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
10	
11	The above-entitled matter came on for ora
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	PROCEEDINGS
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?
- 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.
- 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?
- 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 --
- 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.
- 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

- 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 quidelines. 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 --
- 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

- 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 quideline sentence
- 18 is -- if a sentence is based in part on the quidelines,
- 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?
- 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.
- 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 quidelines.
- 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.
- 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?
- MR. HEFT: Possibly, Your Honor.
- 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-quideline sentence can be based on the quidelines.
- 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.
- JUSTICE ALITO: Well, wouldn't the

- 1 quidelines, 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?
- 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.
- JUSTICE BREYER: Sorry, I don't understand
- 19 that. Don't the guidelines provide for departures?
- 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?
- 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.
- 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
- 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.
- 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.
- 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?
- MR. HEFT: Yes, Your Honor.
- 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

- 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 quidelines. 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?
- 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.
- JUSTICE SCALIA: Well --
- 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 --

- 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.
- 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 quidelines apply to this plea
- 24 agreement.
- 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 quideline sentence? If it
- is, you can approve it. If it isn't, you can't.
- I mean, that's my reading of what it says.
- 14 So -- so why do you resist that conclusion?
- MR. HEFT: Well, Your Honor --
- JUSTICE BREYER: And, of course, the judge
- 17 now could depart from the quidelines -- 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

- 1 guidelines --
- JUSTICE BREYER: Well, how could it not be,
- 3 since the judge has no power if he is to apply the
- 4 quideline --
- 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?
- MR. HEFT: That is what it says, Your Honor,
- 15 but --
- JUSTICE BREYER: Okay. Then if that's so,
- 17 every sentence is -- you're going to say no?
- 18 MR. HEFT: No.
- 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.
- (Laughter.)
- 23 MR. HEFT: Your Honor, to go back to the
- 24 point that Justice Sotomayor made --
- JUSTICE BREYER: Yes.

- 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.
- JUSTICE BREYER: What?
- 10 MR. HEFT: There's a guideline range.
- 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 --
- JUSTICE BREYER: Are we supposed to
- 16 psychoanalyze the judge? The judge says on his writing,
- 17 checks the box: This is a quideline 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.
- Okay? You're saying that isn't based on the
- 23 guideline. No? Okay. Is that the point?
- 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 applies -- done. 5 Now are we supposed to look further and say 6 7 what his true reason is? Is that what you're saying? 8 MR. HEFT: It would -- Your Honor, I would submit it would depend on the nature of the -- the plea 9 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 to the application of the guidelines when a judge is --17 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? It was -- your -- your sentencing took place in July 23 24 2005 and we came out with Booker in --25 MR. HEFT: I believe it was March of 2005.

- 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.
- 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?
- 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?
- MR. HEFT: 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.
- JUSTICE ALITO: Right.
- 22 MR. HEFT: As in this case, there would be a
- 23 recalculation of the quidelines to determine if the --
- JUSTICE ALITO: Right.
- 25 MR. HEFT -- guideline range would be

- 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?
- MR. HEFT: Well, the -- I think that's
- 13 something that district judges decide every day, whether
- 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.
- 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.
- 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 presentence 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
- 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 --
- 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
- 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 quideline 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 --
- 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.
- 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 quideline.
- 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
- 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.
- 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.
- 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.
- 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 --
- JUSTICE KENNEDY: Well, it's got guilty
- 21 pleas on all of the counts. We know that.
- MR. GANNON: Well, but it also --
- JUSTICE KENNEDY: In your position, in your
- view, would the government be able to take the position
- 25 that the guilty pleas stay in place, but it now wants

- 1 maximum?
- MR. GANNON: Well, I think that -- that
- 3 would --
- 4 JUSTICE KENNEDY: Maximum quidelines.
- 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 --
- 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.
- 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 --
- 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?
- 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,
- it ought to be the same for the agreement.
- MR. GANNON: Well, I think it's not clear
- 15 that the judge needed to be considering the guidelines
- in the course of deciding whether to accept the plea
- 17 agreement. And Justice Breyer earlier had a colloquy
- 18 with Mr. Heft about quideline 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.
- JUSTICE SCALIA: No, but let's -- let's
- 24 assume there is no plea agreement.
- MR. GANNON: Yes. And --

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 quidelines --
- 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
- 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 --
- 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 quideline range because the judge --
- 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.
- MR. GANNON: Well, I don't think that's true

- 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 quideline 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.

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.

Τ	JUSTICE ALTIO: 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?
- MR. GANNON: Well, I -- I --
- JUSTICE BREYER: How do you want us to take
- this, pre-Booker or post-Booker?
- 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 --
- 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.
- 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.
- 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.
- 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 quidelines?
- 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 quidelines, 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.
- 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.
- 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 --
- JUSTICE BREYER: Fine.
- 22 MR. GANNON: -- because the agreement hadn't
- 23 given any reason for the judge to -- to leave the
- 24 quidelines.
- 25 JUSTICE BREYER: Correct. Now I would like

- 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 --
- 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?
- 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.
- JUSTICE KAGAN: But I thought you just told
- 25 me that -- binding -- was not a part of the test

- 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
- departure, but it does not then say that everything else
- 14 is prohibited.
- 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 --
- JUSTICE BREYER: I am? I'm reading 6B1.3, I
- 24 am reading commentary on the policy statement.
- MR. GANNON: This is for 6B1.3?

- 1 JUSTICE BREYER: Yes. I am reading the
- 2 commentary on the --
- JUSTICE SCALIA: He is reading the
- 4 commentary.
- 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.
- 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.
- 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.
- 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

- 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 quideline 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.
- JUSTICE SOTOMAYOR: -- no. Because you're
- 14 assuming that the agreement was automatically binding on
- 15 the judge.
- 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.
- 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.
- 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

- 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 quideline range.
- 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.
- 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 quidelines 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
- 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.
- 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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