

1 distinguishes Miller from a Guideline situation.

2 JUSTICE SOTOMAYOR: But doesn't a judge
3 still have to make a finding that there's a reason to
4 give a defendant a higher sentence? There may be some
5 judges who determine the nature of the past conduct
6 qualifies this defendant for career criminal status, but
7 absent that, it seems like the vast majority of those
8 judges who are now resentencing don't believe that
9 those -- that prior criminal history justifies the
10 higher sentence.

11 MR. DREEBEN: We don't doubt, Justice
12 Sotomayor, that the Guidelines range is influential.
13 The question is whether it sets an eligibility
14 threshold. The test is not likelihood of outcome. That
15 would, in effect, collapse one aspect of the test for a
16 watershed procedural rule into the criterion for a
17 substantive rule for retroactivity.

18 A watershed procedural rule both has to have
19 a fundamental effect on accuracy, plus it has to change
20 our bedrock understanding of the elements of --

21 JUSTICE SOTOMAYOR: Could I just ask
22 something? If we rule in your favor and say it's not
23 retroactive, how much is left of the Johnson ruling?
24 What effect would it have? How many cases are there in
25 fact, except the -- I guess it's the felon in possession

1 cases would be the one example that the Guideline --
2 that the Guidelines haven't already been structured to
3 take care of all career offenders.

4 MR. DREEBEN: Our position is, as the Court
5 knows from our submission in Welch, that in Armed Career
6 Criminal Act cases where the effect of the residual
7 clause was to change a defendant from having a maximum
8 of 10 to a minimum of 15, Johnson is retroactive. And
9 we have sought and supported retroactive rulings in
10 cases where somebody is no longer qualified for an Armed
11 Career Criminal Act sentence under Johnson.

12 JUSTICE SOTOMAYOR: Outside of felon and
13 possessions --

14 MR. DREEBEN: We do not --

15 JUSTICE SOTOMAYOR: -- can you think of any
16 other situations?

17 MR. DREEBEN: We do not think that
18 Sentencing Guidelines should be interpreted --

19 JUSTICE SOTOMAYOR: You're not quite
20 answering my question. What other situations besides
21 the felon in possession would Johnson and Welch be
22 operative? Because as I understand it, in virtually all
23 cases, most others, the Guidelines are within the
24 statutory maximum.

25 MR. DREEBEN: That's right. Well, I think

1 in all cases, Guidelines ranges have to be in the
2 statutory maximum. And that is precisely our point.
3 Guidelines ranges function as advice to the judge when
4 he is sentencing. The Guidelines do not impose an
5 insuperable barrier that requires a specific finding of
6 fact before the judge can sentence outside the
7 Guidelines. That was the problem with mandatory
8 guidelines. Advisory guidelines allow the judge to look
9 at the totality of the circumstances and to make policy
10 judgments that may be at variance with the Commission.

11 Now, they don't do that all that often
12 because the Commission is doing its job. And that is
13 why we are on the side of Petitioner with respect to the
14 due process issue.

15 JUSTICE GINSBURG: The third -- the third
16 issue -- you've confused me by your argument. I thought
17 from your brief that if we decide the first issue, that
18 is, was there fair notice of the sawed-off shotgun, then
19 there's no vagueness, and the case is over. But -- so I
20 was thinking, well, we could decide that third issue and
21 not reach either vagueness or retroactivity.

22 MR. DREEBEN: So, Justice Ginsburg, I would
23 urge the Court to decide retroactivity. There are
24 thousands of cases in the Federal system that have
25 already been filed urging resentencing.

1 JUSTICE GINSBURG: But would you say that is
2 not necessary if we agree that in this case there was
3 fair notice about the sawed-off shotgun being --

4 MR. DREEBEN: Well, Justice Ginsburg, this
5 Court's Teague jurisprudence says that in a collateral
6 review case, a habeas case, the threshold question is
7 retroactivity because if the new rule that the
8 Petitioner seeks would not be retroactive to cases on
9 collateral review, there should be no adjudication of
10 that prisoner's constitutional claim. The issue --

11 JUSTICE ALITO: That's like jurisdiction,
12 that we are bound, we have no choice but to decide
13 retroactivity before deciding anything else.

14 MR. DREEBEN: No. It's not a jurisdictional
15 limitation. Teague is a doctrine that this Court
16 framed, Justice Alito, if the Court wanted to decide
17 something else before then, but the reason why the
18 government thinks that it would be in the interest of
19 criminal justice for the Court to resolve the
20 retroactivity issue is that there are thousands of cases
21 waiting in the wings that are being held up today.

22 Now, Justice Sotomayor, you --

23 JUSTICE SOTOMAYOR: Mr. Dreeben, what will
24 happen to all those cases that have been resentenced
25 already?

1 MR. DREEBEN: They will keep their
2 sentences. And the ones that --

3 JUSTICE SOTOMAYOR: Even the -- where the
4 circuits said no retroactivity -- where they have
5 permitted retroactivity?

6 MR. DREEBEN: Well, no circuit has actually
7 ruled on retroactivity. The circuits have ruled on
8 vagueness. All except for the Eleventh have either said
9 vagueness applies to the Guidelines and the residual
10 clause falls. Or they have said we accept the
11 government's concession that vagueness applies.

12 JUSTICE SOTOMAYOR: But they've been
13 resentencing?

14 MR. DREEBEN: They have been resentencing --
15 88 are pointed to in Petitioner's reply brief, and Your
16 Honor asked about those. My view on those is that they
17 are a tiny, small, and unrepresentative sample of the
18 cases that are waiting being held for this one.

19 The reason that those cases have gone
20 forward are most likely because the judge took a look at
21 that defendant and said, I actually am going to sentence
22 him to a lower sentence, maybe time served. I do not
23 want to wait for the Supreme Court's decision in
24 Beckles.

25 The vast majority of cases, however, are on

1 hold, which I think could represent a view by the
2 sentencing judges that they are not so confident that
3 they will resentence the defendant to a lower sentence.
4 After all, these defendants haven't had a change in
5 their criminal history. They've had a change in the
6 advice that the Sentencing Commission is going to give.

7 JUSTICE SOTOMAYOR: If I were a district
8 court judge and I wasn't going to change the sentence no
9 matter what -- what the reason for the retroactivity
10 ruling, I would have just had the sentence.

11 MR. DREEBEN: Well, Justice Sotomayor, you
12 would have produced an efficient result. But I think
13 that for the --

14 JUSTICE SOTOMAYOR: I was known for that.

15 (Laughter.)

16 MR. DREEBEN: And that's admirable. But for
17 many of the judges that are sitting on hundreds upon
18 hundreds of these cases and for U.S. attorneys that are
19 grappling with old records and attempting to reconstruct
20 sentencings from many years ago, they are looking to a
21 decision by this Court on the retroactivity question.

22 JUSTICE ALITO: Well, if I think that it's
23 retroactive, should I stop there, should I go on to
24 consider whether it's vague, or should I just accept
25 your concession that it's vague?

1 MR. DREEBEN: Well, I think that the Court
2 should decide the legal issue. We have submitted to the
3 Court why the Due Process Rule that we think does exist
4 would not be retroactive if the Court disagrees and
5 thinks that it would be retroactive if it is true. Then
6 I think the Court should go on to say that, yes,
7 vagueness applies to the sentencing guidelines, but in
8 view of the commentary here that specified the sawed-off
9 shotgun, the residual clause is not vague as to that
10 particular offense. And as a result, the judgment
11 should be affirmed.

12 But I think that the systemic interest of
13 justice right now in the wake of this Court's decision
14 in Johnson and knowing the pendency of Beckles is for
15 the Supreme Court to pronounce authoritatively on
16 whether retroactivity should apply to the new Due
17 Process Rule that Petitioner seeks and that the
18 government thinks in light of this Court's decisions in
19 Peugh and Molina-Martinez is correct.

20 So the sequence of analysis in the
21 government's view would be first you address
22 retroactivity. If the Court agrees with the government
23 that this is a procedural rule that does not have the
24 consequences that Welch and Montgomery attributed to
25 procedural rules, then the case is over. If the Court

1 concludes that that Due Process Rule would be
2 retroactive if it were correct, I think the Court should
3 go on to decide whether vagueness applies to the
4 Guidelines. I do not agree that any other guideline is
5 going to be invalid under vagueness analysis. Just this
6 one, except insofar as the commentary has specified in
7 enumerated offenses.

8 On that prong, we believe that Petitioner
9 loses because a sawed-off shotgun is an enumerated
10 offense.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 MR. DREEBEN: Thank you.

13 CHIEF JUSTICE ROBERTS: Mr. Mortara.

14 ORAL ARGUMENT OF ADAM K. MORTARA
15 FOR COURT-APPOINTED AMICUS CURIAE
16 IN SUPPORT OF THE JUDGMENT BELOW
17 ON QUESTION 2

18 MR. MORTARA: Mr. Chief Justice, and may it
19 please the Court:

20 I want to start off correcting something
21 that my friend said when he referred to historical
22 sentencing as not being arbitrary. The United States
23 Senate report on the Sentence Reform -- Sentencing
24 Reform Act said: "Correcting our arbitrary and
25 capricious method of sentencing will not be a panacea."

1 That's in the Senate report on the
2 Sentencing Reform Act. Judge Frankel understood
3 sentencing is arbitrary under the old system. It was
4 arbitrary. It may have been individualized, but it was
5 arbitrary.

6 Now, moving forward --

7 JUSTICE SOTOMAYOR: I'm sorry. It wasn't
8 arbitrary to the judge at issue --

9 MR. MORTARA: Correct, Your Honor.

10 JUSTICE SOTOMAYOR: -- meaning, the judge at
11 issue always had his or her own reasons.

12 MR. MORTARA: Correct.

13 JUSTICE SOTOMAYOR: What was arbitrary was
14 that one judge could have put different values on a
15 reason in one place and -- in New York and different
16 values in California. That's a very different form of
17 arbitrariness.

18 MR. MORTARA: I don't think so, when one
19 looks at the sentencing factors in 3553(a)(2), the
20 purposes of sentencing that my friends both agree are
21 not subject to vagueness challenges. These purposes are
22 even more vague than the career offender enhancement --
23 adequate deterrence, respect for the law, just
24 punishment -- yet they result in the calculation in the
25 mind of the judge of a single number, a fixed,

1 determinate sentence.

2 My friend referred to arbitrary determinate
3 sentencing arising from the career offender enhancement
4 residual clause. But think about what 3553(a), the
5 first sentence says: "The Court shall impose a sentence
6 sufficient but not greater than necessary to comply with
7 the extremely vague purposes of (a) (2)."

8 JUSTICE BREYER: But his point, I think, is
9 that, yes, all that you say is true, but this is a
10 special kind of guideline. This is like a threshold.
11 This is like a rule of law that says, get into this
12 career offender business if and only if you satisfy this
13 rule. Thus, most rules are telling the judge, Judge, go
14 back to your history of what this is about. Look at the
15 offender, figure out what he did, and then try to find
16 an appropriate sentence in light of factors. This isn't
17 that.

18 This is off/on. You either are in the
19 career offender or you are not. And just as you
20 couldn't, even before, have decided the sentence through
21 a throw of the dice, so you cannot now interpret an
22 on-off rule to say it's no worse than what you're
23 talking about.

24 MR. MORTARA: And, Justice Breyer, that
25 amounts to an argument that because the career offender

1 enhancement residual clause isn't quite that vague, it's
2 more subject to constitutional vagueness challenges.

3 JUSTICE BREYER: No, no, I'm not saying it's
4 not that vague. It is that -- it is saying you can't
5 rely on how sentencing used to work in order to save
6 this on-off rule.

7 Then what was worrying me in our
8 conversation is I could think of other parts of the
9 Guidelines; for example, the part that deals with
10 concurrent versus consecutive sentencing, which, you
11 know, is a nightmare and is also the notion of a kind of
12 on-off rule, and I'm afraid of what we would do here.
13 See, that's where I a.m. in this. I mean, I'm not
14 saying don't go ahead, go ahead. But I think he's
15 trying to make a qualitative difference in what we're
16 talking about here.

17 MR. MORTARA: I do want to get back to the
18 (a) (2) factors, but I -- I'll address your question
19 directly.

20 My friend said that the problem here is
21 Molina-Martinez and Peugh and the weight that the
22 Guidelines are given. And that weight in part comes
23 from Rita, which says that -- that an appellate court
24 can presume a within-Guideline sentence is reasonable,
25 because that reflects the judgment of both the

1 Commission and the sentencing judge that the 3553(a)
2 factors have been met.

3 But that's actually not true with the career
4 offender enhancement, and that's because the career
5 offender enhancement exists at the command of Congress
6 in 994(h). The Commission is not actually deploying its
7 expertise when it made the career offender enhancement.
8 It's doing something it was commanded to do, which is
9 make sure that sentences get at or near the statutory
10 maximum.

11 So the rationale for the reasonableness
12 presumption of Rita completely goes away with the career
13 offender guideline, and that's why the career offender
14 enhancement should not get that kind of weight and
15 that's why it doesn't.

16 My friend referred to 80 percent of
17 sentences being within Guidelines ranges. It's
18 75 percent outside of the Guidelines ranges -- Guideline
19 ranges for career offenders. Only 25 percent of career
20 offenders in 2015 got within the Guidelines-range
21 sentences. And some of that is government-sponsored
22 departures to be sure. But an astounding nearly
23 30 percent of career offenders got below Guideline-range
24 sentences without the government sponsoring them.

25 And what's going on there is that judges are

1 not giving the career offender enhancement as much
2 weight as Molina-Martinez and Peugh are talking about
3 because it doesn't come from a Commission's expertise on
4 the 3553(a) factors, and the Rita rationale is gone and
5 because sentencing judges are commanded to consider the
6 very facts of the offense and the criminal history that
7 they were deprived of considering under the ACCA.

8 In Johnson, the Court made very clear that
9 the saving construction offered by one of the other
10 opinions, the so-called criminal history or record-based
11 approach, was not available as a matter of statutory
12 interpretation. But under the sentencing guidelines in
13 factor (a)(1), a sentencing judge must consider those
14 facts.

15 So to take the example from Johnson, a
16 variety in a correctional institution under Connecticut
17 law under the categorical approach, probably a crime of
18 violence, but there might be the rare violence-free
19 riot. A sentencing judge under the Guidelines can look
20 at what actually happened and look at the severe effect
21 of the career offender enhancement and then sentence
22 below the range.

23 And that is what is, in fact, happening,
24 because judges are looking at the facts, and they are
25 not acting like automatons blindly adhering to the

1 Guidelines whatever their weight.

2 But coming back to the (a) (2) factors -- and
3 I do want to come back to them -- in 1984, the (a) (2)
4 factors were enacted. They are vague by anyone's
5 definition. And the only answer we get from my friends
6 is the Sentencing Guidelines require numerical range.
7 The (a) (2) factors lead to a specific number, a fixed
8 sentence in the mind of the judge. Which is more
9 arbitrary or provides less notice? That's easy.

10 The only other explanation we get is the
11 weight afforded to the Guidelines. I've already
12 mentioned that a little bit, but another way we can
13 think about it is a district judge is allowed to deviate
14 from the Guidelines if it disagrees with them as a
15 matter of policy. That's Kimbrough and Spears. A
16 district judge cannot declare that they disagree with
17 the purposes in (a) (2) and say, I a.m. now going to
18 sentence under my theory of radical over-deterrence,
19 instead of adequate deterrence. That would be
20 reversible error under all of this Court's precedents.
21 So whatever weight Molina-Martinez and Peugh say should
22 be given to the Guidelines, the (a) (2) purposes have
23 actually equal or more weight, because a district judge
24 cannot disagree with them. They are, in a sense, more
25 binding than the non-binding career offender

1 enhancement.

2 And in that respect, it goes from
3 discretionary sentencing, which I agree historically
4 we've all accepted as constitutional, and then to the
5 (a) (2) purposes, which may be an attempt to codify that
6 historical practice, but they are law. It -- it is a
7 statute. It says shall impose a sentence, a fixed
8 number. And they are vague. And if you accept that
9 discretionary sentencing is constitutional and you
10 accept that (a) (2) purposes are not subject to a
11 constitutional vagueness challenge, it seems extremely
12 difficult to accept that the career offender enhancement
13 is somehow subject to a constitutional vagueness
14 challenge either because of the numerical range, it's a
15 fixed number for (a) (2), or because of the weight for
16 the reasons I've given.

17 One other thing I wanted to raise, which is
18 related to questions Justice Sotomayor was asking about
19 the resentencings. I'm not aware of the percentage of
20 those 88, what percentage that is of the total
21 resentencing that would come up, and my friend suggested
22 it's an unrepresentative sample. But there's plenty of
23 confounders in this resentencing.

24 The -- the first is, sometimes it's been a
25 different judge.

1 The second is, sometimes the -- the
2 defendant was originally sentenced under Booker, or
3 pre-Booker, so mandatory guidelines.

4 The third is that in some of these cases --
5 and I've looked at the government's sentencing
6 referendum -- the United States has gone in and said,
7 well, because the Commission has gotten rid of the
8 residual clause, we would like the defendant's sentence
9 to reflect the way sentences are going to be going
10 forward, so we're asking you to impose a lower sentence
11 because we want things to look, in the future, the way
12 they are going to look for this defendant today.

13 All of those things are confounders on the
14 actual effect that the career offender guideline had in
15 its original form on the defendant's sentence. And to
16 take an example of Mr. Beckles, we talked a lot about
17 Molina-Martinez and Peugh, and some other decisions that
18 are mentioned in Peugh as giving weight to the
19 Guidelines. Most of those decisions did not exist when
20 Mr. Beckles was actually sentenced. Only Rita was
21 there. And Mr. Beckles' lawyer told the sentencing
22 judge that all the factors in 3553(a) were equal, that
23 none of them had any more weight than any of the others,
24 and Mr. Beckles still got his within-Guidelines range
25 sentence.

1 It is true that six years later the district
2 judge said, I would have sentenced him differently. But
3 that may -- that may be just as much an indication of a
4 Rita-Gall style error of overinterpreting the Guidelines
5 or overweighting them as anything else.

6 If the Court has no further questions,
7 I'm -- I'm prepared to sit down.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Ms. Bergmann, you have a minute remaining.

10 REBUTTAL ARGUMENT OF JANICE L. BERGMANN

11 ON BEHALF OF THE PETITIONER

12 MS. BERGMANN: I'd like to make -- start
13 with a point about retroactivity analysis.

14 Mr. Dreeben states that the rule here is a
15 procedural rule, and I would disagree in part because
16 Mr. Dreeben misstated Montgomery as an eligibility test.

17 In both Welch and Montgomery, the defendant
18 was eligible for the same sentence so long as the court
19 made specific findings. And here, just like Montgomery,
20 it will be the rare case where a court can impose the
21 same sentence once the defender -- the defendant no
22 longer qualifies as a career offender. And that's
23 because the court would have to make additional findings
24 just was as true in Montgomery. There it was permanent
25 incorrigibility, but here, the very upward from an

1 ordinary guideline range to the career offender range
2 would require the judge to come forward with specific
3 and compelling significant determination, a
4 justification that would be so compelling that would
5 allow a court to double someone's sentence, and those
6 considerations would have to be things that were not
7 already taken into account by the Sentencing Commission
8 when they determined what the ordinary guideline range
9 would be.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 MS. BERGMANN: Thank you, Your Honor.

12 CHIEF JUSTICE ROBERTS: Mr. Mortara, this
13 Court appointed you to brief and argue this case as an
14 amicus curiae in support of the judgment below on
15 Question 2. You have ably discharged that
16 responsibility, for which we are grateful.

17 The case is submitted.

18 (Whereupon, at 11:05 a.m., the case in the
19 above-entitled matter was submitted.)

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