have the opportunity to object to the

20 calculation, right?

21   MR. HEFT: Yes, Your Honor.

22   JUSTICE ALITO: So what does paragraph 12 of

23 the plea agreement contribute here, other than with

24 respect to the fine and things besides the sentence that

25 we're talking about? It doesn't seem to me to add

16

1 anything substantively.

2   MR. HEFT: I -- well, Your Honor, I think it

3 does, Justice Alito. I think it does add -- it adds

4 substance, and it adds meaning to that plea agreement

5 because in paragraph 11 where the parties very

6 meticulously go through the offense level, tie that to

7 the guidelines, and then -- then they state in paragraph

8 12, the -- the defendant agrees to be sentenced pursuant

9 to the -- to the guidelines. That's very clear that the

10 review in the guideline calculation is what the sentence

11 is based on. And --

12   JUSTICE SCALIA: Can a -- can a sentencing

13 judge be found to have abused his or her discretion in

14 approving a plea -- a C plea agreement which provides

15 for less than the minimum guideline sentence and gives

16 no -- no particular reason for that? Would that be

17 appealed as an invalid sentence?

18   MR. HEFT: Well, Your Honor, under -- under

19 section 3742, the government could -- could appeal an

20 incorrect application of the guidelines if that's what

21 Your Honor is referring to.

22   JUSTICE SCALIA: Well --

23   JUSTICE GINSBURG: But now you're talking

24 about a plea agreement, which the government has

25 consented to whatever this agreement is and whether --

17

1   whether -- sometimes a plea agreement will say okay, if

2   you take a plea, we'll drop certain charges or we'll

3   charge a small amount -- value of the drug. Was there

4   any of that in -- in this plea?

5   MR. HEFT: No, Your Honor. Mr. Freeman

6   pleaded guilty to all charges in the indictment. The

7   parties stipulated the amount of -- of drugs that were

8   found on his person when he was arrested. So there were

9   no dismissed charges, no amended charges in this plea

10   agreement.

11   JUSTICE SCALIA: Let -- let me ask my

12   question a different way. In deciding whether to

13   approve the plea agreement, doesn't the judge have to

14   consider whether it is an application of the guidelines,

15   whether it is wildly inconsistent with the guidelines,

16   whether it does not take into account valid reasons for

17   departure from the guidelines?

18   MR. HEFT: Yes. The judge would have to

19   consider the guidelines. Right.

20   JUSTICE SCALIA: Then, if that's the case,

21   then every plea agreement is based on the guidelines,

22   every single one, because the judge always has to

23   consider how do the guidelines apply to this plea

24   agreement.

25   MR. HEFT: Well, Justice Scalia,

1   consideration of the guidelines alone is not enough to

2   determine whether or not that sentence is actually based

3   on them.

4   JUSTICE BREYER: I don't understand why you

5   resist that. I mean, that's precisely what the

6   guidelines say. The only ones that aren't guideline

7   sentences are -- are dismissal charges, where it's an

8   agreement to dismiss. But a type B, type C -- the

9   guidelines themselves say that the judge, here's what

10   you do. Judge, you look and see if the guidelines

11   sentence is there. Is it a guideline sentence? If it

12   is, you can approve it. If it isn't, you can't.

13   I mean, that's my reading of what it says.

14   So -- so why do you resist that conclusion?

15   MR. HEFT: Well, Your Honor --

16   JUSTICE BREYER: And, of course, the judge

17   now could depart from the guidelines -- I mean, "vary,"

18   whatever that word -- technical word, is -- "vary." He

19   can say, I'm not going to apply the guidelines at all.

20   But if he is going to apply the guidelines, isn't that

21   what they tell him to do? I've always thought that.

22   You may tell me I'm mistaken.

23   MR. HEFT: They -- they do; obviously they

24   do consider the guidelines, but then the other question

25   is whether or not the sentence is based on those

19

1   guidelines --

2   JUSTICE BREYER: Well, how could it not be,

3   since the judge has no power if he is to apply the

4   guideline --

5   MR. HEFT: Well --

6   JUSTICE BREYER: -- to accept any agreement

7   other than agreement that corresponds with the

8   guideline? That's what it says. It says the court

9   should accept a recommended sentence or a C -- the

10   specific sentence -- only if the court is satisfied

11   either that it is within the applicable guideline range

12   or if it's based on a departure under the guidelines.

13   That seems to me what it says. Isn't that what it says?

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

15   but --

16   JUSTICE BREYER: Okay. Then if that's so,

17   every sentence is -- you're going to say no?

18   MR. HEFT: No.

19   JUSTICE BREYER: I mean, I thought that was

20   helping you, but if you want to say no, go say no and

21   explain why that is.

22   (Laughter.)

23   MR. HEFT: Your Honor, to go back to the

24   point that Justice Sotomayor made --

25   JUSTICE BREYER: Yes.

20

1   MR. HEFT: -- with the hypotheticals, there

2   still can be C pleas that are not based on the

3   guidelines.

4   JUSTICE BREYER: How?

5   MR. HEFT: Well, the example --

6   JUSTICE BREYER: Give me an example.

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

8   I gave previously.

9   JUSTICE BREYER: What?

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

11   JUSTICE BREYER: Yes.

12   MR. HEFT: But the judge bases his decision,

13   his or her decision, solely on other -- factors other

14   than the guidelines. As I mentioned earlier --

15   JUSTICE BREYER: Are we supposed to

16   psychoanalyze the judge? The judge says on his writing,

17   checks the box: This is a guideline sentence. It is

18   robbery. It is precisely within the robbery range. But

19   I -- I am going to give it the low end of the range

20   because I believe that the -- he has a lovely mother and

21   family and so forth.

22   Okay? You're saying that isn't based on the

23   guideline. No? Okay. Is that the point?

24   MR. HEFT: Well, it depends what the judge

25   does at sentencing, Your Honor.

 1   JUSTICE BREYER: What he does is he applies

 2   the guideline sentence. He has to do that. Now, within

 3   that range, he has applied the guideline sentence, he

 4   got the information. He says, I am satisfied it

 5   applies -- done.

 6   Now are we supposed to look further and say

 7   what his true reason is? Is that what you're saying?

 8   MR. HEFT: It would -- Your Honor, I would

 9   submit it would depend on the nature of the -- the plea

10   agreement, whether or not that sentence is -- is

11   actually based -- going to be based on the guidelines.

12   JUSTICE KAGAN: Well, I suppose --

13   JUSTICE SCALIA: Incidentally, and it sort

14   of bears upon this discussion, are the guidelines

15   mandatory when they are applied in approving a plea

16   agreement? In other words, does Booker/Fanfan not apply

17   to the application of the guidelines when a judge is --

18   is approving a plea agreement? Do you think the

19   guidelines are mandatory in that situation?

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

21   JUSTICE BREYER: You were -- you were just

22   at the very point when we decided Booker, is that right?

23   It was -- your -- your sentencing took place in July

24   2005 and we came out with Booker in --

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

22

1   JUSTICE BREYER: All right. So it's quite

2   possible the judge wasn't totally -- but I mean -- I

3   agree; it's much more complicated after Booker. I don't

4   know how to treat yours.

5   MR. HEFT: That's true.

6   JUSTICE BREYER: It's on the cusp.

7   JUSTICE ALITO: What if there had been

8   evidence here of that? What if the government in

9   connection with this plea agreement had dropped counts

10   or had decided not to seek a superseding indictment

11   adding counts? Would -- would the situation be the

12   same?

13   MR. HEFT: Yes. Your Honor, I think it

14   would; it would be the same. Because the court would

15   have to look at, again, what the terms of the plea --

16   plea agreement was and what the parties determined.

17   Now, the -- I think what I should emphasize is that

18   we're only talking about eligibility here; and if -- if

19   those -- if those concessions that the government has

20   made would -- would perhaps result or at least in the

21   government's view, result in an unjustified windfall,

22   that -- that's -- that is not a critical factor in

23   determining eligibility. That's not factor at all in

24   determining eligibility.

25   That could come into play after eligibility

1   is determined and the judge -- district judge determines

2   whether or how much.

3   JUSTICE ALITO: How would that possibly

4   work? Let's say the government drops count -- agrees to

5   a plea on count 1 with a guideline range of 60 to 65

6   months; drops count 2, which would have increased the

7   guideline range to, let's say, 100 to 105 months; and

8   says this is our deal, you know, you agree to -- to 65

9   months and we're going to drop count 2. All right?

10   MR. HEFT: Yes.

11   JUSTICE ALITO: And then the guideline for

12   that is lowered, and you say in determining whether the

13   defendant is eligible, what -- the government would then

14   have to have a mini-trial and prove that the -- prove

15   count 2?

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

17   JUSTICE ALITO: How would it work?

18   MR. HEFT: It would work -- assuming that

19   the defendant is eligible, the case is remanded to

20   district court.

21   JUSTICE ALITO: Right.

22   MR. HEFT: As in this case, there would be a

23   recalculation of the guidelines to determine if the --

24   JUSTICE ALITO: Right.

25   MR. HEFT -- guideline range would be

24

1   reduced, and then, as the judge said in this case said,

2   if you have objections, let me know; file your

3   objections. That's where the government could file --

4   JUSTICE ALITO: Yes. The government files

5   its objections and says, well, we dropped count 2. And

6   the defendant says, well, I wasn't guilty of count 2.

7   MR. HEFT: That's -- that's up to the

8   district judge's discretion, whether or not to -- to

9   reduce that -- that amended guideline sentence.

10   JUSTICE ALITO: How is the judge going to

11   decide that?

12   MR. HEFT: Well, the -- I think that's

13   something that district judges decide every day, whether

14   or not -- because the judge presumably has -- has

15   been -- is familiar with the case, with the presentence

16   report, with the terms of the original plea agreement,

17   with the facts of the case; and the -- and the judge can

18   make an assessment based on those factors whether or not

19   the sentence reduction should be granted and, if so, how

20   much of a reduction should be granted.

21   JUSTICE SCALIA: But Justice Alito's

22   hypothetical points out -- points up the fact that even

23   though the agreement may mention the guidelines, it may

24   do that just for the purpose of enabling the -- the

25   judge more readily to approve the agreement, but there's

1 no reason to believe that the government is interested

2 in the guidelines, as opposed to being interested in

3 putting this person away for a certain amount of time,

4 especially when another count is dropped and the

5 government says, well, I'll -- you know, I'll drop it

6 if -- if this guy goes to prison for 2 years. But if

7 the government had known he's not going for 2 years, he

8 is only going for a year and a half or a year, the

9 agreement might not have been concluded. So it

10 really -- I mean, it doesn't further the intent of both

11 parties, at least, to say when the guideline is changed,

12 the agreement changes.

13   MR. HEFT: Well -- well, the agreement

14 certainly has been -- was modified by the amended

15 guideline, and that's where the district judge has to

16 exercise his or her discretion whether or not to grant

17 that reduction.

18   JUSTICE GINSBURG: But in that event, the

19 sweet part would be open to reconsideration too. I

20 mean, you can't say, I want the good part, the lowered

21 guideline, but I also want to keep that certain counts

22 are dropped and that a certain quantity of drugs was

23 agreed upon. You would have to reopen the whole thing.

24   MR. HEFT: No, Your -- no, Justice Ginsburg.

25 I don't think you'd have to reopen the case. Again, I

1   think the judge could look at the presence report,

2   the government could make its objections saying here's

3   why we gave that particular sentence, and the judge

4   could exercise his or her discretion to say whether or

5   not the defendant is going to get that sentence

6   reduction.

7   CHIEF JUSTICE ROBERTS: Thank you, counsel.

8   MR. HEFT: Thank you, Your Honor.

9   CHIEF JUSTICE ROBERTS: Mr. Gannon.

10   ORAL ARGUMENT OF CURTIS E. GANNON

11   ON BEHALF OF RESPONDENT

12   MR. GANNON: Mr. Chief Justice, and may it

13   please the Court:

14   When a criminal defendant and the government

15   agree to a specific sentence and that agreement is

16   binding on the sentencing judge by virtue of Rule

17   11(c)(1)(C), the resulting sentence is based on the

18   parties' agreement. It is not based on the advisory

19   guideline range that would otherwise have been used at

20   sentencing, even if the sentence corresponds to that

21   range.

22   JUSTICE SOTOMAYOR: Counsel --

23   JUSTICE KENNEDY: Well, here the agreement

24   at various points says that the parties agree on the

25   calculation of the guideline. I think it's paragraph 11

1   and 12. They say that the sentence is according to the

2   guidelines. So there's reference to the guidelines

3   throughout, and the court made the guidelines

4   calculation.

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

6   JUSTICE KENNEDY: So it seems to me fair

7   under the statute to say that it is based on the

8   guidelines.

9   MR. GANNON: Well, the question --

10   JUSTICE KENNEDY: And there are other

11   provisions in the agreement you might argue about.

12   MR. GANNON: Well, I think the statutory

13   question here isn't just whether the sentence is based

14   on the guidelines. The language under 3582(c)(2) is

15   whether the defendant was sentenced to a term of

16   imprisonment based on a sentencing range that has

17   subsequently been lowered by the Commission. So it's

18   not just whether the guidelines played a role; it's

19   whether this particular sentencing range was what was

20   driving the sentence.

21   And, Justice Kennedy, you point out pages

22   25, 26 of the plea agreement in the Joint Appendix. And

23   I think it's instructive that the agreement deals

24   differently with the fine component, as Justice Alito

25   referred to earlier, than it does with the term of

1   imprisonment. At the bottom of page 25, the agreement

2   says that a fine will be at the lowest end of the

3   applicable guideline range. And then if you go over to

4   pages 27 and 28 in paragraph 11, that's where the

5   guideline calculation occurs. And notice it is an

6   incomplete calculation. The parties don't actually come

7   up with a final calculation because they don't come up

8   with a criminal history. They don't --

9   JUSTICE KENNEDY: Well, they do come up with

10   a recommendation, which is three levels below the

11   otherwise applicable guideline.

12   MR. GANNON: They -- they come up with a

13   recommendation for purposes of determining the offense

14   level, the base offense level of 22 and then reduced to

15   19.

16   JUSTICE KENNEDY: Yes, but that's all based

17   on the guidelines.

18   MR. GANNON: Well, that aspect is based on

19   the guidelines, but then the guideline application

20   computation is incomplete because the next paragraph,

21   paragraph B, says we aren't agreed on what the criminal

22   history is going to be. And to the next paragraph,

23   paragraph C specifically says that the foregoing

24   statements of applicability of sections of the

25   sentencing guidelines are not binding upon the court.

1   The defendant understands the court will independently

2   calculate the guidelines at sentencing; that is --

3   JUSTICE KENNEDY: But that doesn't mean that

4   the court can't base its conclusion on his

5   independent -- on its independent judgment on the

6   guideline.

7   MR. GANNON: Well, I think what I'm trying

8   to say, Justice Kennedy, is the agreement expressly

9   contemplates that the judge needs to determine the

10   applicable guideline range for purposes of determining

11   what the fine will be. And that's different from the

12   way the plea agreement deals with the term of

13   imprisonment because if we go back to page 26, it does

14   not tie the -- the term of imprisonment to a guideline

15   range. That's completely different from the way it

16   deals with a fine. It specifically says there's an

17   agreement that the sentence of 106 months of

18   incarceration is the appropriate amount. And so that

19   happens to have been at the bottom end of the guideline

20   range that would have been applicable if the parties'

21   agreement -- if the parties' prediction about the likely

22   criminal history calculation turned out to be the right

23   one.

24   JUSTICE KENNEDY: Well, you're talking about

25   what "based on" means, and that's an important part of

1   your argument. If I could just, while I've got you,

2   jump to this question of what happens on remand if you

3   lose the case. On remand, I take it, you're not bound

4   by the agreement because of the last --

5   MR. GANNON: Well, I --

6   JUSTICE KENNEDY: -- the last of section 24

7   says the defendant argues for any sentence other than

8   the one to which he has agreed to and breached the

9   agreement.

10   MR. GANNON: Well, at that point the remedy

11   for the breach would be that the United States is

12   relieved of its obligations under the agreement.

13   JUSTICE KENNEDY: Would you -- what would

14   that mean?

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

16   part of the problem in a case like this where there was

17   a specific sentence agreement, that it's impossible for

18   government to get back the things that it gave up at the

19   time, that were agreed to under --

20   JUSTICE KENNEDY: Well, it's got guilty

21   pleas on all of the counts. We know that.

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

23   JUSTICE KENNEDY: In your position, in your

24   view, would the government be able to take the position

25   that the guilty pleas stay in place, but it now wants

31

1   maximum?

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

3   would --

4   JUSTICE KENNEDY: Maximum guidelines.

5   MR. GANNON: I don't think that the

6   3582(c)(2) contemplates that the sentence will be

7   increased. The only thing, as the court --

8   JUSTICE KENNEDY: Yes, except that the

9   agreement does. The agreement relieves you.

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

11   JUSTICE KENNEDY: Of any obligation. I see

12   what you mean.

13   MR. GANNON: Now that the sentence has

14   become final, I think 3582(c)(2) has opened a narrow

15   window for ways in which the otherwise final sentence

16   could be modified. It only contemplates that the judge

17   will have the discretion to reduce the sentence if it

18   is, first, a sentence that was based on the relevant

19   guideline range that's subsequently been amended and

20   made retroactively applicable. But also, second, then

21   the judge would need to comply with a policy statement

22   that appears in 1B1.10 of the --

23   JUSTICE KENNEDY: So you say the judgment's

24   final, so the fact that the plea -- that there's a

25   breach of the plea agreement is irrelevant at this

 1   point?

 2   MR. GANNON: Well, I think that the remedy

 3   that the agreement contemplates of the government being

 4   released from its other obligations in the plea doesn't

 5   really leave us much of an option at this point. We're

 6   not going to be able to go back and argue that he should

 7   have been sentenced at the upper end of the range that

 8   we're talking about. We're not going to be arguing that

 9   the criminal history should have been a higher or that

10   the criminal history substantially underrepresented the

11   seriousness of his history where he had 10 years of

12   offenses preceding this one. There may have even been a

13   potential career adjustment that -- that went by the

14   boards. That's mentioned on page 162 of the Joint

15   Appendix.

16   JUSTICE SCALIA: Mr. Gannon, you assert that

17   the -- within the language of the statutory provision,

18   the sentence here is not based on the guidelines, but

19   it's based on the agreement, and the agreement arguably

20   is based on the guidelines.

21   MR. GANNON: I think the agreement is

22   arguably -- I mean, I don't think the face of this

23   agreement proves that it's based on the guidelines, but

24   I -- it is obvious that the parties negotiated in the

25   shadow of the guidelines.

1   JUSTICE SCALIA: If -- if you take that

2   position, that "based on" means determined by

3   absolutely, then I don't think any sentence would ever

4   be based on the guidelines after Booker/Fanfan.

5   MR. GANNON: Well --

6   JUSTICE SCALIA: The guidelines form part of

7   the consideration of the judge, but the judge's decision

8   is not based on the guidelines. Just as here, the --

9   the agreement -- the guidelines form part of what

10   produces the agreement, so also they form part of what

11   produces the judge's decision. And it seems to me, if

12   that's going to be enough for the judge's determination,

13   it ought to be the same for the agreement.

14   MR. GANNON: Well, I think it's not clear

15   that the judge needed to be considering the guidelines

16   in the course of deciding whether to accept the plea

17   agreement. And Justice Breyer earlier had a colloquy

18   with Mr. Heft about guideline 6B1.2, which, even before

19   Booker, was a nonbinding policy statement. And so, to

20   be sure, when 3582 was enacted, the guidelines were

21   binding, and, therefore, it -- they would have been

22   expected to have played a larger role in most sentences.

23   JUSTICE SCALIA: No, but let's -- let's

24   assume there is no plea agreement.

25   MR. GANNON: Yes. And --

34

1   JUSTICE SCALIA: You -- you have a judge who

2   sentences post-Booker/Fanfan. Now, his sentence is not

3   based on the guidelines any more --

4   MR. GANNON: I think --

5   JUSTICE SCALIA: -- any more than this

6   agreement is based on the guidelines. The guidelines

7   are one of the things that he must take into account and

8   does take into account in determining the sentence.

9   Now, if that is enough for purposes of

10   determining whether this statute -- statutory provision

11   applies to a sentence imposed directly by a judge, it

12   seems to me the same analysis ought to apply to a

13   sentence imposed through a plea agreement.

14   MR. GANNON: Well, I think that there's a

15   different purpose that's being served by asking the

16   3582(c)(2) inquiry, which is asking the judge to -- to

17   go back and redo the aspects of his analysis that would

18   have been different had the -- the relevant guideline

19   range been changed at the time he engaged in his

20   analysis, and --

21   JUSTICE SCALIA: So you -- you acknowledge

22   that "based on" covers post-Booker/Fanfan sentences by

23   the judge?

24   MR. GANNON: Outside of the context of a

25   specific C --

1   JUSTICE SCALIA: Yes. Yes. Yes.

2   MR. GANNON -- a specific sentence rendered

3   under type C that -- on page 28 of our brief, we

4   acknowledge that in most contexts, it's -- it's open to

5   -- to contend that the sentence was based on the

6   relevant guidelines --

7   JUSTICE SCALIA: Even though -- even though

8   the guidelines are just one of the things that have to

9   be taken into account?

10   MR. GANNON: It is -- the test that we state

11 in the subheading of that section of our brief is

12 whether they're of legal consequence in the

13 determination.

14   JUSTICE KAGAN: Defining "legal consequence"

15 is your test, Mr. Gannon --

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

17   JUSTICE KAGAN: It's not a binding legal

18 consequence post-Booker.

19   MR. GANNON: The test that we have for --

20 the overarching test is whether it is of legal

21 consequence, and the phrase that you're talking about on

22 page 27 of our brief, Justice Kagan, is when we know

23 that there is something that was of binding legal

24 consequence and was controlling, we know that that is

25 the thing that the sentence was based on.

1   JUSTICE KAGAN: So that's not your test.

2   What is your test instead?

3   MR. GANNON: Well, that is -- in -- when

4   something literally is controlling the analysis -- the

5   parties' agreement here binds the district judge -- we

6   know that that is what the sentence is based on. There

7   isn't any -- any --

8   JUSTICE KAGAN: Yes, but is -- is there some

9   other instances in which you would say that something is

10   based on, even though it's not of binding legal

11   consequence?

12   MR. GANNON: Well, it would be of legal

13   consequence even if it weren't controlling. This Court

14   has -- has made clear even after Booker that under

15   3553(a), courts still need to go through the relevant

16   guidelines analysis. They apply the guidelines. It may

17   turn out that the sentence turns out not to be based on

18   the relevant guideline range because the judge --

19   JUSTICE KAGAN: Well, then I'm back with

20   Justice Scalia, because if it's only of legal

21   consequence, not of binding legal consequence, if it's

22   something that somebody considers rather than something

23   that is determinative, it seems to me the same in the

24   non-plea context and in the plea context.

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

37

1 in the context of a specific sentence agreement under a

2 type C plea because of -- and this is reinforced by the

3 language in the policy statement, 1B1.10, which the

4 Court last term in Dillon held is binding and controls

5 what needs to be done during the sentence reduction

6 proceeding. And it specifically refers to the guideline

7 provisions that were applied when the defendant was

8 sentenced. And that's something that happens in the

9 process of the 3553(a) factors applicability.

10   JUSTICE ALITO: Why doesn't this line of

11 questioning lead logically to the conclusion that no

12 sentence after Booker and Fanfan is based on the

13 guidelines? Because, today, a sentencing judge can

14 engage in the same analysis that the Sentencing

15 Commission may engage in when it decides that a

16 guideline range should be lowered and that that should

17 be retroactive. The judge can do that at the time when

18 the sentence is imposed.

19   We roll the clock back on the crack -- on

20 the crack cocaine guidelines. Under the authority that

21 judges now have under Booker and Fanfan, a judge could

22 say, well, I see that this is the crack cocaine

23 guideline right now, but I think it is too harsh for all

24 the reasons that were later persuasive in lowering the

25 range, and therefore, I am sentencing below the range.

38

1   So it seems to lead logically to the

2   conclusion that 3582 is yet another provision of the

3   Sentencing Reform Act that was tied to the old

4   pre-Booker mandatory sentencing regime, and now that

5   that is out the window with Booker and Fanfan, the

6   whole -- the whole mechanism is -- is superfluous.

7   MR. GANNON: Well, I -- I understand the

8   point that the analysis has certainly changed since

9   Booker, but it is still the case that the defendant can

10   appeal an error in application of the guidelines after

11   Booker.

12   If the judge were to -- to misapply the

13   guidelines before he engages in the analysis that you're

14   talking about, Justice Alito, that would be grounds for

15   an appeal. In retrospect, if the judge is asked whether

16   the sentence was based on the guidelines, he -- he may

17   say that particular sentence wasn't, because I ended up

18   disregarding the guidelines under 3553(a). I did the

19   analysis. I was exercising my sentencing discretion the

20   first time around under 3553(a), and the guidelines

21   ended up not being the basis of the sentence.

22   And that is not something that is an option

23   in a type C plea agreement, because there, the defendant

24   cannot appeal when the judge agrees to the sentences in

25   the agreement.

39

1   JUSTICE ALITO: Well, I find it hard to -- I

2   find it hard to understand the analysis that would

3   require courts to decide whether some (c)(1)(C) plea

4   agreements are based on the guidelines and some are not

5   based on the guidelines. Maybe they are all based on

6   the guidelines, and then the obligation would be on the

7   government to put a provision in a standard plea

8   agreement requiring the defendant to give up the

9   opportunity to move for a sentence reduction if the

10   guideline range is subsequently lowered.

11   Or maybe none of them are based on the

12   guidelines because -- for the reasons I just mentioned:

13   This whole mechanism is now needed no longer as a result

14   of Booker and Fanfan.

15   MR. GANNON: Well, I think in the context of

16   an actual specific sentence plea agreement, that is the

17   one that we think is off the table, because that is what

18   is going to control the sentence. And some type C plea

19   agreements affirmatively contemplate application of the

20   guidelines, as this one does with respect to the fine.

21   And so when you have a plea agreement that

22   tells the district judge, you are bound to apply a

23   guideline provision once you've accepted this agreement,

24   we haven't taken the position that the resulting

25   sentence there is not based on the relevant guideline

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

2   JUSTICE BREYER: All right. You want us to

3   decide this case. I completely agree with what Justice

4   Alito is saying, Justice Scalia, that maybe the world

5   after Booker is different. And I have not thought that

6   one through.

7   I am thinking this case is a pre-Booker

8   case. It is not real. I am thinking it is on the cusp,

9   so how am I to treat this case? If it is a case where

10   the guidelines apply, if it is such a case -- and I

11   think maybe everyone here has assumed throughout that it

12   was. Am I right about that? Were you saying this is a

13   case where the guidelines do not apply, where they are

14   not binding? I mean, where pre-Booker doesn't count?

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

16   JUSTICE BREYER: How do you want us to take

17   this, pre-Booker or post-Booker?

18   MR. GANNON: Well, I think that the answer

19   is, it's different. But this is a -- this is a

20   post-Booker case.

21   JUSTICE BREYER: I know, you think the -- I

22   think it is completely different regardless. So let's

23   avoid that controversy at the moment, and you tell me

24   whether you want me to take it pre-Booker or

25   post-Booker.

1   MR. GANNON: The sentencing proceeding

2   occurred six months --

3   JUSTICE BREYER: I want you --

4   MR. GANNON: -- after the Booker opinion

5   came out.

6   JUSTICE BREYER: All right. So you want to

7   -- you want to set aside this post-Booker?

8   MR. GANNON: Yes, but.

9   JUSTICE BREYER: Then perhaps we should have

10   the pre-argument. If we are taking this pre-Booker, I

11   would have throughout it is QED.

12   MR. GANNON: I disagree, Justice Breyer.

13   JUSTICE BREYER: I mean, imagine that the

14   that the Sentencing Commission -- imagine. It is not

15   true, but imagine that the Sentencing Commission had

16   written the following words: "Plea bargaining over

17   sentences is above," as many argued they should. They

18   write those words. Then they write the next word,

19   "exception." There is an exception, however; you are

20   permitted to plea bargain about a sentence insofar as

21   you argue about the range, where, within the range, it

22   applies. And of course when you apply the guidelines,

23   as when you always apply the guidelines, here or

24   elsewhere, departure is an unusual case.

25   Now, suppose those were the words that the

1   Commission had written. Could -- how -- is it possible

2   under those circumstances you would still be arguing

3   this sentence under the -- plea bargaining abolished

4   except over where within the range -- is it possible you

5   would be arguing that this is not based on the

6   guidelines?

7   MR. GANNON: Well, I think that had the

8   Sentencing Commission adopted such a position, and if it

9   were binding on the sentencing judge --

10   JUSTICE BREYER: Oh, it is, because of

11   (a)(4). It used to be --

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

13   JUSTICE BREYER: -- because it says in the

14   sentencing guidelines, Judge, you will apply the

15   guideline, unless you find a circumstance the Commission

16   did not adequately take into account and in respect to

17   that, you may and must consult policy statements, but

18   guidelines and other materials. That is what it says.

19   Okay?

20   So take I am right on that. Assume I am

21   right. You can disagree with me, and I will look into

22   it.

23   MR. GANNON: Before Booker was decided,

24   it -- several of the circuits had already concluded that

25   a judge could accept a type C plea agreement that had a

1   sentence outside the range, and that that wasn't a

2   guidelines-based sentence.

3   JUSTICE BREYER: I want an answer to my

4   hypothetical, because I am trying to figure out how to

5   think about it, and you will help me if you answer my

6   hypothetical.

7   MR. GANNON: I think in those circumstances,

8   the Commission effectively would have repealed type C

9   plea agreements, because --

10   JUSTICE BREYER: Yes, that's right. That's

11   what they wanted to do. Okay? Now, that is correct.

12   But you can still have them.

13   MR. GANNON: In your hypothetical, that is

14   what they wanted to do.

15   JUSTICE BREYER: You could still have them,

16   but they allow them only for the purpose of where within

17   the range the sentence will lie. Okay?

18   MR. GANNON: In those circumstances I think

19   that it would be fair to say that the sentence was based

20   on the guideline range --

21   JUSTICE BREYER: Fine.

22   MR. GANNON: -- because the agreement hadn't

23   given any reason for the judge to -- to leave the

24   guidelines.

25   JUSTICE BREYER: Correct. Now I would like

44

1   -- because if they wrote those words, C agreements are

2   abolished, but for where within the range -- okay? You

3   agree it would be based on the guidelines. Now what I'd

4   like you to do is to look at section 6B, whatever that

5   is.

6   MR. GANNON: 6B1.2 --

7   JUSTICE BREYER: Exactly.

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

9   the --

10   JUSTICE BREYER: You tell me how this

11   differs from what I just said.

12   MR. GANNON: Well, I think it differs in two

13   key ways. First of all --

14   JUSTICE SCALIA: You were about to tell us

15   where it is?

16   MR. GANNON: It is on the last page of the

17   government's appendix which is the 16A of our brief.

18   And I think that it differs in two regards. First of

19   all, it -- it was a policy statement that even before

20   Booker was not binding on the sentencing judge. The

21   Commission determined that -- that this particular

22   guideline was not binding on judges the same way other

23   provisions in the guidelines where.

24   JUSTICE KAGAN: But I thought you just told

25   me that -- binding -- was not a part of the test

45

1 anymore.

2   MR. GANNON: Well, I -- but the question is

3 whether the judge even had to apply it at all, and the

4 judge did not need to. And -- the second point that I

5 was going to get to is that, unlike the colloquy that

6 Justice Breyer had with Mr. Heft earlier on, it doesn't

7 say the court may accept the agreement only if the court

8 is satisfied that it is within the guideline range. It

9 gives the court permission to accept the agreement.

10 This is a policy statement that gives the court

11 permission to accept the agreement when it is within the

12 guideline range or when there is a justifiable

13 departure, but it does not then say that everything else

14 is prohibited.

15   JUSTICE BREYER: It's only if. The words

16 there are "only if." It said should accept the

17 recommended sentence or a plea agreement requiring

18 imposition of a specific sentence only if the court is

19 satisfied either that such sentence is appropriate

20 within the guidelines, or departure.

21   JUSTICE SCALIA: You're reading a different

22 --

23   JUSTICE BREYER: I am? I'm reading 6B1.3, I

24 am reading commentary on the policy statement.

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

1   JUSTICE BREYER: Yes. I am reading the

2   commentary on the --

3   JUSTICE SCALIA: He is reading the

4   commentary.

5   JUSTICE BREYER: Yes.

6   MR. GANNON: I've been looking at a text of

7   6B1.2 itself, which leaves out the word only. But I

8   think that here, even if you go back to the pre-Booker

9   practice, I think it was clear that judges were able to

10   depart from the guidelines to accept type C plea

11   agreements that imposed the sentence that was outside

12   the guideline range, and they -- and it wasn't

13   considered an abuse of discretion.

14   JUSTICE BREYER: I think you're right. You

15   see that is why I am having such a hard time. I am

16   having a hard time because first I put myself back in

17   the Commission days, and there the Commission did want

18   to abolish C.

19   MR. GANNON: Well--

20   JUSTICE BREYER: And then that is what it

21   intended to do and that is what it said it did, but for

22   what we are talking about. Now, you first raised the

23   question of did they have the authority to do that and I

24   agree with you that that is a legitimate question. I

25   made you assume it away, but I think it is a legitimate

1   question.

2   Now we have the additional question of how

3   Booker/Fanfan changes that and for what and when. Do

4   you see why I am puzzled and why I was asking you rather

5   harshly to start with my hypothetical?

6   MR. GANNON: I -- I do think that -- that

7   this gets puzzling as -- as you get further down, but I

8   think that this is the simplest case. It is a narrow

9   category of cases. We are dealing with a subset of one

10   particular type of plea agreement. It is distinct from

11   every other aspect of Federal sentencing. It's unlike

12   what happens when somebody goes to trial; in those

13   circumstances the judge clearly has the discretion to

14   apply the sentencing guidelines at the time of

15   sentencing.

16   It is different from regular type B plea

17   agreements where the parties have come up with an

18   agreement and the judge notwithstanding the agreement is

19   still free to determine the sentence that he or she

20   wants to determine.

21   This is a unique -- this uniquely gives a

22   high level of certainty to the parties about the

23   specific sentence that they negotiated.

24   JUSTICE SOTOMAYOR: I don't -- I am not in

25   disagreement with the point you're making, but I think

1 that going back to what had bothered Justice Alito and

2 Justice Scalia on now that the guidelines are not

3 mandatory, is any sentence even under C really based on

4 the agreement? Because even a C agreement has to be

5 approved by the judge.

6   The legal consequence is not the agreement.

7 That doesn't sentence the defendant. It is the judge's

8 decision as to what the sentence should be which he

9 denotes in accepting the agreement that binds.

10   And I think -- I may be making Justice

11 Breyer's argument -- that if under the policy statement

12 and it's clear what the judge did here, if the judge

13 feels bound by the agreement or otherwise to calculate a

14 sentence in the guidelines and impose one in the

15 guidelines, how can you say that the legal effect is not

16 the guideline sentence?

17   MR. GANNON: Well, because I think that the

18 relevant question for purposes of both 3582(c)(2) and

19 the policy statements that the court said in Dillon

20 controls the -- the process of implementing 3582(c)(2),

21 is what did the judge do at the time of imposing the

22 sentence? And so although it is true that the judge

23 generally will consider how the type C specific sentence

24 that the parties have agreed upon corresponds to a

25 guidelines analysis at the time of deciding whether to

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1   accept the plea agreement, the relevant phrase in

2   1B1.10(b)1 which is -- which is on page 8A of the

3   government's appendix is that the judge is supposed to

4   go back and look at what -- to only make substitutions

5   for the corresponding guideline provisions that were

6   applied when the defendant was sentenced.

7   And so when you have a type C plea agreement

8   that has a specific sentence even under the terms of

9   this agreement, the only thing that the judge considered

10   when he decided the sentence was going to be 106 months

11   with respect to the term of imprisonment was the binding

12   plea agreement. That is what rule 11(c)(1)(C) required.

13   JUSTICE SOTOMAYOR: -- no. Because you're

14   assuming that the agreement was automatically binding on

15   the judge.

16   MR. GANNON: It was --

17   JUSTICE SOTOMAYOR: The judge was always

18   capable of saying at the time of sentence I won't accept

19   the 106. If he had calculated the guidelines and if it

20   turned out that the guidelines called for 240 to 360, he

21   could have said easily no, that is so far outside of the

22   guideline range with no justification that I am not

23   going to accept -- impose the sentence. You could

24   withdraw your agreement and do whatever you're going to

25   do.

 1   MR. GANNON: And had he not done that the

 2   proceeding would have occurred differently and it may

 3   not even have right occurred then, and -- and I think

 4   because under Rule 11 if he was rejecting the plea

 5   agreement and -- and the 106 months that the parties had

 6   agreed to, he would have to give the defendant the right

 7   to withdraw the plea at that point. So the government

 8   would have been released from its obligations; the

 9   parties -- the defendant could have gone to trial. He

10   could have -- he could have continued to plead guilty.

11   The parties could have come up with a type plea -- B

12   plea agreement. The parties may have asked for time to

13   renegotiate a different type C agreement. We do not

14   know what would have happened in those circumstances.

15   And as you pointed out before, Justice

16   Sotomayor, this is not about asking the judge to step

17   into the shoes of the parties and renegotiate what the

18   agreement would have been had the judge decided to

19   reject it the first time around. Instead 3582(c)(2)

20   contemplates a limited process by which the judge will

21   reapply those provisions of the guidelines that he

22   applied the first time around and -- and make the

23   substitution that is now called for by the retroactively

24   applicable change. But here because the judge didn't

25   actually make that application at the time of

1   sentencing, the judge did not actually have to apply the

2   drug quantity table.

3   JUSTICE GINSBURG: I am not following that

4   argument for this reason. It seems to me if you ask

5   what did the judge apply at the time he imposed the

6   original sentence, well, it has got to be the

7   guidelines, because first the agreement provides for it;

8   then he says I am going to wait for the probation report

9   so I can see what the calculation is, whether I agree

10   with it; and then he gives him a sentence that is

11   precisely within the guidelines.

12   So if you asked me to describe what that

13   sentence was -- of what was it, 46 to 106 days -- I say

14   that was a guideline sentence. It was right there

15   within the brackets that -- the guidelines. So why

16   wasn't it a guideline sentence?

17   MR. GANNON: Because for purposes of the

18   term of imprisonment the judge was not actually applying

19   the guidelines at that point. He did so for purposes of

20   the fine. He ended up actually waiving the relevant

21   fine, but those type C plea agreement here called for

22   the judge to apply the guidelines with respect to the

23   fine and did not call for the judge to apply the

24   guidelines with respect to the term of imprisonment. He

25   knew that it was within what the PSR had calculated as

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 1   the guideline range and he concluded that that was the

 2   applicable guideline range which he needed to do for

 3   purposes of calculating the fine and other things, but

 4   it wasn't actually the basis for the sentence.

 5   The basis for the sentence was the plea

 6   agreement that he accepted, and there it was the

 7   parties' agreement. And there are all sorts of things

 8   that went into the parties' agreement that the judge

 9   does not have the wherewithal to reconsider in

10   retrospect.

11   JUSTICE GINSBURG: I thought one of the

12   things in the plea agreement was that the -- that the

13   judge would have the right to himself calculate the

14   guideline range.

15   MR. GANNON: Yes. And that specifically

16   contemplated in Rule 11(c) and in the guidelines, that

17   the judge may postpone acceptance of the plea agreement

18   until after the presentence report is prepared. And the

19   judge did do that here. So he was aware of what the PSR

20   recommended, but once, and had he decided that he did

21   not like the 106 month sentence and he wanted to

22   preserve his sentencing discretion, the option at that

23   point was to have rejected the plea agreement, at which

24   point the parties would have been free to do different

25   things. And among other things, the Government could

1   then have then argued for a higher sentence within the

2   range. Could have argued that the criminal history

3   failed to represent the seriousness of the defendant's

4   criminal past. Could have argued for an upward

5   departure even, but the Defendant got the benefit of the

6   106 month agreement of not having the Government raise

7   any of those other arguments at that time. And now he

8   is asking for essentially another bite of the apple and

9   we think that because the basis for the sentence was

10 indeed the negotiation and the agreement between the

11 parties, that the court of appeals decision was correct.

12   If there are no further questions.

13   CHIEF JUSTICE ROBERTS: Thank you,

14 Mr. Gannon.

15   Mr. Heft, you have three minutes remaining.

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

17   ON BEHALF OF PETITIONER

18   MR. HEFT: Thank you, Your Honor. Just a

19 couple of points. First of all, the record here leaves

20 no doubt that the judge based his sentence on the

21 guidelines. The sentencing transcript specifically

22 states that the judge and I'd like to quote this, this

23 is at page 47 of the joint appendix and I quote, "the

24 court will adopt the findings of the probation officer

25 disclosed in the probation report and application of the

1   guidelines as set out therein." On page 48 of the joint

2   appendix the judge says, having considered the advisory

3   guidelines, he went on to impose that sentence. So it

4   is quite clear that the judge and even in his statements

5   of reasons on page 95 of the joint appendix, again

6   reaffirmed that this sentence was based on the

7   guidelines.

8   Now, the other point that I'd like to make

9   is that the Government acknowledges that it has carved

10   out a very small exception to its argument that C pleas

11   regarding specific sentences and sentencing ranges are

12   not eligible for (c)(2) relief. But it seems to me that

13   reading, taking the Government position into account, if

14   this plea agreement had not stated 106 months, then

15   Mr. Freeman's under the terms of this plea agreement in

16   the Government's view and under the Government's

17   argument of what exception exists under the C pleas for

18   purposes of 3582, Mr. Freeman would be eligible for the

19   relief that was granted. And we would simply urge the

20   Court in this case to adopt a rule that does not exclude

21   specific sentences and C pleas for eligibility in 3582.

22   Thank you.

23   CHIEF JUSTICE ROBERTS: Thank you, counsel.

24   The case is submitted.

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

1   above-entitled matter was submitted.)

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58

45:21 47:17,17
compilation 7:20
completely 30:15
41:3,22
complicated 16:1
23:3
comply 32:21
component 28:24
computation
29:20
concessions
23:19
concluded 26:9
43:24 53:1
conclusion 4:14
19:14 30:4
38:11 39:2
conditions 11:20
connection 15:19
23:9
consented 17:25
consequence
36:12,14,18,21
36:24 37:11,13
37:21,21 49:6
consider 15:18
18:14,19,23
19:24 49:23
consideration
10:14 19:1 34:7
considered 6:1
10:15 47:13
50:9 55:2
considering
34:15
considers 37:22
consult 43:17
contemplate
40:19
contemplated
53:16
contemplates
30:9 32:6,16
33:3 51:20

contend 36:5
content 9:23
contention 6:11
context 3:23 10:1
16:9 35:24
37:24,24 38:1
40:15
contexts 36:4
continued 51:10
contribute 16:23
contributes 7:10
control 40:18
controlling 36:24
37:4,13
controls 38:4
49:20
controversy
41:23
convicted 9:16
correct 6:19 9:18
15:1 44:11,25
54:11
correctly 4:12
correlation 15:20
corresponding
50:5
corresponds
20:7 27:20
49:24
counsel 10:7
27:7,22 55:23
count 24:4,5,6,9
24:15 25:5,6
26:4 41:14
counts 23:9,11
26:21 31:21
couple 10:19
54:19
course 19:16
34:16 42:22
court 1:1,12 3:10
3:16,17 5:3
6:18 8:14 12:2
14:4,7,11 15:2

20:8,10 23:14
24:20 27:13
28:3,5 29:25
30:1,4 32:7
37:13 38:4 46:7
46:7,9,10,18
49:19 54:11,24
55:20
courts 11:12
37:15 40:3
covers 35:22
crack 3:13 7:21
13:22 14:1
38:19,20,22
create 14:8
crimes 8:1
criminal 3:17
27:14 29:8,21
30:22 33:9,10
54:2,4
critical 23:22
criticized 7:10
CURTIS 1:17
2:6 27:10
cusp 23:6 41:8

D

D 3:1
day 25:13
days 47:17 52:13
deal 24:8
dealing 48:9
deals 28:23
30:12,16
decide 3:16 6:14
14:5 25:11,13
40:3 41:3
decided 22:22
23:10 43:23
50:10 51:18
53:20
decides 38:15
deciding 18:12
34:16 49:25
decision 8:10

21:12,13 34:7
34:11 49:8
54:11
decisions 16:6
defendant 11:19
11:19,20,22
14:14,18,24
16:13 17:8
24:13,19 25:6
27:5,14 28:15
30:1 31:7 38:7
39:9,23 40:8
49:7 50:6 51:6
51:9 54:5
defendant's 54:3
Defining 36:14
definition 3:22
5:22,25 6:4,5
6:14 8:17
definitions 6:8
denotes 49:9
depart 12:8
13:14,19,22
14:1·19:17
47:10
Department 1:18
departs 10:25
departure 10:13
12:14 13:23
18:17 20:12
42:24 46:13,20
54:5
departures 12:19
depend 13:24
14:1 22:9
depends 9:13
21:24
describe 10:8
52:12
described 6:6
determination
4:22,23 5:1
14:19 34:12
36:13

determinative
9:21 37:23
determine 3:25
4:11 15:5 16:13
19:2 24:23 30:9
48:19,20
determined
11:13 14:15
23:16 24:1 34:2
45:21
determines 24:1
determining
23:23,24 24:12
29:13 30:10
35:8,10
develop 5:24
dictionary 6:4
different 5:10 6:8
10:1 18:12
30:11,15 35:15
35:18 41:5,19
41:22 46:21
48:16 51:13
53:24
differently 28:24
51:2
differs 45:11,12
45:18
Dillon 38:4 49:19
direction 5:10
directly 35:11
disagree 16:8
42:12 43:21
disagreement
48:25
disclosed 54:25
discretion 17:13
25:8 26:16 27:4
32:17 39:19
47:13 48:13
53:22
discussion 22:14
dismiss 19:8
dismissal 19:7

dismissed 18:9
disregarding 39:18
distinct 48:10
district 6:18 12:2 14:4,7 15:5 16:8 24:1,20 25:8,13 26:15 37:5 40:22
doing 16:15,16
doubt 54:20
downward 12:8 12:14 13:22,23
driving 28:20
drop 18:2 24:9 26:5
dropped 23:9 25:5 26:4,22
drops 24:4,6
drug 18:3 52:2
drugs 18:7 26:22
D.C 1:8,18

E

E 1:17 2:1,6 3:1,1 27:10
earlier 21:14 28:25 34:17 46:6
easier 10:8
easily 50:21
effect 49:15
effectively 44:8
either 15:3 20:11 46:19
elderly 11:19
element 5:25
eligibility 3:18 3:20 4:3 23:18 23:23,24,25 55:21
eligible 16:13 24:13,19 55:12 55:18
emphasize 23:17

enabling 25:24
enacted 34:20
encompasses 6:4
ended 39:17,21 52:20
engage 38:14,15
engaged 35:19
engages 39:13
error 39:10
especially 26:4
ESQ 1:15,17 2:3 2:6,9
essentially 54:8
event 26:18
evidence 23:8
Exactly 45:7
example 11:14 21:5,6,7
examples 10:19 11:10
exception 42:19 42:19 55:10,17
exclude 55:20
exclusive 5:19
exercise 26:16 27:4
exercising 39:19
exist 15:11
existed 7:1
exists 55:17
expected 34:22
explain 20:21
expressed 15:23
expressly 30:8

F

face 33:22
fact 3:16 7:6 8:2 8:4 25:22 32:24
factor 23:22,23
factors 4:24 8:13 11:21 12:16 21:13 25:18 38:9
facts 25:17

failed 54:3
fair 28:6 44:19
fall 14:7
familiar 25:15
family 21:21
Fanfan 38:12,21 39:5 40:14
far 14:23 50:21
February 1:9
Federal 48:11
feels 49:13
felt 8:4
figure 12:6 44:4
figures 8:9
file 25:2,3
files 25:4
final 4:22 7:11 29:7 32:14,15 32:24
find 40:1,2 43:15
findings 54:24
finds 4:6
fine 16:24 28:24 29:2 30:11,16 40:20 44:21 52:20,21,23 53:3
first 3:4,22 11:11 11:18 32:18 39:20 45:13,18 47:16,22 51:19 51:22 52:7 54:19
following 42:16 52:3
foregoing 29:23
form 34:6,9,10
forth 21:21
found 17:13 18:8
foundation 6:21
four 7:7
FRANK 1:15 2:3 2:9 3:7 54:16
free 48:19 53:24

Freeman 1:3 3:4 3:20 18:5 55:18
Freeman's 3:11 3:25 4:8,14 55:15
frustrates 4:5
fundamental 6:2 6:10,14
further 22:6 26:10 48:7 54:12

G

G 3:1
Gannon 1:17 2:6 27:9,10,12 28:5 28:9,12 29:12 29:18 30:7 31:5 31:10,15,22 32:2,5,10,13 33:2,16,21 34:5 34:14,25 35:4 35:14,24 36:2 36:10,15,16,19 37:3,12,25 39:7 40:15 41:15,18 42:1,4,8,12 43:7,12,23 44:7 44:13,18,22 45:6,8,12,16 46:2,25 47:6,19 48:6 49:17 50:16 51:1 52:17 53:15 54:14
General 1:18 10:11 11:6
generally 49:23
Ginsburg 6:23 8:16 14:12 15:6 17:23 26:18,24 52:3 53:11
give 9:3 10:18,19 11:10,14 12:22 21:6,19 40:8

51:6
given 6:4 9:4 44:23
gives 5:14 13:12 17:15 46:9,10 48:21 52:10
giving 12:22,25 14:20 16:2
go 8:13 12:4,7 16:18 17:6 20:20,23 29:3 30:13 33:6 35:17 37:15 47:8 50:4
goes 4:22 5:10 26:6 48:12
going 10:3 13:19 14:20 16:5 19:19,20 20:17 21:19 22:11 24:9 25:10 26:7 26:8 27:5 29:22 33:6,8 34:12 40:18 41:1 46:5 49:1 50:10,23 50:24 52:8
good 26:20
gotten 8:21 9:10
government 4:5 17:19,24 23:8 23:19 24:4,13 25:3,4 26:1,5,7 27:2,14 31:18 31:24 33:3 40:7 51:7 53:25 54:6 55:9,13
government's 23:21 45:17 50:3 55:16,16
grant 26:16
granted 25:19,20 55:19
grounds 39:14
guidance 16:2

guideline 3:14,24
4:2,15 5:20
7:19,21 8:6,17
9:18,20,21 10:4
10:4,12,21,22
10:25 11:15,24
12:6,22 13:8,9
13:16,19 17:10
17:15 19:6,11
20:4,8,11 21:10
21:17,23 22:2,3
24:5,7,11,25
25:9 26:11,15
26:21 27:19,25
29:3,5,11,19
30:6,10,14,19
32:19 34:18
35:18 37:18
38:6,16,23
40:10,23,25
43:15 44:20
45:22 46:8,12
47:12 49:16
50:5,22 52:14
52:16 53:1,2,14
guidelines 5:12
5:15,20 6:16,20
7:1,4,18,21,25
8:3,18,22 9:3,6
9:10 10:10,20
11:4,14 12:1,4
12:10,13,16,19
13:1,4,7,15,18
13:20 14:15,17
14:19,20,25
15:15,21 16:18
17:7,9,20 18:14
18:15,17,19,21
18:23 19:1,6,9
19:10,17,19,20
19:24 20:1,12
21:3,14 22:11
22:14,17,19
24:23 25:23

26:2 28:2,2,3,8
28:14,18 29:17
29:19,25 30:2
32:4 33:18,20
33:23,25 34:4,6
34:8,9,15,20
35:3,6,6 36:6,8
37:16,16 38:13
38:20 39:10,13
39:16,18,20
40:4,5,6,12,20
41:10,13 42:22
42:23 43:6,14
43:18 44:24
45:3,23 46:20
47:10 48:14
49:2,14,15,25
50:19,20 51:21
52:7,11,15,19
52:22,24 53:16
54:21 55:1,3,7
guidelines-bas...
44:2
guilty 15:21 18:6
25:6 31:20,25
51:10
guns 7:7,7
guy 26:6

H

half 26:8
handle 8:4
happened 51:14
happens 30:19
31:2 38:8 48:12
hard 40:1,2
47:15,16
harsh 38:23
harshly 48:5
hear 3:3
Heft 1:15 2:3,9
3:6,7,9 4:25 5:8
5:18 6:3,11,19
7:2,13,17 8:8
8:12,23 9:2,5

9:12,17,22 10:2
10:17,23 11:2,8
11:11 12:9,15
12:20 13:3,10
13:17,24 14:9
14:12 15:1,8,12
15:25 16:7,21
17:2,18 18:5,18
18:25 19:15,23
20:5,14,18,23
21:1,5,7,10,12
21:24 22:8,20
22:25 23:5,13
24:10,16,18,22
24:25 25:7,12
26:13,24 27:8
34:18 46:6
54:15,16,18
held 38:4
help 44:5
helping 20:20
high 48:22
higher 14:6 33:9
54:1
history 4:20 29:8
29:22 30:22
33:9,10,11 54:2
Honor 5:2 6:3,5
7:17 8:24 9:14
9:24 10:3,17,23
11:2,8 12:15,20
13:25 14:9 15:1
16:7,21 17:2,18
17:21 18:5
19:15 20:14,23
21:25 22:8,20
23:13 27:8
54:18
hypothetical
10:1 25:22 44:4
44:6,13 48:5
hypotheticals
14:22 21:1

I

imagine 42:13,14
42:15
implement 4:12
implementing
49:20
important 30:25
impose 49:14
50:23 55:3
imposed 5:16
12:5 35:11,13
38:18 47:11
52:5
imposing 49:21
imposition 12:17
46:18
impossible 31:17
imprisonment
3:13,25 4:1
28:16 29:1
30:13,14 50:11
52:18,24
incarceration
30:18
Incidentally
22:13
incomplete 29:6
29:20
inconsistent 16:5
18:15
incorrect 17:20
increased 24:6
32:7
independent
30:5,5
independently
30:1
indictment 18:6
23:10
individually 4:24
information 22:4
ingredient 6:1
inquiry 35:16
insofar 42:20
instance 13:10

instances 37:9
instructive 28:23
intended 47:21
intent 15:23
26:10
interested 26:1,2
invalid 17:17
irrelevant 32:25
issue 4:17 15:3
15:17

J

joint 28:22 33:14
54:23 55:1,5
JR 1:15 2:3,9 3:7
54:16
judge 9:4 10:14
12:24 13:6,17
13:22 14:1,16
14:19,24 15:5
15:18,21 17:13
18:13,18,22
19:9,10,16 20:3
21:12,16,16,24
22:17 23:2 24:1
24:1 25:1,10,14
25:17,25 26:15
27:1,3,16 30:9
32:16,21 34:7
34:15 35:1,11
35:16,23 37:5
37:18 38:13,17
38:21 39:12,15
39:24 40:22
43:9,14,25
44:23 45:20
46:3,4 48:13,18
49:5,12,12,21
49:22 50:3,9,15
50:17 51:16,18
51:20,24 52:1,5
52:18,22,23
53:8,13,17,19
54:20,22 55:2,4
judges 14:4,8

16:8,15 25:13
38:21 45:22
47:9
judge's 25:8 34:7
34:11,12 49:7
judgment 4:20
30:5
judgment's 32:23
July 22:23
jump 31:2
Justice 1:18 3:3
3:9 4:17 5:7,9
5:18,22 6:7,13
6:19,23 7:5,14
7:23 8:9,16,20
8:25 9:3,8,15
9:19,25 10:7,18
10:24 11:5,10
11:25 12:12,18
12:21 13:5,12
13:21 14:3,12
15:5,8,13,25
16:17,22 17:3
17:12,22,23
18:11,20,25
19:4,16 20:2,6
20:16,19,24,25
21:4,6,9,11,15
22:1,12,13,21
23:1,6,7 24:3
24:11,17,21,24
25:4,10,21,21
26:18,24 27:7,9
27:12,22,23
28:6,10,21,24
29:9,16 30:3,8
30:24 31:6,13
31:20,23 32:4,8
32:11,23 33:16
34:1,6,17,23
35:1,5,21 36:1
36:7,14,17,22
37:1,8,19,20
38:10 39:14

40:1 41:2,3,4
41:16,21 42:3,6
42:9,12,13
43:10,13 44:3
44:10,15,21,25
45:7,10,14,24
46:6,15,21,23
47:1,3,5,14,20
48:24 49:1,2,10
50:13,17 51:15
52:3 53:11
54:13 55:23
justifiable 46:12
justification
50:22

K

Kagan 15:8,13
15:25 22:12
36:14,17,22
37:1,8,19 45:24
keep 26:21
Kennedy 27:23
28:6,10,21 29:9
29:16 30:3,8,24
31:6,13,20,23
32:4,8,11,23
Kentucky 1:15
key 45:13
kinds 15:9
knew 52:25
know 9:1,8,11,25
15:6 23:4 24:8
25:2 26:5 31:21
36:22,24 37:6
41:21 51:14
known 26:7

L

language 4:6,18
7:15 28:14
33:17 38:3
largely 7:15
larger 34:22
Laughter 20:22

lead 38:11 39:1
leave 33:5 44:23
leaves 47:7
54:19
left 9:12,13
legal 36:12,14,17
36:20,23 37:10
37:12,20,21
49:6,15
legislative 4:19
legitimate 47:24
47:25
lenient 8:1
let's 11:15 24:4,7
34:23,23 41:22
level 17:6 29:14
29:14 48:22
levels 29:10
lie 44:17
limited 51:20
line 38:10
literally 37:4
logically 38:11
39:1
longer 13:7
40:13
look 5:4,4,5,6
8:15 15:21 16:1
16:10,11,12
19:10 22:6
23:15 27:1
43:21 45:4 50:4
looking 9:22,23
47:6
lose 31:3
lot 16:2,5
Louisville 1:15
lovely 21:20
low 21:19
lower 12:25
lowered 3:14,24
4:2,15 10:5
24:12 26:20
28:17 38:16

40:10
lowering 38:24
lowest 29:2

M

making 48:25
49:10
mandatory 22:15
22:19 39:4 49:3
March 22:25
materials 43:18
matter 1:11 56:1
maximum 32:1,4
mean 16:3 19:5
19:13,17 20:19
23:2 26:10,20
30:3 31:14
32:12 33:22
41:14 42:13
meaning 17:4
means 30:25
34:2
mechanism 39:6
40:13
medical 11:20
mention 10:20
25:23
mentioned 12:7
21:14 33:14
40:12
meticulously
17:6
minimum 8:2
17:15
mini-trial 24:14
minute 8:16
minutes 54:15
misapply 39:12
mistaken 19:22
modified 26:14
32:16
moment 41:23
month 53:21 54:6
months 7:11 8:5
8:8,11 9:4

11:16,17 13:13
24:6,7,9 30:17
42:2 50:10 51:5
55:14
morning 3:4
mother 21:20
motivating 12:17
move 40:9
mute 7:15
mutually 5:19

N

N 2:1,1 3:1
narrow 32:14
48:8
nature 9:13
13:25 16:10
22:9
need 32:21 37:15
46:4
needed 34:15
40:13 53:2
needs 30:9 38:5
negotiated 33:24
48:23
negotiation 8:14
10:12 12:11
54:10
nonbinding 34:19
non-plea 37:24
note 11:3
notice 29:5
notwithstanding
48:18
noun 5:23
number 7:18
8:13

O

O 2:1 3:1
object 16:19
objections 25:2,3
25:5 27:2
obligated 12:2
obligation 32:11

40:6
obligations 31:12
  33:4 51:8
obvious 33:24
obviously 19:23
occurred 42:2
  51:2,3
occurs 29:5
offense 17:6
  29:13,14
offenses 33:12
officer 54:24
oh 11:8,8 43:10
okay 18:1 20:16
  21:22,23 43:19
  44:11,17 45:2
old 39:3
omit 5:24
once 40:23 53:20
ones 19:6
open 26:19 36:4
opened 32:14
opinion 4:18,20
  42:4
opportunity
  16:19 40:9
opposed 26:2
option 33:5 39:22
  53:22
oral 1:11 2:2,5
  3:7 27:10
order 13:1 15:10
ordinary 3:22
original 25:16
  52:6
ought 34:13
  35:12
outside 35:24
  44:1 47:11
  50:21
overarching
  36:20

P

P 3:1

page 2:2 29:1
  30:13 33:14
  36:3,22 45:8,16
  50:2 54:23 55:1
  55:5
pages 28:21 29:4
paragraph 16:22
  17:5,7 27:25
  29:4,20,21,22
  29:23
part 6:2,24 8:18
  26:19,20 30:25
  31:16 34:6,9,10
  45:25
particular 3:23
  7:25 17:16 27:3
  28:19 39:17
  45:21 48:10
parties 6:15 9:6
  11:17 13:3 14:5
  16:19 17:5 18:7
  23:16 26:11
  27:18,24 29:6
  30:20,21 33:24
  37:5 48:17,22
  49:24 51:5,9,11
  51:12,17 53:7,8
  53:24 54:11
permission 46:9
  46:11
permit 14:4
permitted 42:20
person 8:4 18:8
  26:3
persuasive 38:24
Petitioner 1:4,16
  2:4,10 3:8
  54:17
phrase 36:21
  50:1
picks 10:21
place 22:23
  31:25
plain 4:6

play 23:25
played 28:18
  34:22
plea 3:11,17 4:8
  4:10 5:5,10,16
  5:21 7:3,6,19
  8:13,15,22 9:5
  9:9,14,15,23
  9:24 10:12,14
  10:20 11:13
  14:13 15:14,22
  16:9,10,11,23
  17:4,14,14,24
  18:1,2,4,9,13
  18:21,23 22:9
  22:15,18 23:9
  23:15,16 24:5
  25:16 28:22
  30:12 32:24,25
  33:4 34:16,24
  35:13 37:24
  38:2 39:23 40:3
  40:7,16,18,21
  42:16,20 43:3
  43:25 44:9
  46:17 47:10
  48:10,16 50:1,7
  50:12 51:4,7,11
  51:12 52:21
  53:5,12,17,23
  55:14,15
plead 51:10
pleaded 18:6
pleas 11:9 21:2
  31:21,25 55:10
  55:17,21
please 3:10
  27:13
point 5:23 6:9,17
  6:20 10:13 12:2
  12:10 20:24
  21:23 22:22
  28:21 31:10
  33:1,5 39:8

46:4 48:25 51:7
  52:19 53:23,24
  55:8
pointed 8:16 15:6
  51:15
points 25:22,22
  27:24 54:19
policy 32:21
  34:19 38:3
  43:17 45:19
  46:10,24 49:11
  49:19
position 6:6 7:9
  10:16 31:23,24
  34:2 40:24 43:8
  55:13
possible 23:2
  43:1,4
possibly 10:23
  24:3
postpone 53:17
post-Booker
  36:18 41:17,20
  41:25 42:7
post-Booker/F...
  35:2,22
potential 33:13
power 20:3
practice 47:9
preceding 33:12
precisely 19:5
  21:18 52:11
precludes 3:18
prediction 30:21
prepared 53:18
presentence
  3:12 4:10 12:3
  15:19 25:15
  27:1 53:18
preserve 53:22
presumably
  25:14
previously 21:8
prey 14:7

pre-argument
  42:10
pre-Booker 39:4
  41:7,14,17,24
  42:10 47:8
principal 5:25
  6:21
prior 7:22
prison 8:5 26:6
Probably 5:17
probation 14:16
  52:8 54:24,25
problem 31:16
problematic
  15:12,16
proceeding 38:6
  42:1 51:2
process 38:9
  49:20 51:20
produces 34:10
  34:11
prohibited 46:14
prosecuting 8:1
prove 24:14,14
proves 33:23
provide 12:1,19
provided 6:16
provides 6:9
  17:14 52:7
provision 33:17
  35:10 39:2 40:7
  40:23
provisions 28:11
  38:7 45:23 50:5
  51:21
PSR 16:11 52:25
  53:19
psychoanalyze
  21:16
purpose 4:5,19
  25:24 35:15
  44:16
purposes 29:13
  30:10 35:9

49:18 52:17,19
53:3 55:18
pursuant 14:15
14:19 17:8
put 40:7 47:16
putting 9:9 26:3
puzzled 48:4
puzzling 48:7

Q

QED 42:11
quantity 26:22
52:2
question 5:9
18:12 19:24
28:9,13 31:2
46:2 47:23,24
48:1,2 49:18
questioning
38:11
questions 54:12
quite 14:23 23:1
55:4
quote 5:22 54:22
54:23

R

R 3:1
raise 54:6
raised 47:22
range 9:4,18,20
9:21 10:4,4
11:1,15,24
13:22,23 14:6
20:11 21:10,18
21:19 22:3 24:5
24:7,25 27:19
27:21 28:16,19
29:3 30:10,15
30:20 32:19
33:7 35:19
37:18 38:16,25
38:25 40:10
41:1 42:21,21
43:4 44:1,17,20

45:2 46:8,12
47:12 50:22
53:1,2,14 54:2
ranges 55:11
readily 25:25
reading 19:13
46:21,23,24
47:1,3 55:13
reaffirmed 55:6
real 41:8
really 11:6 26:10
33:5 49:3
reapply 51:21
reason 11:22
12:17 17:16
22:7 26:1 44:23
52:4
reasons 3:21
11:18 12:22
18:16 38:24
40:12 55:5
REBUTTAL 2:8
54:16
recalculation
24:23
received 8:24
11:23
recommendation
29:10,13
recommended
20:9 46:17
53:20
reconsider 53:9
reconsideration
26:19
record 3:12 4:11
5:5 54:19
record-based 4:9
4:13 5:4 15:4
redo 35:17
reduce 25:9
32:17
reduced 25:1
29:14

reduction 3:19
3:21 16:14
25:19,20 26:17
27:6 38:5 40:9
reference 28:2
referred 28:25
referring 17:21
refers 38:6
reflected 7:24
reflects 7:3,20
Reform 39:3
regarding 55:11
regardless 41:22
regards 45:18
regime 39:4
regular 48:16
reinforced 38:2
reject 51:19
rejected 53:23
rejecting 51:4
released 33:4
51:8
relevant 32:18
35:18 36:6
37:15,18 40:25
49:18 50:1
52:20
relief 55:12,19
relieved 31:12
relieves 32:9
relying 14:12
remaining 54:15
remand 31:2,3
remanded 24:19
remedy 31:10
33:2
rendered 36:2
renegotiate
51:13,17
reopen 26:23,25
repealed 44:8
report 3:12 4:10
12:3 14:16
15:19 25:16

27:1 52:8 53:18
54:25
represent 54:3
require 15:8 40:3
required 12:23
13:1 50:12
requiring 40:8
46:17
resist 19:5,14
resolve 15:17
respect 16:24
40:20 43:16
50:11 52:22,24
Respectfully
16:7
Respondent 1:19
2:7 27:11
rests 6:10
result 23:20,21
40:13
resulting 27:17
40:24
retroactive
38:17
retroactively
3:14 4:15 32:20
51:23
retrospect 39:15
53:10
review 17:10
reviews 4:9
right 9:11 10:18
10:24 11:6,11
16:20 18:19
22:22 23:1 24:9
24:21,24 30:22
38:23 41:2,12
42:6 43:20,21
44:10 47:14
51:3,6 52:14
53:13
risk 8:5,11
robbery 13:13
21:18,18

ROBERTS 3:3
4:17 5:7,9 7:5
7:14,23 8:9,20
8:25 9:3,8,15
9:19,25 27:7,9
54:13 55:23
role 28:18 34:22
roll 38:19
routinely 16:15
rule 3:17 4:7
27:16 50:12
51:4 53:16
55:20

S

S 2:1 3:1
satisfied 20:10
22:4 46:8,19
satisfy 15:10
saying 7:6,10
21:22 22:7 27:2
41:4,12 50:18
says 9:24 11:3
12:24 13:14
14:16,18,20
19:13 20:8,8,13
20:13,14 21:16
22:4 24:8 25:5
25:6 26:5 27:24
29:2,21,23
30:16 31:7
43:13,18 52:8
55:2
Scalia 17:12,22
18:11,20,25
22:13 25:21
33:16 34:1,6,23
35:1,5,21 36:1
36:7 37:20 41:4
45:14 46:21
47:3 49:2
second 4:3 32:20
46:4
section 3:19 4:5
4:12 8:19 13:15

17:19 31:6
36:11 45:4
sections 29:24
see 15:19,22
16:3 19:10
32:11 38:22
47:15 48:4 52:9
seek 23:10
sentence 3:18,21
4:11,14 5:14,19
5:20,21 6:17
7:11,18,19 8:6
8:17,18,20,24
10:3,21 11:4,17
11:23,23 12:5,6
12:17,22,25
13:4,20 14:14
14:21 15:14,15
15:15,20,24
16:14,24 17:10
17:15,17 19:2
19:11,11,25
20:9,10,17
21:17 22:2,3,10
25:9,19 27:3,5
27:15,17,20
28:1,13,20
30:17 31:7,17
32:6,13,15,17
32:18 33:18
34:3 35:2,8,11
35:13 36:2,5,25
37:6,17 38:1,5
38:12,18 39:16
39:17,21 40:9
40:16,18,25
42:20 43:3 44:1
44:2,17,19
46:17,18,19
47:11 48:19,23
49:3,7,8,14,16
49:22,23 50:8
50:10,18,23
52:6,10,13,14

52:16 53:4,5,21
54:1,9,20 55:3
55:6
sentenced 8:21
17:8 28:15 33:7
38:8 50:6
sentences 13:16
19:7 34:22 35:2
35:22 39:24
42:17 55:11,21
sentencing 3:12
3:15,16 4:11
5:11,15 6:16
9:10 10:5 11:2
12:23 14:24
15:22 16:12
17:12 21:25
22:23 27:16,20
28:16,19 29:25
30:2 38:13,14
38:25 39:3,4,19
42:1,14,15 43:8
43:9,14 45:20
48:11,14,15
52:1 53:22
54:21 55:11
serious 11:19
seriousness
33:11 54:3
served 35:15
set 14:17 42:7
55:1
sexually 11:21
shadow 33:25
shoes 51:17
show 3:12 13:3
simplest 48:8
simply 55:19
single 18:22
situation 11:7
12:1 22:19
23:11
situations 10:9
six 42:2

Sixth 4:4,16
small 18:3 55:10
solely 21:13
Solicitor 1:17
10:11 11:6
somebody 37:22
48:12
sorry 5:8 12:18
sort 14:7 16:3
22:13
sorts 53:7
Sotomayor 10:7
10:18,24 11:5
11:10 13:21
14:3 20:24
27:22 48:24
50:13,17 51:16
special 12:24
13:14
specific 13:13
14:23 20:10
27:15 31:17
35:25 36:2 38:1
40:16 46:18
48:23 49:23
50:8 55:11,21
specifically
14:14 29:23
30:16 38:6
53:15 54:21
standard 5:25
15:10 40:7
start 10:12 12:5
48:5
starting 6:9,17
6:20 10:13 12:1
12:10
state 17:7 36:10
stated 55:14
statement 14:24
32:21 34:19
38:3 45:19
46:10,24 49:11
statements 15:9

15:11 29:24
43:17 49:19
55:4
states 1:1,6,12
3:5,15 31:11
54:22
statute 3:24 4:7
5:2 28:7 35:10
statute's 4:18,19
4:19
statutory 7:15
28:12 33:17
35:10
stay 31:25
step 51:16
stipulated 18:7
subheading
36:11
submit 3:19 22:9
submitted 55:24
56:1
subsequently
3:24 4:1 10:5
28:17 32:19
40:10
subset 48:9
substance 17:4
substantially
33:10
substantively
17:1
substitution
51:23
substitutions
50:4
suited 4:12
superfluous 39:6
superseding
23:10
support 4:6
supports 4:13
suppose 15:10
22:12 42:25
supposed 21:15

22:6 50:3
Supreme 1:1,12
sure 34:20
sweet 26:19

T

T 2:1,1
table 40:17 52:2
take 5:3 13:18
15:2,3 18:2,16
31:3,24 34:1
35:7,8 41:16,24
43:16,20
taken 36:9 40:24
talking 9:14
14:22 16:25
17:23 23:18
30:24 33:8
36:21 39:14
47:22
technical 19:18
tell 19:21,22
41:23 45:10,14
tells 40:22
term 3:13,25 4:1
5:25 28:15,25
30:12,14 38:4
50:11 52:18,24
terms 4:7 5:5
23:15 25:16
50:8 55:15
test 36:10,15,19
36:20 37:1,2
45:25
text 47:6
Thank 27:7,8
54:13,18 55:22
55:23
thing 6:10 26:23
32:7 36:25 50:9
things 6:25 7:12
7:24 16:3,24
31:18 35:7 36:8
53:3,7,12,25
53:25

think 5:9,11 6:3
  8:14,16 10:9
  12:24 13:24
  16:8 17:2,3
  22:18 23:13,17
  25:12 26:25
  27:1,25 28:12
  28:23 30:7
  31:15 32:2,5,10
  32:14 33:2,21
  33:22 34:3,14
  35:4,14 37:25
  38:23 40:15,17
  41:11,18,21,22
  43:7 44:5,7,18
  45:12,18 47:8,9
  47:14,25 48:6,8
  48:25 49:10,17
  51:3 54:9
thinking 41:7,8
Third 4:9
thought 19:21
  20:19 41:5
  45:24 53:11
three 29:10
  54:15
tie 15:14 17:6
  30:14
tied 13:4,6 39:3
time 16:9 26:3
  31:19 35:19
  38:17 39:20
  47:15,16 48:14
  49:21,25 50:18
  51:12,19,22,25
  52:5 54:7
today 38:13
told 45:24
top 8:6,6
totally 23:2
transcript 15:22
  16:12 54:21
treat 23:4 41:9
trial 9:16 48:12

  51:9
true 12:9 22:7
  23:5 37:25
  42:15 49:22
trying 30:7 44:4
turn 37:17
turned 30:22
  50:20
turns 37:17
two 5:13 6:7,8
  7:7 45:12,18
type 13:2 19:8,8
  36:3 38:2 39:23
  40:18 43:25
  44:8 47:10
  48:10,16 49:23
  50:7 51:11,13
  52:21
types 8:1

___

U

ultimately 10:3
underlying 4:5
underrepresen...
  33:10
understand
  12:18 19:4 39:7
  40:2
understands
  30:1
unique 48:21
uniquely 48:21
United 1:1,6,12
  3:4,15 31:11
unjustified 23:21
unusual 42:24
upper 33:7
upward 54:4
urge 55:19
use 6:13 11:1
uses 5:23
U.S 7:25

___

V

v 1:5 3:4

valid 18:16
value 18:3
varies 10:25
various 27:24
vary 19:17,18
varying 13:7
view 23:21 31:24
  55:16
virtue 27:16

___

W

W 1:15 2:3,9 3:7
  54:16
wait 52:8
waiving 52:20
want 11:1 20:20
  26:20,21 41:2
  41:16,24 42:3,6
  42:7 44:3 47:17
wanted 44:11,14
  53:21
wants 31:25
  48:20
Washington 1:8
  1:18
wasn't 8:5 23:2
  25:6 39:17 44:1
  47:12 52:16
  53:4
way 15:17 18:12
  30:12,15 45:22
ways 32:15 45:13
Wednesday 1:9
went 33:13 53:8
  55:3
weren't 37:13
we'll 3:3 18:2,2
we're 9:22,23
  14:22 16:25
  23:18 24:9 33:5
  33:8,8
we've 5:2,2,3 6:4
  11:12 15:2
wherewithal 53:9
whichever 11:1

wildly 18:15
William 1:3 3:11
willing 7:8 8:5
windfall 23:21
window 32:15
  39:5
wish 13:7
withdraw 50:24
  51:7
word 11:1 19:18
  19:18 42:18
  47:7
words 4:21 5:13
  7:8 22:16 42:16
  42:18,25 45:1
  46:15
work 24:4,17,18
world 41:4
wouldn't 5:17
  11:25 12:12
  13:6
write 42:18,18
writing 21:16
written 42:16
  43:1
wrote 45:1

___

X

x 1:2,7

___

Y

year 26:8,8
years 26:6,7
  33:11

___

0

09-10245 1:5 3:4

___

1

1 24:5 40:3
1B1.10 11:3
  32:22 38:3
1B1.10(b)1 50:2
10 33:11
10:14 1:13 3:2

100 24:7
105 24:7
106 7:11 8:4,11
  30:17 50:10,19
  51:5 52:13
  53:21 54:6
  55:14
11 17:5 27:25
  29:4 51:4
11(c) 53:16
11(c)(1)(C) 3:18
  27:17 50:12
11:12 55:25
117 8:8,11 9:4
12 16:22 17:8
  28:1
151 11:16
16A 45:17
162 33:14
17 13:13
188 11:16
19 29:15

___

2

2 3:20 4:6,13
  24:6,9,15 25:5
  25:6 26:6,7
  55:12
2005 22:24,25
2011 1:9
22 29:14
23 1:9
24 31:6
240 50:20
25 28:22 29:1
26 28:22 30:13
27 2:7 29:4 36:22
28 29:4 36:3

___

3

3 2:4 11:3
3-point 13:13
3553(a) 37:15
  38:9 39:18,20
3582 34:20 39:2

55:18,21
3582(c)(2) 3:19
28:14 32:6,14
35:16 49:18,20
51:19
360 50:20
3742 17:19

4

4 43:11
46 52:13
47 54:23
48 55:1

5

5 13:15
54 2:10

6

6B 45:4
6B1 10:14
6B1.2 12:23
34:18 45:6 47:7
6B1.3 46:23,25
60 11:17 24:5
60-month 11:23
65 24:5,8

8

8A 50:2

9

95 55:5