

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner v. RALPH STUART
GRANDERSON, JR.

CASE NO: No. 92-1662

PLACE: Washington, D.C.

DATE: Monday, January 10, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :
Petitioner :
v. : No. 92-1662
RALPH STUART GRANDERSON, JR. :

Washington, D.C.

Monday, January 10, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

THOMAS G. HUNGAR, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Petitioner.

GREGORY S. SMITH, ESQ., Atlanta, Georgia; on behalf of the
Respondent.

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(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 92-1662, United States against Granderson.

Mr. Hungar.

ORAL ARGUMENT OF THOMAS G. HUNGAR

ON BEHALF OF THE PETITIONER

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

Respondent was convicted of a felony that carries a maximum sentence of 5 years in prison. Under the Sentencing Guidelines, the presumptive imprisonment range was zero to 6 months. Instead of sending respondent to prison, the district court imposed a sentence of 60 months probation.

Shortly after he began serving that sentence, respondent tested positive for cocaine, and the district court revoked his probation and sentenced him to 20 months in prison. The court imposed that sentence under 18 U.S.C. section 3565(a), which provides that when a defendant possesses illegal drugs while on probation, the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.

1 The court of appeals reversed, holding that the
2 phrase "original sentence" refers to the presumptive range
3 of imprisonment that could have been imposed under the
4 guidelines rather than the sentence of probation that was
5 actually imposed. We submit that the court of appeals
6 erred in reaching that conclusion.

7 Our argument has two parts. First, the
8 interpretation adopted by the court of appeals and urged
9 by respondent is flatly inconsistent with the plain
10 language of the statute and must be rejected. Second,
11 once respondent's interpretation has been rejected, there
12 are only two suggested ways to read the statute, and of
13 those, only our interpretation is consistent with the
14 statutory structure, context, and purpose.

15 Turning to the first point, our principal
16 disagreement with respondent concerns the plain meaning of
17 the phrase, "original sentence." In our view, under
18 either the dictionary definition, or the ordinary, common
19 sense understanding of that phrase, it has only one
20 possible meaning in the context of Federal sentencing law.
21 It means the initial judgment of the court specifying the
22 punishment to be imposed on a convicted criminal.

23 QUESTION: If that's the case, then you're
24 arguing for a sentence of probation all over again, only
25 one-third of -- with a one-third minimum of the original.

1 I mean, if plain meaning is good, you've got to take plain
2 meaning all the way.

3 MR. HUNGAR: With respect, Justice Souter, we
4 don't agree with that. We certainly agree that we have to
5 take plain meaning all the way, but the fact that
6 "original sentence" means the sentence of probation that
7 was imposed in this case does not mean that the defendant
8 here had to be sentenced to a new sentence of probation,
9 and there are two reasons why that is so.

10 We agree that the phrase, "one-third of the
11 original sentence," if considered in isolation, has two
12 possible meanings. It could refer to the length of the
13 original sentence, in this case 20 months, or to the
14 length and the type of the original sentence, in this case
15 20 months of probation, and if that were the only thing we
16 had to go on, the answer you suggest would be the only one
17 possible under the Rule of Lenity, but we have other
18 guides to congressional intent here. First, and most
19 important, is the context in which that provision, one-
20 third of the original sentence, rests.

21 In section 3565(a), Congress required the court
22 to revoke the sentence of probation before resentencing
23 the defendant. The word "revoke" is a term of art in
24 Federal sentencing law in the context of probation or
25 other forms of conditional release.

1 QUESTION: Do you agree that this is a rather
2 poorly drafted statute?

3 MR. HUNGAR: We do agree with that, Justice
4 Blackmun. If Congress had more clearly expressed its
5 intention, then obviously we wouldn't be here, but we
6 don't believe the statute is so poorly drafted that we
7 can't discern, by applying normal rules of statutory
8 construction, the meaning that Congress in fact intended.

9 QUESTION: Mr. Hungar, following up on Justice
10 Souter's question, I suppose at the time the statute was
11 enacted there might well have been people still
12 incarcerated who were sentenced to a term of imprisonment
13 followed by a term of probation, and supposing someone was
14 in jail on a 15-year sentence, 10 years jail imprisonment
15 plus 5 years probation, and that had not expired at the
16 time the statute was enacted, and that person had his
17 probation revoked in the third year of the probation
18 period, what would the appropriate sentence be there?

19 MR. HUNGAR: Well, as I understand the
20 preexisting sentencing scheme, Your Honor, that would not
21 be a possible sentence, because the way probation formerly
22 worked was that it was an alternative to imprisonment. A
23 judge would either impose a sentence of imprisonment, and
24 then suspend the execution --

25 QUESTION: Well, that's true now, but was that

1 always true?

2 MR. HUNGAR: I don't know whether it was always
3 true, but certainly prior to the 1984 Sentencing Reform
4 Act the law was that probation was an alternative to
5 imprisonment. The judge would either impose a sentence
6 and then suspend the execution of that sentence, or would
7 suspend sentencing, so either there would be a suspended
8 sentence of imprisonment, or no sentence at all, then the
9 defendant would be on probation, but probation could
10 not -- you couldn't sentence a defendant to so many years
11 of prison followed by so many years of probation. That
12 wasn't possible.

13 QUESTION: Probation would not have been a
14 sentence prior to the '84 reform --

15 MR. HUNGAR: That's also true, Your Honor.
16 Probation was imposed in lieu of the sentence. It was --
17 the judge either suspended the sentence or suspended
18 imposition of sentence and placed the defendant on
19 probation was the language of the prior statute.

20 QUESTION: On your view of the interpretation of
21 this language, then, not less than one-third of the
22 original sentence, what is the maximum to which the
23 defendant could have been -- the maximum sentence that
24 could have been imposed?

25 MR. HUNGAR: Well, it depends. If the minimum

1 required by our reading of the statute is within the
2 guidelines range, then the guidelines maximum would be the
3 maximum, because -- because this provision of section
4 3565(a) only trumps the other provisions of section 3565
5 to the extent they're inconsistent. To the extent they're
6 not inconsistent, they continue to govern, so if the
7 minimum is within the guidelines range or below the
8 guidelines range, the top of the guidelines range would
9 still be the maximum, because --

10 QUESTION: Which is, in this case --

11 MR. HUNGAR: Well, in this case it's 6 months,
12 which is -- so the guidelines range is not the maximum.

13 QUESTION: I don't follow that. If one-third of
14 the original sentence is 20 months --

15 MR. HUNGAR: Yes.

16 QUESTION: -- wouldn't the full sentence be 5
17 years?

18 MR. HUNGAR: Well, the maximum sentence is 5
19 years if the court wishes to depart from the -- and has
20 grounds for an upward departure from the guidelines range,
21 but normally the maximum sentence that is available under
22 subchapter (a), which is the language of 3565(a)(2). You
23 see, our position is that --

24 QUESTION: How can 20 months be one-third and 60
25 months not be the full original sentence? We're talking

1 about what this defendant's exposure is --

2 MR. HUNGAR: Yes, Your Honor.

3 QUESTION: -- under your reading of the statute.

4 MR. HUNGAR: Yes, Your Honor, but the last
5 provision of section 3565(a), the provision we're
6 discussing here, only imposes a mandatory minimum. It
7 doesn't change what otherwise would be the maximum
8 sentence.

9 So to the extent that -- for instance, if the
10 guidelines range here were 15 to 25 months, and the
11 mandatory minimum under this statute were 20 months, the
12 defendant could be sentenced to -- obviously would have to
13 be sentenced to 20 months.

14 The court could sentence him up to 25 months
15 because -- because the provisions of 3565(a)(2), which
16 normally govern revocation and which provide that the
17 court can impose any sentence that would otherwise have
18 been available under subchapter (a), that provision would
19 permit the court to go up to 25 months, because a 25-
20 month sentence would also have been available under
21 subchapter (a) at the time of the initial sentencing, so
22 the mandatory minimum 20 months trumps anything in section
23 3565 to the extent it's inconsistent, but to the extent
24 there's something in 3565 that would permit a higher
25 sentence, that continues to have effect.

1 QUESTION: I don't understand why it trumps
2 anything inconsistent, because subsection (2), which is
3 the "any other sentence that was available" provision, is
4 trumped by the proviso after it which says,
5 "notwithstanding any other provision."

6 MR. HUNGAR: Yes, but the "notwithstanding"
7 proviso only requires a mandatory minimum. It doesn't say
8 the rest of sentencing law is totally inapplicable here.
9 All it says is, notwithstanding any other provision of
10 this section, this mandatory minimum sentence must be
11 imposed.

12 QUESTION: Not less than one-third.

13 MR. HUNGAR: That's correct, so to the extent
14 other provisions of section 3565 are not inconsistent with
15 the mandatory minimum, they continue to govern.

16 Now, if the mandatory minimum, as in this case,
17 is higher than the guidelines range, is higher than any
18 other sentence available under subchapter (a), then our
19 position is that the mandatory minimum is also the
20 maximum, because the guidelines provide that when a
21 mandatory minimum sentence exceeds the normal guidelines
22 range, then that mandatory minimum sentence shall be the
23 guideline sentence, and you can't go higher than that.

24 Further on the point of why the word "revoke"
25 demonstrates that a sentence of imprisonment rather than a

1 sentence of probation is required, the word "revoke" is a
2 term of art in Federal sentencing law when applied to
3 probate or other forms of conditional release. It means
4 that, at least for a time, the defendant has lost the
5 opportunity to enjoy the privilege of conditional release.

6 Section 3565(a)(2) demonstrates that in the
7 context of probation, under the current sentencing scheme,
8 it makes clear that once a court has revoked a defendant's
9 probation, probation is no longer an option, and some
10 other sentence must be imposed, so by using the word
11 "revoke" in section 3565(a), the provision at issue here,
12 Congress made clear --

13 QUESTION: Well, is that necessarily true, just
14 as a matter of pure plain meaning? Suppose there was just
15 1 month left of the probationary -- say it was on 9 years
16 probation. At the end of the probation he's caught with
17 cocaine in his system. Would it not be at least logically
18 possible to revoke the remainder of that probationary
19 period and impose a new sentence of 3 years' probation?

20 MR. HUNGAR: Well, first of all --

21 QUESTION: Why isn't that possible?

22 MR. HUNGAR: -- the maximum probationary
23 sentence is 5 years, but --

24 QUESTION: Well, whatever the --

25 MR. HUNGAR: -- that applied, right. We don't

1 think so, because that's not the way "revoke" is used in
2 Federal sentencing law. It doesn't mean, terminate
3 conditional release with the option of then imposing a new
4 sentence of conditional release. What it means is, you
5 have lost your chance to enjoy conditional liberty, and
6 you're going to go to prison --

7 QUESTION: You have lost your chance to enjoy
8 the particular conditional liberty on which you have been
9 sentenced --

10 MR. HUNGAR: Well, the dichotomy in section --

11 QUESTION: -- which has another 30 days to run.

12 MR. HUNGAR: The dichotomy in section 3565(a)(1)
13 and (a)(2) demonstrates this point, and this applies not
14 merely to probation under this statute, but the same is
15 true under previous statutes, the same is true for
16 supervised release and parole. When revocation occurs, as
17 a rule the defendant goes to jail, and at the very least,
18 conditional liberty is no longer possible, and in section
19 3565(a)(1), the court has an option of continuing the
20 defendant on probation, the same probation and extending
21 the term if the court wishes.

22 QUESTION: Well, I should think that you can
23 argue, at least from a semantic standpoint, that if you
24 revoke the first sentence of probation, and then impose a
25 new sentence of probation with much more onerous

1 conditions -- that you have to report for drug treatment,
2 et cetera, et cetera, that that is a different sentence of
3 probation, and it's still a sentence that's available to
4 the judge under the law.

5 MR. HUNGAR: No, Justice Kennedy, because that
6 would not be revocation, that would be continuance.
7 That's the dichotomy in section 3565.

8 QUESTION: Well, but that's the argument, it
9 seems to me. You can argue it's the imposition of a new
10 sentence of probation with new conditions.

11 MR. HUNGAR: But our point is that Congress uses
12 these words in a certain way in the Federal sentencing
13 scheme. Throughout the scheme, it consistently uses the
14 word "revoke" to mean, you're no longer going to enjoy
15 conditional release. It uses the word, continue, or
16 extend, to achieve the result you desire, and that's shown
17 because in 3565(a)(1), the first option a court normally
18 has when a defendant violates probation is to continue the
19 defendant on probation with or without extending the term
20 or modifying or enhancing the conditions of probation, so
21 if that were what Congress had meant -- if Congress had
22 meant, the court should have the option of continuing
23 defendant on probation and modifying the terms and
24 conditions, then that's what it would have said, because
25 that's what it said in 3565(a)(1), but instead, Congress

1 said "revoke," and "revoke" --

2 QUESTION: Yes, but it said more than that. It
3 said, "revoke and impose any other sentence," so (2) can
4 contemplate something other than probation.

5 MR. HUNGAR: Exactly.

6 QUESTION: But the proviso doesn't say that. It
7 refers back to one-third of the original sentence --

8 MR. HUNGAR: But it --

9 QUESTION: -- and the original sentence was
10 probation.

11 MR. HUNGAR: But it also uses the word
12 "revoke" --

13 QUESTION: Yes, but "revoke" unmodified --

14 MR. HUNGAR: -- which as we've indicated is
15 always used --

16 QUESTION: Unmodified by the additional language
17 in subparagraph (2).

18 MR. HUNGAR: Well, our point is that whenever --

19

20 QUESTION: I know you think --

21 MR. HUNGAR: -- any place else in the system --

22 QUESTION: -- "revoke" has all that baggage with
23 it, but the statutory language doesn't say that.

24 MR. HUNGAR: Well, it's a fundamental rule of
25 statutory construction that we generally construe words

1 used by Congress in a particular statute to mean the same
2 thing. Every other place in the statute the word "revoke"
3 is used, that's what it means. We submit Congress must
4 have meant the same thing here, and there's another reason
5 why we must reach that conclusion, and that's because it
6 would be absurd, as even respondent concedes, to construe
7 the statute as you're suggesting. No court of appeals has
8 done so, for the obvious reason that if --

9 QUESTION: Well, it isn't absurd, because it's a
10 floor, and there are cases in which it would make sense.

11 MR. HUNGAR: It's --

12 QUESTION: If you impose more onerous terms of
13 probation, and an additional period of time, say there's
14 only 1 month left to serve -- it's not absurd. It's a
15 floor, not a ceiling.

16 MR. HUNGAR: In the first place it's not clear
17 in that case that that would be permissible, because the
18 maximum sentence for probation is 5 years. It's not clear
19 that this statute would authorize an additional sentence
20 on top of those 5 years, but leaving that point aside,
21 except in the case that you've hypothesized -- that is, a
22 defendant who doesn't do anything wrong in the last few
23 months of a lengthy probationary sentence -- that is, in
24 most cases where this arises, where the defendant is in
25 the first two-thirds of his probationary sentence, this

1 statute, as you're suggesting it be construed, would make
2 possible a more lenient sentence than is otherwise ever
3 possible upon a finding of a violation of probation.

4 Normally, absente this provision, if a defendant
5 had been found to have violated the provision of his
6 probation forbidding him from possessing drugs, the court
7 would have only two options. It could continue the
8 defendant on the same term of probation with or without
9 extending that term and modifying the conditions -- that
10 is, the court couldn't shorten the term of probation. It
11 could extend it or leave it the same -- or the court could
12 revoke probation, which means the defendant no longer gets
13 probation at all and will be sent to prison.

14 The court did not have the option of shortening
15 the term of probation, but under your hypothesis, in the
16 vast majority of cases this provision would provide for
17 the possibility of a more lenient sentence. That is, a
18 shorter term of probation than is otherwise permitted by
19 law, and it would be absurd to think that Congress in the
20 Anti-Drug Abuse Act of 1988, where it was trying to reduce
21 the demand for illegal drugs and discourage drug use and
22 possession, would have enacted a provision that permits
23 persons who use drugs to be rewarded by the possibility of
24 a more lenient sentence than is otherwise possible.

25 QUESTION: Well, I don't think that's correct --

1
2 QUESTION: Mr. Hungar, if this man had been
3 separately prosecuted for the conduct that led to the
4 revocation of his probation, what would have been his
5 maximum exposure?

6 MR. HUNGAR: The maximum penalty for simple
7 possession by a non-Federal inmate is 12 months.
8 Interestingly, if Mr. Granderson had been imprisoned -- if
9 the judge had sent him to prison rather than placing him
10 on probation, and if Mr. Granderson had then possessed
11 cocaine in prison, the maximum penalty as a --

12 QUESTION: But you pointed to an absurdity in
13 response to Justice Stevens. Isn't there something
14 anomalous about saying, if you had an independent
15 prosecution the maximum exposure would be 12 months, and
16 yet without a separate prosecution the person can be
17 incarcerated for 20 months?

18 MR. HUNGAR: I don't think so, Your Honor,
19 because Mr. Granderson is in a very different position
20 from a person who is simply prosecuted for possession of
21 drugs. Mr. Granderson was given a second chance. He
22 committed a felony punishable by up to 5 years in prison,
23 and the judge didn't require him to serve 1 day in prison.
24 The judge placed him on probation. Conditional liberty,
25 conditioned on Mr. Granderson's compliance --

1 QUESTION: But the maximum the judge could have
2 sentenced him under the guidelines was what?

3 MR. HUNGAR: For the original --

4 QUESTION: Instead of the probation, would have
5 been what, 6 months?

6 MR. HUNGAR: Yes. The --

7 QUESTION: Mr. Hungar, may I ask you, under the
8 former sentencing scheme, if some defendant were placed on
9 probation, I assume the court would have gone through the
10 mechanics of saying the defendant is sentenced to X amount
11 of time in prison, and then saying, but I suspend that
12 term of imprisonment and place you on probation?

13 MR. HUNGAR: Not necessarily, Your Honor. Under
14 the previous version of the statute, 18 U.S.C. 3651, in
15 the 1982 version of title 18, and also I think under
16 previous versions of the probationary sentencing scheme,
17 the court had the option.

18 It could either impose a sentence and then
19 suspend the execution of the sentence, which is the option
20 you identified, or it could suspend sentencing -- suspend
21 the imposition of the sentence, so there would be no
22 sentence, assuming the defendant complied with the
23 conditions of probation.

24 QUESTION: What was normally done, do you
25 suppose? I mean, in the times when I used to participate

1 in sentencing, the typical thing was to impose the
2 sentence and then suspend it.

3 MR. HUNGAR: I don't know, Your Honor. I know
4 that it was done both ways. I don't know what the
5 relative frequency --

6 QUESTION: Well, if that were the practice, the
7 language of the statute makes perfect sense, because the
8 original sentence would refer to the sentence that was
9 suspended.

10 MR. HUNGAR: If that were the practice under
11 current law --

12 QUESTION: That would make it quite
13 understandable.

14 MR. HUNGAR: Yes.

15 QUESTION: I don't know how this language got in
16 here, but it's a little hard to figure it out.

17 MR. HUNGAR: And it would show that Congress
18 intended the defendant to serve a significant term of
19 imprisonment, but since that is not the way the current
20 sentencing scheme works, and since we always presume that
21 Congress knows the law when it amends the law, we can't
22 assume that Congress --

23 QUESTION: Was this language, the original
24 sentence language, put in there originally when that was
25 the old scheme, or not?

1 originally MR. HUNGAR: No, Your Honor. This was enacted
2 in 1988 as part of the Anti-Drug Abuse Act of 1988, and
3 the sentencing guidelines -- the Sentencing Reform Act was
4 enacted in 1984, and the sentencing guidelines went into
5 effect in 1987, so when this was enacted, current law was
6 as we've described it.

7 If there are no further questions, I'd like
8 to -- MR. HUNGAR: The maximum of the guidelines

9 range -- QUESTION: I have one more. This is a minimum
10 provision that we're talking about, and really the only
11 thing at issue is whether the sentencing judge is -- I
12 suppose it's whether he is able to go above -- whether he
13 is both able and compelled to go above the maximum that
14 was available at the time of the original offense. It is
15 both whether he is able to -- interpretation of the words

16 of this statute MR. HUNGAR: Well, the --

17 QUESTION: -- and whether he is compelled to,
18 isn't it? QUESTION: Very well, Mr. Hungar. Mr. Smith,

19 we'll hear MR. HUNGAR: Well, there are two different -- it
20 depends on what you mean by maximum. We think clearly it
21 requires the Court to go above the guidelines range if the
22 mandatory minimum yields that result, yes. I'm not sure
23 I'm answering your question.

24 QUESTION: Well, I think -- I guess you are.

25 QUESTION: The maximum incarceration term

1 originally was 6 months, and --

2 MR. HUNGAR: No, Your Honor --

3 QUESTION: -- you're saying that the judge is
4 obliged to give a minimum of 20 months.

5 MR. HUNGAR: The maximum incarceration term
6 originally was 5 years.

7 QUESTION: Under the statute --

8 MR. HUNGAR: The maximum of the guidelines
9 range --

10 QUESTION: Yes.

11 MR. HUNGAR: -- was 6 months. The court can
12 always depart, assuming there are grounds for that, but
13 yes, we're saying the judge had to impose more than the
14 maximum of -- under the guidelines range, because that's
15 what we believe the only fair interpretation of the words
16 of this statute require.

17 Thank you.

18 QUESTION: Very well, Mr. Hungar. Mr. Smith,
19 we'll hear from you.

20 ORAL ARGUMENT OF GREGORY S. SMITH

21 ON BEHALF OF THE RESPONDENT

22 MR. SMITH: Thank you, Mr. Chief Justice, and
23 may it please the Court:

24 Congress has not unambiguously said it wants to
25 fundamentally change the nature of Federal probation

1 revocations. There are four reasons why Judge Phyllis
2 Kravitch's decision should be affirmed: first, the
3 history of Federal probation revocations; second, the
4 language of the statute; third, the disparities caused by
5 the Government's interpretation; and finally, the
6 legislative history.

7 First, history. The Government's brief is
8 sparse on history, and the reason is exactly why Justice
9 O'Connor asked the question. Historically, revocation
10 terms have never been based on the probation terms. They
11 have never been convertible. Before 1984, you had a
12 sentence that was suspended, plus probation. After 1984,
13 you had the guideline term imposed plus probation. Before
14 1984, you went back to the sentence imposed, the sentence
15 that was suspended. After 1984, you go back to the
16 guideline range.

17 Probation terms have never been used as the
18 barometer, ever, in Federal courts for the probation term.
19 The Government is seeking to --

20 QUESTION: Probation terms have never been used
21 as the barometer for probation terms. Perhaps you
22 misspoke.

23 MR. SMITH: I did, Your Honor. I apologize.

24 QUESTION: What do you mean?

25 MR. SMITH: Probation terms have never been

1 convertible into revocation terms. You've always looked
2 back to either the sentence that was suspended before the
3 '84 act, or after the '84 act, you looked back to the
4 guideline range.

5 QUESTION: Well, what do you mean by a
6 revocation term? That's not a term that's ever used in
7 the statute, as I recall.

8 MR. SMITH: Your Honor, I'm asking -- I'm
9 talking about the revocation sentence. The revocation
10 sentence has never been based on the probation term,
11 ever --

12 QUESTION: What is a revocation sentence? I
13 mean, again, the statute doesn't use that term.

14 MR. SMITH: The sentence imposed upon
15 revocation, Your Honor, when somebody's probation is
16 revoked, the sentence imposed after revocation has never
17 been based on the probation term. They've always used
18 something different, and there's a reason for that.

19 Probation terms are based on something very
20 different -- rehabilitation. Probation terms are based on
21 things like how long it takes to pay a fine back, or how
22 long it takes to do community service. It's not intended
23 to be converted, and it never has been converted into
24 revocation sentences.

25 The Government from this tapestry of history,

1 long history, is asking you to take two snippets, the 1984
2 act's discussion of probation as a sentence, and the 1988
3 act's reference to original sentence, and ask you to view
4 those two things in isolation, ignoring all of history.
5 They want you to turn probation into proration.

6 Well, it's never been done that way, and this
7 Court should not assume that Congress, without any warning
8 and without any discussion, intended through these minor
9 statutory changes to fundamentally change the way that
10 probation works. The language of the statute confirms
11 that there is not an unambiguous statement by Congress
12 that they intend to change this.

13 The Government tries to give you the impression
14 that they are using the sentence imposed, but the sentence
15 imposed on Mr. Granderson was 60 months of probation plus
16 \$2,000 fine. As Justice Souter said, taking that
17 literally, one-third of the original sentence, as the
18 Government tries to infer it, is 20 months of probation
19 plus a \$667 fine.

20 QUESTION: Well, what's your argument as to what
21 the term "original sentence" means? The Eleventh Circuit
22 seemed to take the view that the original sentence was not
23 a determinate thing at all, but a range, which I find very
24 difficult to follow, when you're referring to the original
25 sentence.

1 MR. SMITH: Your Honor, we submit it is the
2 equivalent of what the old, original sentence would have
3 been under old law. Justice O'Connor noted that the
4 way -- it would be very clear under the old system.

5 QUESTION: Well, but what would it be in this
6 case?

7 MR. SMITH: It would be the top of the range,
8 which would be the top --

9 QUESTION: Why the top of the range rather than
10 the bottom of the range?

11 MR. SMITH: Well, Your Honor, I don't think that
12 this Court needs to answer whether it's the top or the
13 bottom.

14 QUESTION: Well, but I'd asked you that
15 question, and you need to answer it.

16 MR. SMITH: All right. Yes, Your Honor. I
17 apologize if I misspoke.

18 I think that the top of the range is the most
19 logical understanding of what Congress meant. This is not
20 a plainly written statute. The top of the range yields a
21 minimum in every case, and I think that it is the most
22 logical conclusion. If --

23 QUESTION: Except that the language of the
24 statute now does clearly refer to a sentence of probation.

25 MR. SMITH: Yes, Your Honor.

1 QUESTION: And the sentence of probation given
2 here was 5 years probation. I guess that's the basis of
3 the argument of the Government here.

4 MR. SMITH: Yes, Your Honor.

5 QUESTION: And so you can read the statute, as
6 the Government does, to say he was given a 5-year sentence
7 of probation initially.

8 MR. SMITH: Your Honor, while it's true that in
9 form probation is treated as a sentence --

10 QUESTION: Under the new statute, yes.

11 MR. SMITH: Under the new statute. It is not
12 treated as a sentence in every respect. A person who's on
13 probation and then gets revoked doesn't get credit for the
14 time spent on probation as if it's service as a sentence.

15 QUESTION: Well, perhaps, except we have to do
16 the best we can in interpreting this, and it is clear that
17 3565, as it's presently written, refers to sentence of
18 probation.

19 MR. SMITH: Yes, Your Honor, but they didn't use
20 the word, "sentence" or "probation" here. They used
21 "original sentence." They could have used "sentence" or
22 "probation."

23 QUESTION: Well, "original sentence" could
24 logically refer to the original sentence of probation,
25 could it not? I mean, that's --

1 MR. SMITH: Yes, Your Honor. It also could
2 refer to the sentencing guideline range. If you want to
3 view it technically, section 3742 refers to sentence --

4 QUESTION: Well, but that would be more of a
5 stretch than it would to say it refers to the sentence of
6 probation.

7 MR. SMITH: Your Honor, I don't think so, viewed
8 in its historical context. This Court would have to find
9 that this technical change was meant to fundamentally
10 alter the way probation revocations work, and I think that
11 that is what is the real stretch here. It's like the tail
12 wagging the dog. The Government is asking this Court to
13 infer from discussions -- minor discussions, no
14 discussions in the legislative history.

15 I indicated to the Solicitor General I would
16 mention this case, and it's the Dewsnap case. It's a --
17 Dewsnap v. Tim, and in that case, it's a bankruptcy case,
18 but the court found that pre-code law should not be
19 assumed to be fundamentally changed without at least
20 something in the legislative history.

21 QUESTION: Well, I'm not sure what you mean by a
22 fundamental change in revocation. I mean, it's always
23 been the case that if someone is convicted and sentenced
24 to probation, that if the terms of the probation are
25 violated, a revocation is possible.

1 What we're looking at here is what is the
2 required minimum sentence of incarceration in the event of
3 a violation of probation that involves possession of a
4 controlled substance. I don't think that's a fundamental
5 change. You still have to go through the mechanics of
6 revoking probation and then figure out what the mandatory
7 minimum incarceration is.

8 MR. SMITH: Yes, Your Honor, you do have to do
9 that, but what is different from history, fundamentally
10 different, is you've never based the amount of revocation
11 time on the probation term, because probation serves a
12 very different purpose. That's the fundamental change.
13 It's never been done that way, and it yields --

14 QUESTION: Mr. --

15 MR. SMITH: -- very strange results.

16 QUESTION: -- Smith, maybe you've been too
17 generous here. I suppose your first answer to Justice
18 O'Connor, were you not so generous, is that you don't mind
19 interpreting this thing literally. If you interpret it
20 literally, you end up with a probation term of one-third
21 the original sentence, right?

22 MR. SMITH: Yes, Your Honor, that would be the
23 literal interpretation.

24 QUESTION: And so once we -- and literally,
25 that's clearly what it means, and once we depart from

1 that, the issue is simply whether we take a -- I mean,
2 really, to call it a nonliteral interpretation doesn't
3 really do justice to what a leap it is -- we take a
4 fanciful interpretation, should we take a fanciful
5 interpretation that favors your client, or the fanciful
6 interpretation that favors the Government? That's really
7 the choice, because the only literal interpretation gives
8 your client, as punishment, one-third of his original
9 probation term.

10 MR. SMITH: Yes, Your Honor.

11 You want to -- you want to know what I really
12 think happened? In October of 1988, there had been almost
13 no guidelines revocations. Even though it was passed in
14 the Sentencing Reform Act of 1984, it didn't go into
15 effect until November 1st of '87, for crimes that were
16 committed after then.

17 For somebody to have gotten to the revocation
18 stage, they would have had to commit a crime after
19 November 1st of '87, been arrested, been convicted, have
20 he presentence report prepared, be sentenced, and
21 sentenced under the guidelines, which there was a big
22 dispute before Mistretta whether the guidelines were even
23 constitutional, then go out and be revoked and again be
24 arrested and sentenced for revocation, all before October
25 of '88, less than 10 months after the guidelines went into

1 effect.

2 It is likely, if you really want to know what I
3 think, that Congress was thinking about the old system
4 when they did this, and it is not clear that this is what
5 Congress intended.

6 QUESTION: Well, but I'm still not clear on your
7 answer to Justice Scalia. He points out, it seems to me
8 correctly, that you are in basic agreement with the
9 Government, so far as your submission so far, that your
10 client must receive a term of incarceration --

11 MR. SMITH: No, Your --

12 QUESTION: -- and I don't see why you don't
13 argue that one-third of the original sentence means one-
14 third, as a minimum, of the original probation sentence, a
15 probation sentence with maybe more onerous condition, but
16 you seem to back away from that.

17 MR. SMITH: Your Honor, if I did, I apologize.
18 What I'm trying to say is this. I think the issue before
19 this Court is the cert petition issue, did the lower
20 court -- did the court of appeals err in finding that it
21 could not be more than the top of the guideline range, the
22 original sentence could not be more than the top of the
23 guideline range, and I think this Court can easily answer
24 that, whether following Justice Scalia's interpretation or
25 the court of appeals decision below, that it does not.

1 QUESTION: Well, Mr. --

2 QUESTION: Well, we have to answer it with some
3 sort of reasoned opinion, not just kind of a -- the least
4 common denominator type of -- what did the Eleventh
5 Circuit say about -- do you think it followed the statute
6 literally?

7 MR. SMITH: Your Honor, I think they followed it
8 particularly in its historical context as closely as it
9 could be followed. The guideline range replaced the old
10 suspended sentences, in our view, and that's what they
11 tried to go back to as the barometer.

12 QUESTION: They certainly didn't say, did they,
13 that the only sentence that could be imposed was
14 probation?

15 MR. SMITH: They did not, no, Your Honor.

16 QUESTION: Well then, in fact, Mr. Smith, the
17 whole statutory scheme here seems to me to be perfectly
18 clear that you can't reinstate someone on probation after
19 they had a controlled substance possession established. I
20 mean, that just seems to be the clear import of the
21 language.

22 MR. SMITH: Your Honor, I don't agree for this
23 reason. There are additional conditions that could be
24 placed on the probation, and while it may seem odd to put
25 somebody back on straight probation when the probation has

1 a condition of inpatient drug treatment, it doesn't seem
2 quite the same sentence.

3 The disparities created by the Government's
4 interpretation are weird, to say the least.

5 QUESTION: Mr. Smith, before you go on with
6 that, do I understand you correctly to say that on your
7 view, if there must be incarceration, then the top would
8 be 6 months, and the minimum, not less than one-third,
9 would be 2 months, is that your view?

10 MR. SMITH: Yes, Your Honor, and it's
11 interesting, the Government below in its plea agreement
12 agreed not to recommend a sentence above the original 6-
13 month range, so it's clear that Mr. Granderson would not
14 have gotten more than 6 months, unless the judge disagreed
15 with the Government on what was the --

16 QUESTION: Your interpretation of not less than
17 one-third of the original sentence would be --

18 MR. SMITH: Two months of some kind of
19 confinement.

20 The disparities by the Government, however, are
21 very strange. A person who's a misdemeanor, who gets
22 5 years of probation, the Government would have that
23 person get 20 months in jail, more than the statutory
24 maximum for the underlying offense.

25 It would cause Mr. Granderson to get a higher

1 minimum sentence of 20 months than his revocation range
2 under the revocation guidelines would have been if he
3 distributed or manufactured drugs while on probation.

4 It would cause him to get a minimum that is more
5 than 40 times what he would get if he were convicted as a
6 repeat drug possessor -- convicted a second time as a
7 repeat drug possessor. If the Government had intended --

8 It would even cause him to get more than if he
9 possessed -- the drug that he possessed in his system in
10 jail, if he'd had the audacity to bring it in to jail, his
11 maximum would have been 1 year. The Government submits
12 that it's more than that. case, you would think, based on

13 QUESTION: Mr. Smith, if we adopt your
14 interpretation, is it always the more lenient for the
15 defendant, or does it just happen to be in the case of
16 your client? absent some showing to the contrary either in

17 MR. SMITH: It certainly is in the case of my
18 client, and we submit it will always be. the principles

19 QUESTION: I know -- there's no situation in
20 which using the Government's system would produce a lower
21 sentence? law.

22 MR. SMITH: We don't believe so, no. The
23 Government's situation also pretends further problems
24 down the road. If this person who is a misdemeanant gets
25 20 months after the revocation, and then possesses a gun,

1 is that person a felon in possession? These are problems
2 this Court need not create.

3 Our recommendation, and the one from the court
4 of appeals below, has no such problems. The Government --
5 and all the courts of appeals that have adopted it
6 indicates no problems, and if you turn to the legislative
7 history, you see why. If the Government had intended --
8 if the Congress, excuse me, had intended this fundamental
9 change, don't you think there would be something in the
10 legislative history -- something, if they wanted to start
11 using probation terms as the barometer? There's nothing.

12 In the Dewsnap case, you would think, based on
13 that, that that would be required. More importantly --

14 QUESTION: Dewsnap dealt with the principle
15 we've enacted in connection with the Bankruptcy Code in
16 1978, that absent some showing to the contrary either in
17 the legislative history or the statutory language, we
18 would presume that the old Bankruptcy Act, the principles
19 carried over, but we've never had -- enunciated any such
20 general principle in connection with the entire body of
21 criminal law.

22 MR. SMITH: No, Your Honor, not specifically,
23 but I think frankly it ought to be more easily applied in
24 a criminal context because the Rule of Lenity applies in a
25 criminal context and would not in a bankruptcy context.

1 QUESTION: No change from prior law unless it is
2 specifically mentioned in the legislative history.

3 MR. SMITH: Yes, Your Honor, that's how we read
4 Dewsnap.

5 QUESTION: So you can't make any changes in
6 conference committee, for example. That's sort of a
7 constraint upon Congress.

8 MR. SMITH: Justice Scalia, I know you dissented
9 from Dewsnap and don't necessarily agree with that
10 principle, and I think it's an issue that --

11 QUESTION: Oh, I disagree with much more than
12 that. I wouldn't use it at all, but to say that a piece
13 of legislation is ineffective unless the text of the
14 statute is supported by legislative history is
15 extraordinary.

16 MR. SMITH: No, Your Honor, perhaps I'm stating
17 it too broadly. I think what this Court said is, it would
18 not assume a fundamental change absent some indication in
19 the legislative history, it would not assume that, and I
20 think it shouldn't assume it here.

21 If Congress made the change we suggest --

22 QUESTION: May I ask you a question, going back
23 to -- looking at the time the statute was enacted, were
24 there people in Federal prisons at that time who had been
25 sentenced under the regime that Justice O'Connor described

1 such as having gotten a sentence of 6 months -- or a
2 sentence of 6 months in jail suspended, and in lieu
3 thereof probation for 5 years, for example?

4 MR. SMITH: That's most of the cases that were
5 coming before cases in 1988, Your Honor.

6 QUESTION: And under that view, what would you
7 have interpreted the original sentence to refer to, the
8 suspended term of imprisonment, or the probationary
9 period?

10 MR. SMITH: The suspended sentence. You never
11 use the probation term as the barometer, never. It's not
12 done.

13 QUESTION: So you're saying that there are --
14 there were -- at the time the statute was enacted, there
15 was a prison population who would have fit the description
16 Justice O'Connor's hypothetical used.

17 MR. SMITH: Yes, Your Honor.

18 QUESTION: And they were eligible for having
19 their probation revoked at that time.

20 MR. SMITH: Yes, Your Honor.

21 QUESTION: But do you disagree with the
22 Government that that would not have fit this statute
23 because prior to this change probation was not considered
24 a sentence of any kind?

25 MR. SMITH: Your Honor, it's called a sentence

1 in 1984, but it's not treated as a sentence in every
2 respect. As I indicated, you don't get credit for time --

3 QUESTION: Before it wasn't treated -- I mean,
4 you didn't convert probation time into jail time because
5 probation was not considered a sentence.

6 MR. SMITH: Yes, Your Honor.

7 QUESTION: It didn't fit the words, a sentence,
8 until the change in the law.

9 MR. SMITH: Yes, Your Honor, and even after the
10 change in the law -- after 1984, when probation was called
11 a sentence, you still didn't use the probation terms. You
12 go back to any sentence that was available under
13 subchapter (a) at the time of the sentencing, which means
14 you go back to the revocation range.

15 Every court of appeals to interpret that has
16 said that that meant the original guideline range, so you
17 still didn't use the probation term even after probation
18 was called a sentence. Probation was called a sentence to
19 make it more understandable to citizens. They didn't
20 understand the suspended sentence part, and Congress
21 wanted to do away with those formalities in the 1984 act
22 that were confusing, and they also may have wanted to make
23 it easier to make statutes, certain crimes not eligible
24 for probation.

25 There used to be a split in this court about

1 whether that meant, if you just simply say no probation,
2 does that also outlaw suspended sentences, and they wanted
3 to do away with all that gobbledygook, but it didn't
4 change the way probation worked. Even after 1984, you
5 still didn't use the probation term, which is based on how
6 long it takes to pay a fine, those sorts of questions,
7 into revocation sentences.

8 QUESTION: I suppose it wouldn't be strange to
9 think that if Congress did have in mind the old system,
10 and was referring to one-third of the original sentence
11 that was suspended, I wonder, it was always my
12 understanding that if you violated the terms of your
13 probation, not just one-third of the sentence that was
14 imposed would be given you, but in fact the whole term.

15 Would it be normal to revoke probation, which
16 was a grace from a sentence that was presumably a
17 considered sentence? Revoke the probation, and then say,
18 but we're not going to give you your original sentence,
19 we're just going to give you one-third of it?

20 MR. SMITH: My understanding is that the
21 parameters were set by the suspended sentence. I don't
22 think --

23 QUESTION: I'm talking about under the old
24 system that Justice O'Connor was referring to. It had
25 always been my assumption that if you violated your

1 probation, what would happen is that the original
2 sentence -- the full term of it, not one-third of it --
3 would come down upon you.

4 MR. SMITH: No, Your Honor, the court could
5 suspend imposition of the sentence, for example, and there
6 would be no sentence to put in its place, so I think the
7 court still retained discretion, but there was something
8 over their head, just like there's a guideline range over
9 a defendant's head now.

10 QUESTION: Yes, but this statute would have made
11 a change in that prior to this statute, if the person on
12 probation were found in possession of cocaine, as this man
13 was, the judge might not have revoked this probation at
14 all. He might have said, well, I'll give you a second
15 chance, but as I understand it, it is now mandatory that
16 probation must be revoked if this particular reason for
17 revoking exists, so that in that sense it's tougher, even
18 though --

19 QUESTION: Well, if you're dealing with the
20 world of earlier sentencing jargon, your answer to Justice
21 Scalia's question is based on the hypothesis that the
22 judge in that hypothetical case said he would suspend the
23 imposition of sentence, but as I recall it myself, and as
24 I think I understand the discussion, judges also under
25 that regime would impose a sentence but suspend serving

1 it.

2 In other words, they wouldn't always suspend the
3 imposition of a sentence, and it seems to me your answer
4 to Justice Scalia doesn't fit so well in the latter
5 situation, where there are sentences imposed but its
6 service is suspended.

7 MR. SMITH: Yes, Your Honor. Even in that
8 context, though, looking at this case, the judge under the
9 guidelines wouldn't have given more than 6 months. It's
10 as if he imposed a sentence of 6 months and suspended it.

11 The guidelines suggest that a sentence of more
12 than 6 months wasn't warranted, and the Government's
13 agreement in the plea agreement suggests that a sentence
14 beyond 6 months wasn't warranted, so looking even at the
15 imposition -- excuse me, execution suspended, it's
16 still -- the sentence that would have been imposed would
17 not have been more than 6 months.

18 QUESTION: What was the sentence in fact imposed
19 in this case?

20 MR. SMITH: Mr. Granderson was placed on
21 probation for 5 years plus a \$2,000 fine, and that doesn't
22 fit either side's description.

23 QUESTION: Mr. Smith, let me make sure I
24 understand something, because I was never a Federal
25 sentencing judge. In the case that you were just talking

1 about, which the execution is suspended --

2 MR. SMITH: Yes, Your Honor.

3 QUESTION: -- if the probation is violated, the
4 judge under the prior law had complete discretion to
5 determine how much of the execution would then be imposed,
6 isn't that true, so if --

7 MR. SMITH: I believe so, Your Honor.

8 QUESTION: Okay.

9 MR. SMITH: If you look at the legislative
10 history the way we see it, where a floor is being placed
11 within the existing framework of zero to 6 months, that is
12 a minor technical change, the kind you would not expect
13 there to be a lot of legislative history on, and so it's
14 not surprising that there's not here.

15 More importantly, since the briefs have been
16 filed, I indicate that Senator Thurmond introduced a bill
17 to change this, and he did so because Congress recognized,
18 or at least he told Congress, that there was ambiguity in
19 that statute. It's interesting that that is now part of
20 the omnibus Senate crime bill.

21 Senate bill 1607 states that if a person
22 possesses drugs while on probation, the court shall --
23 this is what it says: "The court shall revoke the
24 sentence of probation and resentence the defendant under
25 subchapter (a) to a sentence that interns a term of

1 imprisonment.

2 QUESTION: Gee, I guess if that's what they want
3 to change it to, it must not mean that now.

4 MR. SMITH: Your Honor, that is not the
5 legislative history. Senator Thurmond's --

6 QUESTION: This is subsequent legislative
7 history we're talking about now, isn't it?

8 MR. SMITH: Yes, Your Honor.

9 QUESTION: Future -- future history, so to
10 speak.

11 MR. SMITH: Yes, Your Honor, and Senator
12 Thurmond's reason for introducing it was that there was
13 ambiguity in the statute.

14 QUESTION: This final decision whether there's
15 ambiguity in the statute is committed to the courts, not
16 to Senators, or individual Senators.

17 MR. SMITH: Yes, Your Honor, this has limited
18 impact, but all I'm trying to tell the Court is that if
19 this Court finds ambiguity, it would be telling Congress
20 nothing more than it's already been told.

21 QUESTION: Perhaps by a superior source.

22 MR. SMITH: By a superior source, indeed, Your
23 Honor.

24 (Laughter.)

25 MR. SMITH: All I'm saying is, I don't think it

1 would be a surprise to Congress to learn that they had --
2 as Justice Blackmun said, that this is not a particularly
3 well-drafted statute.

4 I think when the Government's suggestion would
5 lead to fundamental and dramatic changes, this Court
6 should require real clarity. When the Government's
7 suggestion would lead to these kind of disparities and
8 potential constitutional concerns, this Court should
9 require real clarity.

10 QUESTION: On your reading, could the judge say,
11 originally the guidelines gave me zero to 6 months, but I
12 could have gone up to 5 years if I wrote an opinion saying
13 why I was going outside the guidelines. Now I'm ready to
14 do that. Would that be within the range on your
15 interpretation?

16 I asked you before -- I think you said that the
17 range would be 2 months minimum, 6 months maximum. Could
18 the judge at this stage say, I'm going to go back to the
19 sentencing authority I had originally, sentence him to the
20 5 years, and I'll write an opinion explaining why?

21 MR. SMITH: Yes, Your Honor, if the facts
22 warranted it, they could depart as they normally depart,
23 but we would have a right to appeal that departure as
24 being above the range. The Government takes that
25 opportunity away from it and creates disparities as a

1 result, but that's an interesting point, because it raises
2 this hypothetical.

3 If a person is a misdemeanor, and gets 5 years
4 of probation, and that person commits murder while on
5 probation, the statute would -- Congress would take that
6 person back to the zero to 6-month range, and that's where
7 they're presumptively supposed to be sentenced upon
8 revocation, within zero to 6 months. Even if the court
9 departed, it could go only to 12 months, the statutory
10 maximum.

11 The Government's position would cause a person
12 who simply possesses drugs -- not that that's not a
13 serious offense, but possesses drugs, to get 20 months,
14 8 months more than somebody who commits murder in that
15 context.

16 QUESTION: The Government with a more serious
17 crime always has the option to independently prosecute the
18 person and not simply to resort to this provision.

19 MR. SMITH: Yes, Your Honor, and they have the
20 opportunity to prosecute for possession of drugs as well.

21 QUESTION: Mr. Smith, I think you've just given
22 me an example in which the Government's interpretation
23 would be more lenient to the defendant than yours. Wasn't
24 that the point of your example?

25 MR. SMITH: No, Your Honor. Their

1 interpretation yields 20 months for possession of drugs,
2 whereas we submit that the range of zero to 6 months is
3 what ought to apply.

4 QUESTION: I thought your point was that you
5 should be able, in the event of murder, to consider going
6 higher, to consider going beyond the guidelines range,
7 wasn't that your point?

8 MR. SMITH: Your Honor, I think upon any
9 revocation you can depart if departure is warranted, even
10 with drug possession. All I'm trying to say is, the
11 Government's situation in a misdemeanor context would
12 cause somebody who murders while they're on a misdemeanor
13 probation to potentially get less than a person who
14 possesses drugs while on probation.

15 This Court should require real clarity not only
16 when there's a fundamental and dramatic change that
17 they're suggesting, not only when there are disparities
18 created, as the Government suggests, but when you're
19 taking away a judge's right, an ability to do justice,
20 justice as he sees fit, individualized sentencing is best
21 unless Congress restricts it.

22 Here, no one -- no one below, no one here --

23 QUESTION: -- know that individualized
24 sentencing is best? I mean, Congress provided for a
25 regime of individualized sentencing for a long time. It

1 abandoned it in '84, and now has guidelines. How is a
2 court to say that one is better than the other?

3 MR. SMITH: Your Honor, there are limits that
4 Congress has placed on it, but they've never taken away
5 individualized sentencing.

6 QUESTION: Well, they haven't totally taken it
7 away, but why should a court say that more judicial
8 discretion is better than less judicial discretion in
9 sentencing?

10 MR. SMITH: Your Honor, I guess it's because I
11 just don't think that judges are -- I mean, why do we have
12 judges? They'd be simply robots if they're simply doing
13 what Congress says has to be done and Congress is doing
14 all the sentencing. I think we have judges because we
15 want justice to be tempered with mercy.

16 QUESTION: It's not any necessary part of your
17 case to talk about the difference between individualized
18 sentencing and guideline sentencing.

19 MR. SMITH: No, Your Honor. The only point I'm
20 trying to make is that no one below and no one here argues
21 that Mr. Granderson needs 9 more months of jail from
22 today. No one says that's the just result, and I
23 recognize that if Congress states clearly that that's not
24 what should happen, this Court has to follow it, but
25 Congress hasn't stated so clearly here.

1 If there are no other questions from the Court,
2 I have nothing further to say.

3 QUESTION: Thank you, Mr. Smith.

4 Mr. Hungar, you have 10 minutes remaining.

5 REBUTTAL ARGUMENT OF THOMAS G. HUNGAR

6 ON BEHALF OF THE PETITIONER

7 MR. HUNGAR: I have a few brief points I'd like
8 to make. First, in response to Justice Stevens' question
9 about whether there would be a class of defendants who had
10 been sentenced under the previous scheme, the answer to
11 that question is no. This statute -- the effective date
12 of this provision was to those defendants whose term of
13 probation began in 1989. That is, after December 31st,
14 1988. This statute was enacted in I believe in -- well,
15 it was adopted by Congress in October of 1988.

16 So because probation begins under the statute
17 upon imposition of the sentence, anyone who received a
18 sentence of probation that would be covered by this
19 statute would have done so after the statute went into
20 effect.

21 QUESTION: How would the statute apply,
22 Mr. Hungar, to a person who 4 years earlier had been given
23 a suspended sentence of 6 months, then was suspended and
24 was put on probation for 5 years? Now, that would not be
25 a sentence, I understand, as Justice Ginsburg has pointed

1 out, but he's on probation at the time, and then that
2 person's probation was revoked. Would the statute apply
3 to that person?

4 MR. HUNGAR: No, because the effective date
5 provision of this particular statute at section 7303(d) of
6 the 1988 act, which added this amendment -- the effective
7 date of this provision, it applies to sentences of
8 probation that begin after December 31st, 1988, so in your
9 hypothetical, it would not be subject to this provision.

10 QUESTION: So the sentence -- if the person on
11 probation had its probation revoked after the enactment of
12 the statute, that person would not have had any mandatory
13 requirement. I mean, the statute simply wouldn't apply.

14 MR. HUNGAR: This statute would not apply to
15 that person, yes.

16 QUESTION: The statute you refer to explicitly
17 says that the effective date of this statute will be with
18 reference to those persons whose sentence of probation was
19 after the effective date?

20 MR. HUNGAR: Yes, Your Honor, I think I have the
21 language here. It's section 7303(d) of the act.

22 QUESTION: 7303(d)?

23 MR. HUNGAR: Of the 1988 act, and it provides,
24 "The amendments made by this section shall apply with
25 respect to persons whose probation begins after December

1 31st, 1988.

2 QUESTION: All right.

3 MR. HUNGAR: In answer to Justice Scalia's
4 question about whether there are any cases in which the
5 Government's interpretation would be more lenient, there
6 are such cases. In fact, there was a district court case
7 which we didn't cite in our brief in the District of
8 Columbia, the United States against Harrison, 815 F.Supp.
9 494, and in that case the judge held that the Government's
10 interpretation was more lenient, and therefore, regardless
11 of the ambiguity, the Rule of Lenity required adoption of
12 the Government's interpretation, because there the
13 guidelines range was 97 to 121 months, and the court had
14 departed downward and imposed probation, but then the
15 defendant --

16 QUESTION: But that's an extraordinary case with
17 a downward departure. Where the sentence is within the
18 guideline range, then overwhelmingly your interpretation
19 is going to incarcerate the defendant for a considerably
20 longer time.

21 MR. HUNGAR: That's correct, Your Honor. The
22 Sentencing Commission statistics, the 1991 and 1992 annual
23 report, suggest that only 5 to 10 percent of probationary
24 sentences are downward departures, but of course, in those
25 downward departures, in this case, for example, the effect

1 of applying respondent's interpretation would have been to
2 mandate a sentence of over 40 months in prison, which is
3 far more than our interpretation could ever mandate, but
4 it's true that in most cases that would not be the case.

5 QUESTION: It is true that supervised release
6 terms, in terms of number of months or years, tends to be
7 shorter than sentences of probation, is that not so?

8 MR. HUNGAR: I don't know whether that's true,
9 Your Honor. There are limitations that are more strict in
10 some cases than in probation, but it's interesting to note
11 that of the 12 court of appeals cases of which we're aware
12 that apply this provision, Granderson is the only one in
13 which the defendant received 5 years of probation. In
14 every other one of those cases the defendant received no
15 more than 3 years of probation, and I'm not aware of
16 statistics indicating whether supervised release or
17 probation on average is longer.

18 QUESTION: Mr. Hungar, how does the Rule of
19 Lenity work? I'm not real sure how it works. If -- just
20 make believe the Rule -- we decide to apply the Rule of
21 Lenity. Would that give us a constant interpretation of
22 this statute, depending upon what kind of a situation
23 first comes before us, or rather, would we interpret the
24 statute leniently to the first defendant and then also
25 leniently to the second defendant, depending upon which

1 interpretation works case by case?

2 MR. HUNGAR: I think the Rule of Lenity requires
3 a constant interpretation. You can't determine lenity
4 based solely on the facts of a particular case and then
5 have the statute mean different things, depending on the
6 particular defendant before the court.

7 QUESTION: Can you make your basic lenity
8 determination based upon the standard case, the
9 nonextraordinary case --

10 MR. HUNGAR: Absolutely, Justice Souter, but --

11 QUESTION: -- which would be this one rather
12 than the D.C. Circuit case?

13 MR. HUNGAR: Our -- well, I suppose you would
14 also have to consider the degree of lenity. That is, it
15 may be slightly more lenient here and far more harsh
16 there, and that would be taken into consideration as well,
17 but our principal submission is that the Rule of Lenity
18 does not apply. It certainly doesn't apply to permit
19 adoption of respondent's interpretation.

20 If it applies, then the only way to construe the
21 statute is to require a new, shorter term of probation,
22 which we think is absurd, but can't require respondent's
23 interpretation, because respondent's interpretation is
24 contrary to the plain language of the statute.

25 QUESTION: That's not the Rule of Lenity, that's

1 just reading the statute.

2 QUESTION: That's the rule of least absurdity.

3 MR. HUNGAR: That's right -- no, Your Honor, the
4 Rule of Lenity, as this Court said last term in the Smith
5 v. United States case, which we've cited in our brief, the
6 Rule of Lenity doesn't come into play to let you choose
7 between one interpretation that is consistent with the
8 language and another that's not. The Rule of Lenity just
9 doesn't permit you to adopt an interpretation that is
10 barred by the plain language of the statute.

11 QUESTION: But once we've applied the rule of
12 least absurdity, then we may be in a position to apply the
13 Rule of Lenity.

14 MR. HUNGAR: Well, that's my next point, Your
15 Honor. Justice Scalia and Justice Kennedy I think and
16 others have suggested that our interpretation is not
17 consistent with the plain language, so we just have to
18 pick and choose between various inconsistent
19 interpretations -- that is, interpretations that aren't
20 consistent with the plain language, but our interpretation
21 is consistent with the plain language.

22 It is possible for the phrase, "one-third of the
23 original sentence," to refer to the length but not the
24 type of the sentence. Indeed, Congress used exactly that
25 same formulation in section 3583(g), because there the

1 Congress -- the term of imprisonment to be imposed depends
2 on, and is based on one-third of the term of supervised
3 release, but we know from the context that Congress didn't
4 mean a new term of supervised release that's one third as
5 long as the old term, even though it used the same
6 structure. It meant, in prison, and it made that very
7 clear in section 3583(g). original sentence was one of
8 probation. We think it's equally clear here in context,
9 because when Congress said, sentence the defendant,
10 Congress had already said, revoke probation, so we know
11 probation is not an option. Therefore, by saying,
12 sentence the defendant to not less than one-third of the
13 original sentence, Congress had to be saying, sentence the
14 defendant to prison, and the only question is how long,
15 and that is answered by the phrase, not less than one-
16 third -- third of the term of release doesn't mean a new
17 sentence. QUESTION: Why isn't it just as logical, then,
18 if you -- to go back to the only reference you have for
19 incarceration, which is the originally available sentence
20 of incarceration? You won't allow for probation to get to
21 a sentence of incarceration. supervised release provision
22 you're talking about. You have to drop something on your They said,
23 interpretation, and on the other interpretation you take
24 the only incarceration sentence that's possible, the
25 sentence that was open to the judge originally. I don't

1 see why that's not an equally permissible interpretation.

2 MR. HUNGAR: Because original sentence doesn't
3 mean, sentence that was available but not imposed.

4 Original sentence has only one possible meaning as the
5 words are used in the English language.

6 QUESTION: But we know it cannot mean original
7 sentence, because here the original sentence was one of
8 probation.

9 MR. HUNGAR: And that's precisely our point.
10 The original sentence was a sentence of probation.
11 Therefore, original sentence means the sentence of
12 probation that was imposed in this case, but one-third of
13 the original sentence doesn't necessarily mean 20 months
14 of probation.

15 Just as in the supervised release provision,
16 where one-third of the term of release doesn't mean a new
17 sentence of supervised release, here one-third of the
18 original sentence doesn't mean a new sentence of
19 probation, it means --

20 QUESTION: Well, but in -- that's mis -- it
21 seems to me in 3583(g), the supervised release provision
22 you're talking about, they made it very clear. They said,
23 "and require the defendant to serve in prison" --

24 MR. HUNGAR: Yes, Your Honor.

25 QUESTION: -- "not less than one-third of the

1 term of supervised release," and there's no such language
2 here. ~~an option.~~

3 MR. HUNGAR: Because it was unnecessary, because
4 when Congress says, "sentence," at the point in the
5 statute where Congress is now directing the court to
6 sentence the defendant, probation is no longer an option,
7 because Congress has already directed the court to revoke
8 probation, and the phrase, "revoke the sentence of
9 probation" means in Federal sentencing law, probation is
10 not an option. Something else has to be imposed instead.
11 The only something else that there is by the time you get
12 to the part of the statute that mandates a new sentence is
13 imprisonment. ~~or was submitted.)~~

14 QUESTION: Can you cite your authority -- you've
15 said it several times -- for the proposition that once
16 probation is revoked, the judge does not have the
17 authority to reinstate probation on different terms and
18 conditions?

19 MR. HUNGAR: Well, it's inherent in the very
20 doctrine -- section 35 --

21 QUESTION: No case has said that, that you know
22 of?

23 MR. HUNGAR: Yes. Every case that construes
24 section 3565(a)(2), which talks about revocation of
25 probation, says that the court has to impose some other

1 sentence from within the guidelines range, but probation
2 is not an option.

3 QUESTION: You all think this statutory language
4 commands that, and forbids a different sentence of
5 probation on much more severe terms?

6 MR. HUNGAR: The fact that Congress has always
7 used revoked to mean exactly that I think commands the
8 result that we urge.

9 QUESTION: So you have no authority for it.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hungar.
11 The case is submitted.

12 (Whereas, at 11:02 a.m., the case in the above-
13 entitled matter was submitted.)

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18 BY Ann Marie Federico

19 (REPORTER)
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CERTIFICATION

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UNITED STATES V. RALPH STEWART GRANDERSON, JR.

NO. 92-1662

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