OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: WILLIAM J. BURNS, Petitioner V. UNITED STATES

CASE NO: 89-7260

PLACE: Washington, D.C.

DATE: December 3, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM J. BURNS, :

Petitioner :

v. : No. 89-7260

UNITED STATES :

- - - - - - - - - - - - - - - - - - - X

Washington, D.C.

Monday, December 3, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:12 a.m.

APPEARANCES:

STEVEN H. GOLDBLATT, ESQ., Washington, D.C.; on behalf of the Petitioner.

STEPHEN J. MARZEN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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PROCEEDINGS

(10:12 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument this morning in No. 89-7260, William J. Burns against the United States.

Mr. Goldblatt.

ORAL ARGUMENT OF STEVEN H. GOLDBLATT

ON BEHALF OF THE PETITIONER

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

This is a Federal sentencing guidelines case. Mr. Burns was sentenced to 60 months' imprisonment, although the judge, the presentence investigator, and the parties all agree that the appropriate guideline range for the case is 30 to 37 months' imprisonment.

Neither the parties or the presentence investigator identified any grounds that might justify departure from the appropriate guideline range as that terms is defined by statute. It was not until sentence was imposed, however, that the judge indicated that she disagreed with that assessment and in fact found at least three grounds which did justify departure. She at that point immediately imposed sentence of 60 months' imprisonment and directed the defendant to step back with the marshal.

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The issue that is before the Court today is whether or not the judge was obliged to alert the parties that she had found three grounds for departure that no one had identified so as to allow comment on whether or not departure was appropriate before sentence was imposed.

We make this argument both under rule 32(a)(1) of the Federal rules of criminal procedure and, alternatively, as a matter of fundamental due process.

Rule 32(a)(1) was amended at the same time that Congress passed the Sentence Reform Act of 1984 to provide as follows, and I will quote for this purpose. "At the sentencing hearing the court shall afford counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence."

The court goes on to provide that the court shall also afford counsel for both sides and the defendant the opportunity to address the court. It is our argument that under the circumstances presented here, where the judge is the only person who has identified grounds for departure, that the judge must alert the parties to that fact, otherwise the court is not affording the parties the opportunity to comment on a matter that is very much relating to the appropriate sentence.

QUESTION: Mr. Goldblatt, I would have thought that every defendant would be on notice that a judge could give a sentence any place within the range, that it could be enhanced or otherwise. I mean, the sentencing scheme contemplates that. Why isn't that the kind of notice you need?

MR. GOLDBLATT: Justice O'Connor, the reason that I think that that notice is not adequate is because the guidelines contemplate that, for most cases I would submit, that the sentence should be within the guideline range and that it requires unusual circumstances before the judge can depart from the range which have to be identified for the record and are subject to appeal.

It is a complex enough decision that without some guidance, it would be almost impossible for a lawyer to pick up the guideline manual and identify any possible grounds for departure. Thus, the presentence investigator in preparing the presentence report, which the parties are entitled to see -- at least this part of it -- is directed under the rule to identify any grounds which might justify departure without regard to whether the investigator believes they ought to be used.

Thus, I would submit that in the situation where that investigator says there are no grounds for departure -- that might justify departure -- counsel truly is not on

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notice.

I think it's also important to bear in mind that the guideline manual, or the guideline system, contemplates two types of departure: those that are recognized either in the 5 case series, aspects of the crime, those that involve the prior criminal history under the 4 series. But also the judge also has the ability to depart for reasons that the judge determines were not considered at all by the sentencing commission.

Therefore, in that circumstance the defendant or the defense counsel would have to look at their record in the case to attempt to identify is there anything here that wasn't taken into consideration.

QUESTION: Did you take the position they were factual inquiries that you wished to address?

MR. GOLDBLATT: No, Justice Kennedy, I think we acknowledge that the underlying facts that there can be some debate as to whether we knew that there was a substantial impairment of governmental function when none was identified in the presentence report. But I don't think there's any factual matter that we wish to contest that the fundamental facts are incorrect.

However, what we would have contested had we had the opportunity -- I think it's a reasonable conclusion of the record -- would have been whether there were

reasonable grounds for departure and whether it was appropriate under the circumstances and even assuming that there were grounds for departure, whether or not departure to the extent that the judge in fact departed, which is some 42 percent over the guideline range maximum, was necessary under the circumstances.

QUESTION: It's somewhat paradoxical that this right had not been identified, at least in our jurisprudence, before the Sentencing Guidelines Act. And the Sentencing Guidelines Act now limits the district court's discretion and yet you would say that we impose more restrictions on how the sentencing procedures should be conducted. That seems paradoxical to me.

MR. GOLDBLATT: Justice Kennedy, I would submit that in this circumstance, I would -- I would -- it's important I think to underscore that we are not requesting that the Court construe the guidelines and the rules as requiring a judge in all circumstances to announce to the parties that the court is considering a departure. This only comes up in the situation presented here where no one, other than the judge, has identified grounds for departure, and in fact, the presentence investigator has indicated that there are none. It is only in that circumstance that we submit that the obligation under rule 32(a) to afford the parties the opportunity to comment on

matters relating to the appropriate sentence cannot be exercised unless the court indicates in one fashion or another that the court disagrees with it -- other people's conclusions -- and that there is a ground for departure.

QUESTION: Of course, under the old system, following up on Justice Kennedy's question, you would have perhaps a recommended sentence from either the probation officer or maybe from the Government and yet the court had just a complete latitude within the statutory limits. No one ever thought that you had to have notice as to what the district court had in mind.

MR. GOLDBLATT: Mr. Chief Justice, that is correct, and I would submit that not only did anybody think of it, I don't think he would have had the right. But I think that's one of the things that the Congress attempted to change with guidelines sentencing.

There are two concepts here. One was to restrict the discretion of the district court because of what Congress found to be unconscionable disparity in sentencing. But also to inject a large measure of fairness in the process that did not previously exist.

Under rule 32(c), the defense right to access to the presentence report and their right to challenge matters in that report, factual -- actually the right of both sides to challenge it -- has no parallel in previous

sentence existence in the Federal system. And our point is that under this guideline system it was changed so that one of the key factors is that the parties are to have meaningful participation.

I guess the best analogy I can draw is that if the presentence investigator had identified any grounds for departure, that had to go in the report. If it did, the defense would have been on notice. They could have challenged the factual premises for it. They could have prepared for the sentencing hearing and presented arguments that -- such as we suggested in our brief to try and convince the judge that it was either inappropriate to depart or, if the judge was going to report, to try and reduce the amount the judge would depart.

That is consistent with how the guidelines are supposed to operate. Informed participation by the parties is essential.

Yes?

QUESTION: Focusing, Mr. Goldblatt, focusing on this case, what is there that Mr. Addis could have said to Judge Johnson if he had known about her intent to depart that he didn't say and that wasn't already raised in the court of appeals on appeal -- in this case?

MR. GOLDBLATT: Justice Blackmun, what counsel could have said I believe, addressing the three grounds

here -- we have three grounds: duration, concealment, and significant disruption of governmental function. Duration is a factor that was not considered by the guideline commission at all as a grounds for departure, so it's a judge-directed departure.

With that, I think counsel could have argued to the court that duration, in essence, is captured in the guidelines because they allow the relation back to the events -- so in this case it was over 6 years, the duration of the crime as how it was aggregated to over $1.2 million. And that's what raised the level of the crime, I believe, to level 19 and that this really wasn't something different than what the guidelines had already factored into it.

With regard to concealment, which relates to the tax evasion to cover up the crime, although that is covered by 5K29 of the departure grounds, it was also a basis for enhancing the level of the tax fraud by two levels, so it was in that sense already considered by the guideline commission.

And with regard to significant disruption of a governmental function, counsel could have and should have argued that this type of disruption of a governmental function is inappropriate for departure or is not required since almost any crime that involves the Federal

Government will disrupt it in some way or another. And this should not be considered significant.

QUESTION: Mr. Goldblatt, do you have to -- does the judge have to be specific or does he just have to say I'm going to go outside of the guidelines?

MR. GOLDBLATT: Justice Marshall, I would submit that what the judge would need to do would be to alert the parties by indicating the grounds of the departure in advance in such a way that the parties could comment on that.

QUESTION: Sort of a bill of particulars?

MR. GOLDBLATT: I think it would be done on a case-by-case basis. In this case I don't think it would require much more than I am considering the duration of the crimes, the facts that they were concealed --

QUESTION: You go case -- you go case by case, you might say you don't need it at all.

MR. GOLDBLATT: In -- certainly if it's -- there are many circumstances where you wouldn't. Since the premise is rule 32(a)(1) that the court has to afford an opportunity to comment.

QUESTION: Well, why is this not one of those cases?

MR. GOLDBLATT: Because in this case, there was no indication to alert the parties to the type of argument

they should --

QUESTION: That's what I said, if there's no need, no need, then there's no need. You don't take that position. You take the position there was need.

MR. GOLDBLATT: There was very much a need here. As I indicated, if this had been indicated anywhere in the --

QUESTION: Well, how much -- I think what I'm trying to ask is how much is the need. If he just goes outside and by -- 2 days, there is not need, obviously. What is the need to tell the defendant that I'm going to exceed the guidelines?

MR. GOLDBLATT: The need is so that counsel can prepare the arguments that are necessary to the decision whether or not there --

QUESTION: It has to be in particular?

MR. GOLDBLATT: Yes, it would have to be in particular. The specific grounds that the judge was relying on, and that --

QUESTION: There's not a word in the guidelines that says that.

MR. GOLDBLATT: There is not a word in the guidelines that says that, except --

QUESTION: It wasn't done before.

MR. GOLDBLATT: There certainly would not have

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been a guideline range before either. This language that was added to the rule was superimposed on language that already existed in the rule that allowed the parties the right to address the court.

QUESTION: There was a sentencing range before if not a guideline range.

MR. GOLDBLATT: There was a statutory range, a statutory maximum.

QUESTION: And a judge would say, you know, I'm giving you the maximum because I think you're a really bad fellow for the following reasons, and why wouldn't it have been just as necessary under the prior regime for counsel who didn't know that the judge thought he was a bad fellow for those reasons to be able to refute it?

MR. GOLDBLATT: The reason, I think, Justice Scalia, is before the guidelines went into effect no statutory rights were created or expectation. It is precisely because of the situation you describe, where the parties had no rights at all at the proceeding to know anything, that these guidelines came into effect because Congress determined that sentencing as it existed in the Federal system, pre-guidelines, produced unwarranted disparity.

QUESTION: Well, they had a right to non-arbitrary decision making and you say that it's, it's

simply arbitrary decision making to use a reason for putting somebody in prison for a longer period of time that the individual has had no reason to, to address. It seems to me that was -- if that unlawfully arbitrary under this regime, it was unlawfully so under the earlier one.

MR. GOLDBLATT: Justice Scalia, the distinction I would draw there is I think that the guidelines create a structure whereby the parties are entitled to participate in this process to try and persuade the judge and influence the decisional process. I'm not suggesting, and we have not indeed argued on -- in this appeal -- that the judge's decisions were unreasonable. What I am suggesting is there are alternatives that may also may be reasonable and in fact are reasonable that should have been presented to the court before she made her decision. Then she would made her decision, and that is very much what the guidelines were attempting to create.

QUESTION: You, you have, of course, the right of allocution. I mean you have a right to say something before sentence is imposed.

MR. GOLDBLATT: That is correct, Mr. Chief Justice, and that appears elsewhere in the rule. As a matter of fact, the rule goes on to say the court shall also afford counsel the opportunity to address the court and --

QUESTION: So your complaint is not that you don't have a right to say something, but that you weren't as fully formed -- informed as you should have to be able to take advantage of your right to say something?

MR. GOLDBLATT: And I would say that there's an independent right to comment on matters relating to the appropriate sentence beyond the other part of the rule.

QUESTION: By virtue of the rule?

MR. GOLDBLATT: By virtue of this language that was superimposed. I mean the language is rendered redundant or possibly even superfluous and I -- again, the analogy I would draw to is if the presentence investigator identifies grounds for departure, counsel is guaranteed, at least 10 days before imposition of sentence, opportunity to prepare arguments against departure or if the other side raises it, he would get the same right.

And it is anomalous to suggest that in the situation where no one has identified it, where there is no alerting of the parties to the possibility that departure may be there, that the court should not afford that opportunity but should back silently, listening to argument that really has nothing to do --

QUESTION: But if you look at it as an adversary process, I -- the prosecution isn't advancing this claim and the -- to say that the defendant has no knowledge --

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the person who's -- it really isn't -- and the claim that's advanced. It's the decision maker making, making the decision. It's not as if the prosecutor has somehow got around to the judge without your knowing it.

MR. GOLDBLATT: No, no. It's the judge alone that is doing it. And I would submit -- I would submit what you're asking for is informed participation, the ability to comment on a matter relating to the appropriate sentence.

Here, this record, I think, amply demonstrates that counsel really didn't have the opportunity to comment on departure.

QUESTION: Suppose the judge said, counsel, I've been considering this over the weekend and I want you to know before you address the court that I am considering departing from the guidelines to increase the sentence. Is that sufficient?

MR. GOLDBLATT: Assuming the judge also indicated the basis for the departure. In other words, if the judge said, I'm considering departing because of the duration of these crimes, then I think courts have upheld that it's been adequate unless counsel at that point raises an objection that they need more time to address the question of departure. But that type of notice can be consistent with what rule 32(a) requires.

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And in fact, this is the rule that exists in some six circuits at this point. The D.C. Circuit is the only circuit that has held otherwise. And I think the premise is largely that one of the major changes that the guidelines bring into the process is informed participation by the parties. The Government itself has on two occasions filed appeals where they have been deprived of notice of a downward departure. And as the Court is aware, these appeals were part of the approval of the Attorney General or the Solicitor General.

Under this guideline scheme, the ability to make the arguments as to whether or not departure is appropriate is essential to effective representation of the defendant or the Government and also is an important tool in assuring that you don't have unwarranted departures.

It may well be that in this case the judge would have departed anyway had she heard from counsel. But the question is would it have been 60 months, might it have been 58 months, might it have been 57 months? It's impossible to tell. But this type of process ensures that the court will get the best arguments on both sides.

And what happens here that does not occur. Counsel's argument, as the transcript reveals, had nothing to do with departures. It was a generalized discussion

which Judge Newman in the United States v. Kim cite -- said in our brief in the Second Circuit indicated almost invariably as what's going to happen if you don't have notice of the possibility of departure. You'll simply make and argument identifying the mitigating circumstances and that will be it.

But when you have notice that the judge is considering various factors, it requires you to marshal what the guideline commission considered, what it didn't consider, and make the best possible arguments that are almost the equivalent of a mixed question of law. In fact, it's not a straight factual argument.

QUESTION: Mr. Goldblatt --

MR. GOLDBLATT: Yes, sir.

QUESTION: Do I correctly understand from your brief, you agree that in the case of downward departures, the Government should get the same notice that you're asking for today?

MR. GOLDBLATT: Yes.

QUESTION: And is it -- do you happen to know empirically whether the number of downward departures exceeds the number of upward departures?

MR. GOLDBLATT: Almost threefold, 3.5 percent --

QUESTION: So, actually your position is more in favor of the Government than for the defense bar as a

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general matter?

MR. GOLDBLATT: As a general matter, yes. Only 3.5 percent of the some 12.5 percent of departures in 1989 were upward departures. And the Government very --

But I think the most telling thing about the Government appealing is they recognized as well that this type of notice is essential to preparing for sentencing proceeding. And it's important -- there's no question that under traditional sentencing the types of rights I'm talking about would not even be discussed. The case wouldn't be here.

The guidelines change the calculus. It's a different process. It's not unfettered discretion of the district court. It's totally changed from that.

QUESTION: Well, you would think if it was so obvious that the guidelines would require notice. Certainly the guidelines restricted the discretion of district courts, but they didn't impose a requirement of notice. They reimposed a requirement that you have to give your reasons specifically, and the district judge did. But you would think that if it's all that obvious, the guidelines would have said that what you're urging -- but they didn't -- but they didn't.

MR. GOLDBLATT: Justice White, that's true, but I would submit the reason for that is in the vast majority

--

QUESTION: So we've -- you want us to -- you want us as part of the guidelines to say notice is required without even getting to a constitutional argument, is that it?

MR. GOLDBLATT: No, but again the important thing to stress there is we're asking for notice in a very limited circumstance and not for the purposes of knowing what the judge is thinking, but --

QUESTION: But we would be amending the guidelines.

MR. GOLDBLATT: No, I would submit not. I think the language in rule 32(a)(1) is adequate in this limited circumstance to conclude that the judge cannot afford you the opportunity to comment on a matter relating to the appropriate sentence without alerting you to the fact that the court is considering departure.

QUESTION: Where do you get that a 32(a)(1)? It just says before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant.

MR. GOLDBLATT: No --

QUESTION: Is that the --

MR. GOLDBLATT: -- the (inaudible) goes beyond that. It says, shall afford the attorney for the

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defendant and the Government the opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence.

QUESTION: Oh, I see.

MR. GOLDBLATT: That is a change that came -- the language I think you were referring to, Justice Scalia, is from the earlier pre-guidelines.

QUESTION: I see.

MR. GOLDBLATT: And I very much agree, pre-guidelines, it's not there. But this language, the court is under an obligation to allow you to address matters relating to the appropriate sentence. Well, we'll arguing as a matter of fact almost that where the judge is the only one that knows there are grounds for departure, the only way the judge can afford you the opportunity to address those matters is to identify them for counsel before sentence is imposed.

QUESTION: Well, you had the probation officer's report.

MR. GOLDBLATT: That's it. There were no grounds for departure.

QUESTION: Well, that's what he said, but the facts, all the facts were there that the judge relied on.

MR. GOLDBLATT: Yes, but --

QUESTION: And I suppose that -- I don't know

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why you shouldn't just rest on the probation officer and the prosecutor. There were the facts. You could have at least argued with the judge, and furthermore none of these facts were a departure. Couldn't you? You could have.

MR. GOLDBLATT: You could certainly argue that, Justice White, but to be able to structure it and figure out duration, which isn't even mentioned as a ground for departure in the guidelines, is something the judge identified.

QUESTION: I don't know why you let your opposition gull you into silence. I would think that if any fact in a probation officer's report that would arguably influence the judge you would want to address it.

MR. GOLDBLATT: Justice While, our point is that the guidelines are sufficiently complex that without notice from somewhere --

QUESTION: What if you had -- what if you had -- what if you had said, now here are these facts that I suppose judge arguably could -- could justify a departure or might justify a departure in your mind? I want to tell you that they really don't. Now, would you -- and the judge said, well, you're just dead wrong. Here is the maximum. Now, would you still be here?

MR. GOLDBLATT: If in fact --

QUESTION: No notice, no notice --

MR. GOLDBLATT: No notice --

QUESTION: -- but you made the very arguments that you would have.

MR. GOLDBLATT: That would -- I would submit in that situation, as the Second Circuit concluded in Jagmohan where the Government appealed to lack of notice, the conclusion there was that it's harmless error. You would have -- if you made the arguments that should have been made, you can't complain that you didn't get notice.

We did not make the arguments that should have been made.

QUESTION: Mr. Goldblatt, if you extend this rule 30 -- 32(a) which requires the counsel to be given notice of what the probation officer's determination is with respect to the guidelines, if you extend that to the judge, you come out with something quite different from what you're urging us to do, and something much more sensible, I might add. That is, you come up with a situation in which the judge tells counsel -- not -- he doesn't say coyly, I'm thinking of departing from the guidelines, and then counsel has to guess, you know, on what basis. You would come up with something in which the rule would read, the judge shall make his determination, tentatively, as is done in the Administrative Procedure Act. You make a tentative determination and then counsel

has an opportunity to argue that your basis for departure was wrong.

But there's nothing remotely like that here. And what you're arguing for seems to me something so, so strange that the judge just says, I just want you to know that I'm thinking of departing from the guideline. And counsel says, but why, Your Honor, and he says, well, I don't have to tell you that.

MR. GOLDBLATT: No, Your Honor, I'm suggesting that the judge does have to tell you that. That if all the judge says is I'm thinking of departing without stating the grounds that that does not afford the opportunity to --

QUESTION: You are requiring the grounds to be stated in advance by the judge?

MR. GOLDBLATT: That is correct. That the judge is considering -- I would assume in most situations this type of notice would be given before the sentencing hearing itself. The courts that have addressed it have suggested that certainly is the better procedure, but since everybody is grounded it on 32(a)(1), it's a case-by-case determination as to whether or not you were deprived of an opportunity to comment. But everyone contemplates that you must know the grounds.

QUESTION: (Inaudible) mind. And after argument

by both defense counsel and the probation officer, he decides to use another ground?

MR. GOLDBLATT: In that situation, I would suggest that it is a new ground that nobody has yet to address. This language would require the judge before sentence was imposed to identify it and afford the parties an opportunity to comment on a matter related to the appropriate sentence.

QUESTION: So you'd have another continuance?

MR. GOLDBLATT: Mr. Chief Justice, that would be true, but I think that what is being overstated here is the likelihood that a judge is going to come up with new and different grounds at the proceeding itself.

QUESTION: But the fact of the matter is that district judges all over the country have had to spend a great deal more time than they ever had to before in these sentencing hearings because of the guidelines, and that's because of an act of Congress. Everybody realized that's got to be spent. But to complicate the things still further by additional continuances and that sort of thing would just make it even worse.

MR. GOLDBLATT: I don't think that you will have the continuances. I would point out that, that this, this rule is in effect in six circuits in one form of another, some for over a year, and the various problems --

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QUESTION: Maybe that's the circuits that are complaining.

(Laughter.)

MR. GOLDBLATT: I don't think so, because I don't think the Government has identified any specific problems that have come from this. In most situations there will not be postponements of proceedings. The decision to depart has to be formulated too carefully. Most judges, as was the case, I think, here, have to think about it before they come to the proceeding. It's a very complex decision and also in most situations it will be identified either by the presentence investigator or the parties.

So we're talking about something that comes up very rarely and I would submit that this language is adequate as a safety valve to ensure that the parties have some say in it.

QUESTION: Mr. Goldblatt, assuming for the sake of the question that the Court does not hold that you are entitled as a matter of statute to the notice you require, is the defendant in any different position for due process purposes than the defendant would have been under the prior law -- the prior guideline law, rather?

MR. GOLDBLATT: Our position on that is that the creation of guideline ranges with the use of the language

that the court shall sentence within the guideline range unless certain factors are found to exist is sufficiently mandatory as to change the due process calculus in much the same way that the court has held in cases involving statutory provisions that afford greater rights than existed.

QUESTION: But the language that you quote from the guidelines goes to substance, not to notice.

MR. GOLDBLATT: That is correct, but if a substantive right is recognized to a sentence that is not only within the statutory range but also that you have a protectable liberty interest in the guideline range itself, then it would -- the court would have to determine under Mathews v. Eldridge as to whether or not the notice requirement materially aids -- reduces the risk of error. So in that situation, even if the rule did not provide it, the Court could conclude, as it often does in due process situations, that meaningful notice and an opportunity to comment are fundamental protections of any liberty interest. So --

QUESTION: So that your interpretation of the guidelines is that a new liberty interest has been created by them?

MR. GOLDBLATT: Yes, I would submit that the guideline range by using the mandatory language in 3553(b)

that the court shall sentence within the guideline range is a substantial departure from previously existing sentencing law in the Federal system and that it does create a protectable interest and that in the circumstances presented here the defendant should have the right to address that, the departure from it. And because he perceived no notice here and did not address it, that he's entitled to resentencing.

If there are not further questions, I would like to reserve my remaining time for rebuttal.

QUESTION: Very well, Mr. Goldblatt.

Mr. Marzen.

ORAL ARGUMENT OF STEPHEN J. MARZEN

ON BEHALF OF THE RESPONDENT

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

The question in this case is whether district judges conducting sentencing hearings must be required to comply with new procedures imposed by appellate courts developed through case-by-case litigation rather than through the traditional amendment process.

QUESTION: Mr. Marzen, what if the judge makes a downward departure? Is it the Government's position that it is entitled to notice?

MR. MARZEN: That would depend on the court's

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rule in this case. Our --

(Laughter.)

MR. MARZEN: If you do say defendants have the right, we would certainly in a subsequent case say that we would have a right. As the first matter though we do not -- it -- the position of the acting Solicitor General is that it -- no notice is required. The two cases in which Assistant U.S. Attorneys have requested that in briefs, in the Goff case and the Jagmohan, the -- excuse me -- the appeal was authorized only on the substantive departure. There was no authorization to appeal on the notice issue. And that's about all I can say.

QUESTION: So you don't stand by the argument the Government's attorneys made in those cases?

MR. MARZEN: Not at all. We're a big department, and we authorize appeals. We don't review briefs before they're filed, and in this case this may have been an instance where we should have seen the briefs before they were filed.

QUESTION: Mr. Marzen, what's your response, apropos of that point -- what's your response to Mr. Goldblatt's argument that the reason he, his client has a due process right is that his client has been the beneficiary of a new liberty interest created by the guidelines. The Government doesn't have a new liberty

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interest, does it?

MR. MARZEN: No, I was -- to the extent -- oh excuse me --

QUESTION: Are you saying that you would be entitled to notice is simply a matte of evenhanded interpretation of the guidelines but not as a matter of due process?

MR. MARZEN: Justice Souter, if I understand the due process argument it's that to minimize risk of error, notice is required. That, I think, would apply evenhandedly to the defendant as well as to the Government, because there could be erroneous downward departures against the Government just as there could be erroneous upward departures against the defendant. So if the theory is, and I take it the position in petitioner's brief which we vehemently disagree with, but to the extent that position is accepted, it would apply as well to the Government as it would to the defendant.

QUESTION: Yes, but the Government isn't guaranteed due process of law.

MR. MARZEN: That's an interesting point. To the extent that the sentencing is to get a just sentence though and a just sentence would require a departure in that case, I suppose then we might well argue that it requires notice to both parties. But --

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QUESTION: Well, you're appealing to justice now, not to the due process clause.

MR. MARZEN: Yes, indeed.

QUESTION: That's a little fuzzier argument, isn't it?

MR. MARZEN: It is indeed. The --

QUESTION: Mr. Marzen, in the briefs that you vehemently disapproved of filed by the U.S. attorneys in the cases seeking -- did they rely on the constitutional argument or the interpretation of rule 32(a)(1), do you know?

MR. MARZEN: I haven't reviewed those briefs myself. It seems from the way the court has discussed those briefs that they were only based on the rule and as well it seemed they were both basically trying to evoke circuit precedent that had been developed in favor of defendants -- in favor of the Government in that case.

QUESTION: And the rule does expressly refer to both counsel for the defendant and counsel for the Government, doesn't it?

MR. MARZEN: Yes, which, which and there's also a decision made when Congress adopted the appellate review provision to allow Government -- the Government to appeal as well as the defendant. So the rule does have -- the rule and the guidelines themselves reflect an

evenhandedness that would require this same treatment to defendants and to the Government.

QUESTION: Mr. Marzen, while I've got you interrupted, do you happen to know -- there are, you know, thousands and thousands of sentences imposed in the Federal system. What percentage of the cases under the guidelines actually involve departures? Is it a substantial number?

MR. MARZEN: There are a total -- all the figure are as follows. 82 percent of cases are sentenced within the guidelines. 12.2 of the remaining 18 percent of cases are sentenced outside the guidelines. There are about -- there are approximately 2.49 downward departures against the Government for every one departure upward. The balance of the sentences are departures on motion of the Government for substantial assistance after the sentence had been meted out. And that is -- all in the 1989 annual report of the sentencing commission.

QUESTION: Mr. Marzen, you really haven't had a chance to give your argument yet and I am in part to blame for that. I just want to know are you going to address the issue of the existence of a new liberty interest under the rule as argued by your brother?

MR. MARZEN: Certainly, maybe I can comment on that just briefly now. As I understand it in rejecting

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the sort of bitter with the sweet notion, at least a majority of the court has, there's a bifurcation of the decision-making process. One first determines whether the due process clause applies, then the court determines what processes do.

In this case, I would think the defendant has a constitutional liberty interest in his sentence. That's why this Court in cases such as Townsend v. Burk have required that the right to counsel extends to the sentencing hearing and requires that the court base its sentence on materially correct information. So the due process clause has always applied to sentencing, before and after the guidelines.

QUESTION: But I think -- maybe I misunderstand him, I thought Mr. Goldblatt was arguing that there had been some new liberty interest created by the guidelines themselves and he's saying that in part to avoid the problem of having someone come back to him and say, well, why are you in any different position today from the position you were in for due process purposes before? So I think the argument is that there's something new here.

MR. MARZEN: I think that's right, but my point, Justice Souter, is that what's new goes to the first part of this Court's due process jurisprudence, whether the due process clause applies. It doesn't go to the second

question, which is what processes do.

QUESTION: Well, do you concede that there is something new, that there is a new liberty interest that didn't exist before?

MR. MARZEN: If -- if the guidelines were instead to be applied by a parole commission, for example, yes, there would be something new, and under the Greenholtz decision, the parole commission may well have some minimum hearing requirements as the court determined in that case. QUESTION: Well, what about the situation we've got in which the guidelines are being applied by the court?

MR. MARZEN: No, not by the court because sentencing judges have always had to comply with due process. Their proceedings have always had to be fundamentally fair, and I think --

QUESTION: No, but again, this goes to the first question. Is there a new liberty interest created with respect to which due process must be afforded? And are you conceding that there is a new liberty interest created by the guidelines?

MR. MARZEN: I guess my -- actually my initial answer was that it's really academic to whether there's a liberty interest, a new one, because there was one before and what processes do doesn't matter on how many liberty

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interests you sort of stack on, one on top of another. The language in this case, given that all that Congress adopted was a presumptive sentencing system. I don't think there really is a new liberty interest.

Unlike prior cases in which -- like Greenholtz, in which the Court relied very much on the shall language, Congress, in enacting the sentencing guidelines, specifically rejected flat time and mandatory sentencing processes like the State of New York's which would have given rise to an expectancy that one get a particular sentence.

It rejected both that and indeterminate sentencing and instead adopted Minnesota's procedure. Minnesota's procedure was that of -- was of presumptive sentencing, which was to give the judge a presumptively applicable guidelines range which the judge could depart from is he or she stated that there were certain reasons calling for either a higher or lower sentence. I don't think there's enough certainty in that system to create an expectancy to create a new liberty interest --

QUESTION: Mr. Marzen --

MR. MARZEN: -- facing directly to your question, Justice Souter.

QUESTION: Could I give you a hypothetical? What if the judge before sentencing said to counsel, you

know I believe in these guidelines. I think they're a wonderful development and I -- I've always followed them and I want you to know I believe in following them, and I never depart. And then he listens. And so they said (inaudible) I'm not going to depart. He listens to the argument. He thinks it over and after he gets all through, he says, by gosh, I never thought of that one thing. It justifies a departure. And then he departs and gives reasons. Would that satisfy your notions of fairness?

MR. MARZEN: It -- yes, it certainly satisfied -- would satisfy the notion of fairness. Under the prior system the judge could say, this seems like a garden-variety robbery. I think it's worth no more than 2 years, and then the prosecutor brings out a bunch of other information or highlights the facts in a specially egregious way and says, my goodness, I think you deserve --

QUESTION: I don't think I meant to suggest in my hypothetical that no new facts were developed. He just hadn't thought them through. Everything in the presentence report was there.

MR. MARZEN: Justice Stevens, I think that's very similar to what could very well have happened under the old system and would have been held under this Court's

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precedent as fundamentally fair. Prosecutor makes a compelling sentence --

QUESTION: Well, I understand, but you really go back to the old system, the judge had absolutely no lead. He didn't even have to disclose the presentence report. But what has considered fair has changed over the years in sentencing.

MR. MARZEN: Well, I would submit that what the constitution has considered fair under the due process clause should not have changed. The -- Congress has gone beyond that and enacted additional reforms to make the sentence more rational and fair. The perversity of the due process argument in this case is that if there are absolutely no holds barred, if the judge -- district judge had absolutely unfettered discretion, then that's fundamentally fair. But now that Congress has gone beyond that and given a guidelines range, a right to appeal, and the other rights provided under the sentencing guidelines, all of a sudden that's not fair or is at least an invitation for the, the court under a cost benefit analysis to --

QUESTION: What if --

MR. MARZEN: -- rachet up the procedural requirements.

QUESTION: Let me take it one step farther.

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Supposing counsel started to argue about the reasons why a departure would be inappropriate. And the judge says, I don't want to hear an argument on departures and didn't let him argue it and then nevertheless departed?

MR. MARZEN: Is that fair? I don't think it would be wise for the district judge, but there is a right to appeal.

QUESTION: Well, do you think it would be -- the bill would comport with the rule and with due process, yes?

MR. MARZEN: Yes, it's -- it satisfies the text of the rule and it's ill advised of the judge, but it's consistent with due process. This -- a similar thing could have happened under the old system and there are additional protections under the current system, because there's essentially a right to de novo review of the permissibility of the departure under the guidelines.

QUESTION: Does that complies with the rule? Are you sure it complies with the rule? Don't you have to allow counsel to speak to the sentence?

QUESTION: On other matters relating to the appropriate sentence?

MR. MARZEN: Yes, you do. Let me turn to that right now.

QUESTION: Well, don't turn to that, answer my

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question first.

MR. MARZEN: Oh.

QUESTION: I -- I wouldn't have thought that what Justice Stevens proposed to you could happen.

MR. MARZEN: I didn't understand Justice Stevens' question to basically have all the parties gather in the sentencing hearing and say shut up, here's the sentence. I understood him to say that they had talked about the sentence and he'd changed his mind or perhaps I was under the wrong hypothetical.

QUESTION: Well, let me make it clear. My hypothetical --

MR. MARZEN: He certainly has to listen to what the parties have to say --

QUESTION: My hypothetical is that the judge is considering a departure on grounds of the duration of the wrongdoing, one of the factors that was justified here.

MR. MARZEN: Uh-huh.

QUESTION: And he doesn't tell anybody that and it's not in the report or any place else. And counsel starts to argue about duration and he says to counsel, I don't want to hear argument about that; that goes to departure and I never believe in departure. Just don't argue about that.

MR. MARZEN: Okay. That -- if that's the

question you were asking, Justice Scalia, I think that clearly conforms to the text of the rule -- of the rule. The reason is the rule does not provide access to the judge's thoughts about sentencing, requires no advisory sentence of any sort. The parties had an opportunity to address the other matters relating to the appropriate sentence. Even if the judge does not tell him what the advisory sentence is --

QUESTION: But the judge silenced him. He started -- he started to address the matter and the judge says, I don't want to hear it.

MR. MARZEN: Well, he didn't tell him no to comment. He --

QUESTION: Yes, he did.

MR. MARZEN: He suggested that --

QUESTION: No, that's my hypothetical. He says --

MR. MARZEN: Well, not to --

QUESTION: He says -- he says -- if the counsel starts arguing duration is not a ground for departure. And the judge says, I don't want to listen to argument about no grounds for departure.

MR. MARZEN: Then -- okay --

QUESTION: I've got the presentence report. Don't argue duration.

MR. MARZEN: Clarified in that way, that would violate the rule. I --

QUESTION: And the reason it would violate the rule because duration, if the judge is thinking about it, is a matter relating to the sentence.

MR. MARZEN: No, the reason that that violates the rule is because counsel is entitled to address any other matter related to the sentence, without limitation.

QUESTION: But it's only another matter relating to the sentence because the judge was thinking about it.

MR. MARZEN: There could be many things that the judge does not disclose that he's thinking about, and counsel can address anything that he thinks would bear on the exercise of the judge's discretion. Whether he -- whether the judge has let him know that that may be a factor or has told him that as things currently stand that is not a factor.

Under the old system, just as under the new, you have to put your best case forward. Under the system, you know the facts as set up in the presentence report. You know -- you have a copy of the guidelines and you have counsel and then you run with it. On page 50 of the Senate report, Congress made very clear that the change in procedure it expected under the guidelines was that a new, more highly detailed presentence report would allow the

parties to address the issues and prepare for the sentencing hearing.

There's just nothing in the rules that require a judge to disclose any of his intentions regarding the sentence. There's just one exception to that, and that's the 18 U.S.C. 3553(d) where the court, the district judge, is required to give notice if he intends to impose an order of a victim notice. But that's it. Everything else Congress wrote against a background tradition in sentencing in which the judge did not have to disclose its preliminary thoughts on the sentence.

QUESTION: Mr. Marzen, I have the same problem that Justice Souter had in thinking that this situation is not substantially different from what used to be. It seems to me you minimize what the guidelines do. Under the old system -- it seems to me the equivalent here would be under the old system, a judge deciding to impose a sentence of 45 years when the statue only allows him to do 40 years. You'd need notice for that. You -- you'd have to have another indictment for the separate crime that allows him to act on --

MR. MARZEN: If there was a separate crime. It would just be --

QUESTION: Then he could only go to 40 years, right?

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MR. MARZEN: That's right. It would be an illegal -- I think that --

QUESTION: But under these guidelines now it is absolutely -- you say that judges can depart from them. They can depart from them for reasons that are not set forth in the guidelines. They can't -- they can't go upward more than a certain amount on the basis of a particular element such as duration of the crime. Isn't that correct?

MR. MARZEN: No, that's not correct --

QUESTION: That's how I understand the --

MR. MARZEN: -- Justice Scalia, there's, there's not a specific limit as I understand it in the guidelines on the extent of a departure. Once the departure is authorized, there's a right to an appellate review of the reasonableness of that extent.

QUESTION: No, no, can they make a departure on the basis of an item that is already specified within the guidelines?

MR. MARZEN: If the -- correct, if the guidelines don't consider that factor or don't adequately account for that factor.

QUESTION: That's right, but what about a factor that's already within the guidelines?

MR. MARZEN: Well --

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QUESTION: They have to accept the aggravation or, or the minimization that the guidelines themselves provide and can't make it greater or lesser, isn't that correct?

MR. MARZEN: No, that's --

QUESTION: Otherwise the guidelines really don't do very much.

MR. MARZEN: No, the guidelines do a lot, but it's a system, again, of presumptive sentencing. It's not a flat range that judges are limited to. It's a range that is limited based on certain factors and if those factors aren't adequately considered in the guidelines, the judges can depart. That was the basis of departure in this very case. And there are at least five mechanisms within the current procedure that make that fair.

First of --

QUESTION: And if the guidelines say you can -- you can reduce the sentence by 2 years for youth of the offender, a particular judge can say, well, no, I'm going to reduce it 3. Can he do that?

MR. MARZEN: No, no, no, that's not -- the guidelines are a bit more specific than that. In this case, for example, there was an upward departure on the basis of concealment. The guideline assumed that the income tax evasion, the concealment, was $10,000 or more -

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- or more. Petitioner evaded income taxes to the tunes of almost half a million dollars or 50 times what the guidelines presupposed. That was one basis for departure.

The other basis for departure was for duration. The guidelines specified, "more than minimal planning." In this case, there was much, much, much more than minimal planning. The guideline presupposed that it would be planning typical for a "simple offense." And this is on pages 14a and 17a of the appendix to petitioner's opening brief.

But the simple of -- this was far more than a simple offense. This was 8 years of embezzling more than $1.2 million from the Government via 53 fraudulent checks. That was far more than just a simple offense. So the guidelines -- so the answer to your question I think is that the guidelines are much, much more specific than that. They don't say a 2-year adjustment is all you can give for youth. They provide certain point adjustments for very particular offense characteristics and very particular conduct. And conduct could well exceed what is presupposed in the guidelines, just as it happened here.

QUESTION: I understand. All you're saying is that there are good reasons for departing here which, which could have been argued. But suppose that the amount

had been $10,001. Could the judge have said, well, the guidelines say that you should increase the sentence only so much for $10,000 and above? But I think that's not enough and I'm going to increase it more. Can he do that?

MR. MARZEN: The district judge is entitled to do that. Whether that will be upheld on appeal is another matter. The question is whether --

QUESTION: Well, let me rephrase my question.

(Laughter.)

MR. MARZEN: The question is whether --

QUESTION: If the district judge were to do that, would it be upheld on appeal?

(Laughter.)

MR. MARZEN: No. The question is whether it's a fair interpretation of the guidelines. And in that case, with a guideline specifying in $10,000 or more, $10,001 would clearly not be a fair reading of the guideline to allow for a further upward departure.

QUESTION: So he is -- he is held to the guidelines, just as the judge held to 40 years under the old sentencing system. For $10,000 he can increase it only that much and no more. Isn't that different, quite different, from what the system used to be?

MR. MARZEN: No, and again, I -- I perhaps am not making it clear, but the guideline system are -- the

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guidelines are based on quite specific conduct and you can have conduct far in excess of the facts presupposed within the guidelines' range, just as what happened here.

The guidelines are not a rule that says any conduct, any income tax evasion, no matter how far above $10,000 is all accounted for in a two-point adjustment, and that's the difference between the statutory minima and maxima that was the system --

QUESTION: But at least the $10,000 is required. The judge could not say, since this is $10,000 that you stole, that's a lot of money. I'm going to increase the sentence by so much, which is more than the guidelines provide.

MR. MARZEN: That is absolutely correct.

QUESTION: The judge cannot do that.

MR. MARZEN: That's correct.

QUESTION: And that -- it is unlawful for him to do it. Just as it would have been unlawful for the judge to increase his sentence from 40 years to 42 years unless he had a reason which would have consisted of another offense.

MR. MARZEN: That's correct.

QUESTION: Which reason would have been made known to the defendant.

MR. MARZEN: That is correct, Justice --

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QUESTION: So why shouldn't there be made known to the defendant here the reason that justifies going over what, what is normally applicable for $10,000? At least the defendant should be able to come in and say, Your Honor, it's only $10,000. And the judge can say, oh, my goodness, I thought it was $20,000. Thank you for telling me that. You're telling me he has no opportunity to even --

MR. MARZEN: No, I'm not saying that. He has plenty of opportunities. The first opportunity came when he read the guidelines. The guidelines specify the adjustments that are made. They're listed -- the facts are listed in the presentence report. That -- in a case like this, it's very easy to tell that the guide -- the facts presupposed in the guidelines don't adequately take into account the conduct for which the petitioner was convicted.

This case is an excellent example. On pages 41 and 45 of the joint appendix, it's very clear that petitioner's counsel knew that an upward departure was a possibility in this case. He urged the court to consider a sentence "within the guidelines," and he argued that all the aggravating factors were adequately accounted for in the guidelines. If the court wants to hear more on this, it can specifically invite further comment. If the

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defendant is surprised, he can file -- he can object upon hearing the sentence.

As petitioner did here with respect to whether he could voluntarily surrender, petitioner in fact essentially told the district judge, on pages 60 and 61 of the joint appendix, that he was going to file an appeal on the departure issue but chose not to argue that question before the district judge and instead argued whether he should be able to --

QUESTION: Mr. Marzen, did somebody make a mistake here? Who made it?

MR. MARZEN: I don't think there was any mistake. I think that everyone knew that a departure was a possibility here and that -- the counsel -- the petitioner had --

QUESTION: Do --

MR. MARZEN: -- I'm sorry --

QUESTION: That somebody was thinking about a small amount of money and somebody else was thinking about a large amount of money?

MR. MARZEN: No, I --

QUESTION: Well, who made the mistake about the amount of money involved?

MR. MARZEN: There was no mistake about the money involved.

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QUESTION: Well, you said the judge said, ooh, I didn't know it was this much. You said that.

MR. MARZEN: The fact was clear in the presentence report that it was almost a half a million dollars of income taxes evaded and the judge didn't say that there was a mistake on that. She just said that was far in excess of what was presupposed by the --

QUESTION: And everybody saw that?

MR. MARZEN: I think -- I think in this case the sentencing -- the transcript of the sentencing hearing makes pretty clear that everyone knew that this was a reasonable candidate for departure. Yes, and the -- the fact that petitioner's counsel, you know, didn't raise the argument and object to the departure at the time or file a post-hearing motion is because it was -- it was really fruitless.

QUESTION: Would you go for -- agree to require the judge to say, you know, in this case I think I'm going to make a departure and I want to warn you of that -- without details?

MR. MARZEN: I think the judge --

QUESTION: Would you object to that?

MR. MARZEN: That's not contemplated by the text of rule 32(a). What we would say to that is the district judge in its discretion and common sense, if it's

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concerned about something, he can certainly let the parties know that it's the party. It can share --

QUESTION: I don't want to let. I want to require.

MR. MARZEN: I don't think the -- it -- the rule can fairly be read to require that. And the reason for that is that there are two sentences in rule 32(a)(1) and we've only talked about one this morning.

The one we've talked about is the comment sentence.

QUESTION: Right.

MR. MARZEN: There's a sentence that immediately precedes it called a notice sentence. And this is all at pages 7a and 8a in the appendix to petitioner's brief.

The notice sentence specifically says that the parties get notice of the probation officer's determination pursuant to subdivision (c)(2)(b) of the guidelines' range and the offender characteristics.

The comment sentence says that you have a right to comment on that determination and on other matters relating to the appropriate sentence. The curious thing is that subdivision (c)(2)(b), the cross-reference subdivision, includes the explanation of the probation officer of whether there is a fair ground for a departure in this case. So a fair reading of the notice sentence is

the only thing that's omitted in the notice requirement in rule 32 is exactly what petitioner asks or part of what petitioner asks for here, which is some advanced notice of the departure decision.

Reading the notice and the comment sentence together I think is very revealing for a couple of reasons. It very clearly says that there's a right to comment, not a right to notice. It's a right to speak your mind to the judge on anything you think that may bear on the sentence. It's not a right to be informed of what those sentencing matters are.

Second, you can't imply notice in the comment sentence without making the notice sentence superfluous. In other words, if you substitute the words "notice and comment" for the word "comment," there's just no meaning for the -- no purpose that's served by the notice sentence.

Finally, the two sentences also reveal one other thing. The notice sentence only requires notice of the probation officer's determination. It doesn't require notice of what the judge is thinking. And with the one exemption -- exception I mentioned earlier about a judge's intention to order a victim notice, there is nothing that has changed the traditional sentencing practice. The judges do not have to circulate advisory sentences for

comment --

QUESTION: But Mr. Marzen, isn't there, isn't there a reasonable explanation for that in the fact that presumably the sentencing commission expected that virtually all sentences would conform to the guidelines or, if there were departures, that the reason for the departure would be revealed in the presentence report. It's a fairly rare situation if they put a provision like this in, wouldn't it have more or less been an invitation to departures, which they didn't really want to invite?

MR. MARZEN: Justice Stevens, the sentencing guidelines passed by Congress contemplated quite a few departures, in fact, about 20 percent of cases. In the Senate report it notes 71. The committee in a backhanded way says that there were 20 percent departures in the parole context. We expect about the same amount of departures here. The Senate report also cross-references to the Minnesota experience as the only State which had a system like the one that it's adopting.

In Minnesota one of the sources in the footnote cites Minnesota had a departure rate of greater than 23 percent. In the statute itself in several places specifically invites judges to depart in order to individualize sentencing. So, one -- I guess one can quibble about whether the glass is half empty or half full

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or whether 20 percent departures is big or not. But departures in one-fifth of the cases is departures in quite a few cases and underscores that this is just presumptive sentencing __

QUESTION: I see.

MR. MARZEN: -- and that departure is a realistic possibility in all these cases and that counsels just have to be expected to address that concern.

QUESTION: Could you clarify one thing, a piece of information you gave me earlier, about the number of departures are around 12 percent and a certain percentage were Government and certain were defense requested.

MR. MARZEN: Yes.

QUESTION: Those that -- the downward departure -- is it correct that, if you exclude downward departures that the Government itself asked for, that it's still true that downward departures exceed the number of upward departures?

MR. MARZEN: Yes --

QUESTION: I thought that's what you said.

MR. MARZEN: By a factor of 2.5 to 1. And the page -- there are page references, page 47 to the 1989 annual report, there are 3.5 percent departures of upward departures above the guideline range, and there are 8.7 percent departures against the Government below the

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guidelines range.

QUESTION: Which the Government had not requested?

MR. MARZEN: Yes, not requested.

QUESTION: I wanted to be sure. That's what I wanted to be sure about.

MR. MARZEN: Yes, in addition to those departures, there are in departures an additional 5.8 percent of cases for substantial assistant -- assistance on motion of the Government and that's authorized by section 994(n) of 28 U.S.C.

QUESTION: Counsel, this isn't really a classic bitter-with-the-sweet argument with reference to the expectancy that's created, is it? Because the expectancy that has been created here without any limitation expressed by the --

MR. MARZEN: No, that's the perversity, Justice Kennedy. It's a reverse bitter with the sweet argument. The bitter-with-the-sweet argument goes that Congress gave you something and you have to take the allegedly poor procedure that came with it. In this case, Congress gave you something and gave you a nice procedure, too, but the due process clause can be used to rachet it up even more so that --

QUESTION: Well, has -- Congress hasn't

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foreclosed the procedure that's being requested and that's what usually happens in the bitter-sweet context --

MR. MARZEN: That's right and it hasn't done so here.

QUESTION: Mr. Marzen, what's the due process significance of this argument? Counsel for the other side says, I understand that I have a right to comment on any subject that the court might take into consideration as a basis for departure. But if I do that without warning that the court is considering it, I am in fact increasing the odds that the court is going to do that.

If, for example, in this case I said, Your Honor, pay no attention to the fact that it was $400,000 not $10,000, that's going to give the court an idea, isn't it? Is there, is there a due process significance in that argument?

MR. MARZEN: I don't think so, Justice Souter, and the reason is that defense counsel and allocution had this same problem before the sentencing guidelines were passed in addressing -- in trying to explain away a potentially very damaging or unfortunate fact about his client's arrest -- you know, criminal history or something else. He had the -- he was forced to choose between bringing that up and putting that in the judge's mind or not raising it at all and hope the judge would forget.

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Nothing has changed.

Thank you.

QUESTION: Thank you, Mr. Marzen.

Mr. Goldblatt, do you have rebuttal?

REBUTTAL ARGUMENT OF STEVEN H. GOLDBLATT

ON BEHALF OF THE PETITIONER

MR. GOLDBLATT: Thank you, Mr. Chief Justice. I do.

For the Government implicit in their argument is that everybody knew departure was a possibility and, therefore, this came as no surprise. The Government entered a guilty plea in which it agreed that the sentencing range for this case was 30 to 37 months, and at page 6 of the joint appendix, what they didn't agree to was where the sentence would be within that range.

They received a presentence report that said there was no basis for a departure from the guideline range. They signed off it, no objection. They went to the sentencing proceeding, argued on behalf of the Government, did not ask for a departure from the guidelines, did not state any grounds for departure. That is what happened in this case. This was not obvious to anyone. This was not implicit in what was going on.

The parties had agreed they had enough evidence to sink a battleship, so it's not a question of a guilty

plea because of thin evidence. That's what they agreed to. That's what they determined the case was.

And what happened here is certainly not what Congress anticipated was going to happen. The first point for that argument is Congress thought that sentencing as it existed in the Federal system before the guidelines was in a word, lousy. They sought to change it radically. They did change it radically. And part of what they changed was their perception of what was fair.

Justice Stevens, I think your point is very important that Congress anticipated that in most, if not all cases, the various grounds for sentencing would appear in the presentence report or, if not there, in the presentence report plus the parties were reacting to it.

QUESTION: Mr. Goldblatt, do you think that the -- that the possibility of the sentencing commission creating new liberty interests is consistent with our Mistretta decision, with the theory of approving the existence of that body, the ability of that body to create new liberty interests?

MR. GOLDBLATT: I think so particularly because of the structure in which Congress -- I mean, Congress is the one that really creates the liberty interest, not the sentencing commission. What Congress said was that sentences should be within that range. Congress is the

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one that has created the liberty interest, not the guideline commission. It's by statute that we're relying on 18, section 3553(b), so I think under that circumstance it is consistent with Mistretta.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Goldblatt.

The case is submitted.

(Whereupon, at 11:13 a.m., the case in the above-entitled matter was submitted.)

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