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IN THE SUPREME COURT OF THE UNITED STATES

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PERCY DILLON, :

Petitioner : No. 09-6338

v. :

UNITED STATES. :

- - - - - x

Washington, D.C.

Tuesday, March 30, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:11 a.m.

APPEARANCES:

LISA B. FREELAND, ESQ., Federal Public Defender, Pittsburgh, Pennsylvania; on behalf of Petitioner.

LEONDRA R. KRUGER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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P R O C E E D I N G S

(10:11 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 09-6338, Dillon v. United States.

Ms. Freeland.

ORAL ARGUMENT OF LISA B. FREELAND

ON BEHALF OF THE PETITIONER

MS. FREELAND: Thank you, Mr. Chief Justice, and may it please the Court:

Believing its hands were tied by a policy statement created to prevent application of this Court's decision in Booker to section 3582(c) proceedings, the district court imposed a mandatory guideline sentence that exceeded the maximum authorized by the jury's verdict by more than six years. Sentencing Commission policy cannot override this Court's clear and unambiguous directive to courts to treat the guidelines as advisory in all cases moving forward, and any interpretation of section 3582(c) that permits the Commission to mandate sentences must be rejected, not only as a matter of statutory stare decisis, but because it would violate the Sixth Amendment.

In an effort to avoid this result, the government elevates form over substance, arguing that

1 section 3582(c) proceedings are not sentencings at
2 the -- and that the sentence imposed is not a new
3 sentence. The government is wrong.

4 Section 3582(c) proceedings are sentencings
5 at which Booker's constitutional and remedial holdings
6 must apply. The --

7 JUSTICE GINSBURG: Ms. Freeland --

8 CHIEF JUSTICE ROBERTS: What if the
9 Sentencing Commission just issued a new guideline and
10 said anyone with a -- a crack sentence, their sentence
11 is going to be reduced by 10 percent? That wouldn't
12 present any problems, would it?

13 MS. FREELAND: Mr. Chief Justice, I think it
14 would present precisely the same problems here. By
15 indicating an amount of time that a sentence could be
16 reduced, the Sentencing Commission would be doing
17 precisely what it did here, which is setting a lower
18 level, mandatory lower level, on sentences --

19 CHIEF JUSTICE ROBERTS: But there's no --

20 MS. FREELAND: -- that the district court
21 could impose.

22 CHIEF JUSTICE ROBERTS: But 3553(a) doesn't
23 even come into play under my hypothetical.

24 MS. FREELAND: I'm sorry, Your Honor.

25 CHIEF JUSTICE ROBERTS: 3553(a) doesn't even

1 come into play, so there's not a resentencing by a
2 judge. It is just an across-the-board policy, like
3 increasing good time credits.

4 MS. FREELAND: I disagree, Your Honor,
5 because Congress in this case decided to enact a
6 statute, 3582(c), that invokes the discretionary
7 sentencing power of the court.

8 CHIEF JUSTICE ROBERTS: Right, in -- in this
9 case, but in my hypothetical Congress hasn't done that.
10 It hasn't -- or the Sentencing Commission hasn't done
11 that. They haven't invoked the discretionary
12 sentencing. They just said: Across the board, 10
13 percent off.

14 MS. FREELAND: And, Your Honor, perhaps I
15 misunderstood, but once the Sentencing Commission acts
16 to revise a guideline under its power under 994(u) and
17 opts to make that amendment retroactive under -- I mean,
18 994(o) -- and opts to make it retroactive under 994(u),
19 only the court has power to lower a sentence. Congress
20 enacted --

21 JUSTICE KENNEDY: Well, why is that? It's
22 the same hypothetical of the Chief Justice. I'm not
23 interrupting your -- your discussion with him. Suppose,
24 pursuant to a permissible regulation, the BOP says: Just
25 file paperwork with us, and if -- and if you show that

1 you were under a crack cocaine sentence, you're going
2 to be reduced by X number of months, period. Just file
3 it. What --

4 MS. FREELAND: And, Justice Kennedy --

5 JUSTICE KENNEDY: Is there a problem with that?

6 MS. FREELAND: Justice Kennedy, I think there
7 would be. And, again, I don't mean to be dodging the question.
8 The problem is section 3582(c). Congress clearly indicated
9 that it wanted these types of reductions to be treated
10 differently than those under 3624(b), which are
11 delegated to the Bureau of Prisons. And those types of
12 reductions --

13 JUSTICE KENNEDY: No, but the -- the
14 hypothetical is Congress doesn't do this. The
15 hypothetical is that Congress just tells the BOP: Find
16 out who's in on crack cocaine and release them --
17 whatever, 20 months early.

18 MS. FREELAND: Your Honor --

19 JUSTICE KENNEDY: What's wrong with that?

20 MS. FREELAND: Your Honor, if
21 Congress chose to draft a statute similar to 3624(b) to
22 empower the Bureau of Prisons to act whenever the
23 Commission lowered a guideline or -- or changed a
24 guideline under 994(o), I agree with Your Honor. It
25 would not present the problems here.

1 JUSTICE KENNEDY: Okay. Then the Chief
2 Justice's hypothetical, at least for me, meant: What --
3 why should there be a difference?

4 MS. FREELAND: The difference, again -- and
5 I don't mean to be dodging your questions. The
6 difference is that Congress acted in two very different
7 ways here. It enacted 3582(c) to deal with reductions
8 in sentence that are -- that are prompted by revisions
9 to the guidelines, and it enacted 3624(b) to deal with
10 revisions that are prompted by good behavior. And
11 it --

12 JUSTICE SOTOMAYOR: What is the
13 constitutional difference that would inure a Sixth
14 Amendment right in the resentencing by the court that
15 doesn't when it's a resentencing or a modification of a
16 sentence by the Bureau of Prisons?

17 MS. FREELAND: Justice Sotomayor, I think
18 the difference would be that when it is delegated to the
19 courts under a statute like 3582(c), the court is then
20 dealing with a mandatory guideline range, and the Sixth
21 Amendment problem arises when the court sentences --

22 JUSTICE SOTOMAYOR: But is this truly a new
23 sentence, meaning a person serving a sentence? This is
24 an act of clemency. Whether the Bureau of Prisons does
25 it or the court does it, why should we introduce a

1 different binding or non-binding constitutional limit on
2 one body rather than the other?

3 MS. FREELAND: Justice Sotomayor, I disagree
4 with the premise of your question that this is an act of
5 clemency similar to the reductions for good time
6 behavior.

7 The -- the term "clemency," "leniency,"
8 "grace," connotes the idea that you deserve to be
9 punished for this, but we're going to -- we're going
10 to exercise leniency --

11 JUSTICE GINSBURG: Ms. Freeland --

12 MS. FREELAND: -- and give you a lesser
13 sentence.

14 JUSTICE GINSBURG: May I take
15 you on another path, not the question of the difference
16 between the two -- two sections. We have a large
17 prison population, and then Booker comes down, and then
18 the guidelines change only as to crack cocaine, nothing
19 else. All of the others whose sentence has become final
20 cannot get into the court's door because they don't have
21 the entering wedge.

22 In what system -- what fair system would
23 say, aha, because the crack cocaine guideline was
24 reduced -- the disparity was reduced -- these people are
25 now going to overcome the finality bar, but all of the

1 others who are identically situated with respect to all
2 other factors, they don't get their sentences revised?

3 MS. FREELAND: Justice Ginsburg, I have a
4 couple of responses to your question. The first is that
5 I think that a decision by a district court judge to
6 correct a sentence under 3582(c) should be analogous to
7 a decision of a district court judge to correct a
8 sentence under 2255.

9 Once the decision is made that the sentence
10 should be corrected, finality is extinguished, and when
11 the court goes about imposing the new sentence, it must
12 comport with the law of the land at the time.

13 JUSTICE GINSBURG: But why should, bearing
14 in mind that entire prison population similarly
15 situated, the courts say it's -- the finality bar is lifted
16 only to the extent that the crack cocaine guideline disparity
17 has been reduced?

18 MS. FREELAND: And, Your Honor, once the
19 finality bar is lifted, the concerns about retroactivity
20 should slip away. But with respect to fairness, which I
21 think is at the heart of your question, the fact that
22 this partial remedy for an urgent and compelling
23 problem, that is, the crack guideline, was afforded to
24 some should not prevent the court from seeing justice
25 for those like Mr. Dillon, even though there are some in

1 prison that are serving unconstitutional sentences that
2 will not be able to seek relief.

3 Mr. Dillon is properly compared to other
4 defendants who were sentenced under the amended crack
5 guideline, not the original crack guideline. His
6 sentence is an amended crack guideline sentence, and for
7 purposes of avoiding unwarranted disparities, Mr. Dillon
8 is most comparable to those other defendants that are
9 sentenced after the crack guideline.

10 JUSTICE GINSBURG: If you -- if you are
11 right that this benefit goes to -- only to the class
12 that can get in the door, wouldn't that be a powerful
13 motive to the Sentencing Commission not to make its
14 guidelines reductions retroactive?

15 MS. FREELAND: Your Honor, I would certainly
16 hope not. 994 clearly contemplates that the Commission
17 will undertake a constant review and revision of the
18 guidelines to make sure that they serve the purposes of
19 punishment. And 994(u) clearly shows that Congress
20 contemplated that some of those decisions would warrant
21 retroactive application.

22 If the Commission were to respond to a
23 decision by this Court in Mr. Dillon's favor by refusing
24 to revise the guidelines in the future or refusing to
25 make any of those revisions retroactive, I submit that

1 it would be abdicating its duty under 994.

2 JUSTICE SCALIA: It wouldn't say that. It
3 just wouldn't do it. That's all.

4 MS. FREELAND: You're right, Your Honor.
5 It just wouldn't do that, but history would speak for
6 itself. The Commission has constantly undertaken this
7 duty under 994(o).

8 JUSTICE SCALIA: But it's certainly a
9 factor that if I were -- if I were on the Commission, I
10 would certainly take that factor into account. Every
11 time I make it retroactive, it's going to reopen --
12 going to reopen the whole sentencing and -- and allow
13 a Booker application where -- where it didn't apply
14 before. How can I close my eyes to that if --

15 MS. FREELAND: Well, Your Honor --

16 JUSTICE SCALIA: -- if I'm making the
17 retroactivity determination?

18 MS. FREELAND: Your Honor, if I could, I'm
19 not suggesting that the Commission close its eyes to
20 anything. However, what we're asking for in this case
21 is not a full resentencing where all sentencing
22 decisions would be reopened. We're simply saying that
23 when a court imposes a new sentence, that new sentence
24 must comply with this Court's decision in Booker, and --

25 CHIEF JUSTICE ROBERTS: Only Booker?

1 JUSTICE SOTOMAYOR: But that means it --

2 CHIEF JUSTICE ROBERTS: Only Booker?

3 What if there is another constitutional objection
4 to the sentence, and he goes back under --
5 under the crack cocaine? Can you say, oh, and, you
6 know, also, it violated my rights under equal
7 protection? You didn't notice that before, but here's
8 the argument. Is that before the sentencing court?

9 MS. FREELAND: Your Honor, I would have to
10 say that it is. The -- the new sentence --

11 CHIEF JUSTICE ROBERTS: Yes, you would you
12 have to say. So --

13 MS. FREELAND: The sentence imposed would
14 have to comply with the Constitution.

15 CHIEF JUSTICE ROBERTS: So it's not only as
16 unfair as Justice Ginsburg hypothesized. It's even more
17 unfair than that, because just because of the crack
18 cocaine change, somebody with an equal protection
19 challenge gets to raise that. While somebody in prison
20 without an equal -- with an equal protection challenge
21 but not the crack cocaine one is still stuck.

22 MS. FREELAND: That's true,
23 Mr. Chief Justice, but that's the case in any situation
24 where a defendant has raised an issue on appeal or has
25 presented a claim in a 2255 petition, and just by

1 happenstance the decision awarding them a new -- a new
2 trial or a new sentence happens when a new
3 constitutional rule is announced by this Court.

4 Now, certain --

5 CHIEF JUSTICE ROBERTS: Well, that's a new
6 constitutional rule. This is an old one. This is one
7 that was -- you know, the equal protection clause has
8 been in the books for a while. And -- and he -- he just
9 gets the chance to raise it solely because of the fact
10 that his conviction involved crack cocaine.

11 MS. FREELAND: And, again, Your Honor, I
12 think that he would get to raise it, but I want to point
13 out that not every constitutional issue would be ripe
14 for the court's decision at that proceeding. If there
15 were an opportunity to raise -- as you said, equal
16 protection isn't a new law like -- we're talking about
17 Booker being a new law for Mr. -- for Mr. Dillon. If
18 there were an equal protection challenge that had not
19 been lodged at the original sentencing, the district
20 court would apply the law of the case and then --

21 CHIEF JUSTICE ROBERTS: Oh, no, no, no. I
22 thought under your theory this is a whole new
23 sentencing. So who cares whether he waived it at the
24 first one? We're starting from -- from point zero.

25 MS. FREELAND: Mr. Chief Justice, I must

1 have misspoken. That is certainly not what I meant to
2 indicate. What I meant to say is, certainly, all
3 sentences imposed ought to comply with the Constitution,
4 but we live in a system that has waiver principles, law
5 of the case, mandate rule. These are all obstacles that
6 a defendant seeking to overturn a sentencing or raise an
7 issue on equal protection grounds that weren't presented
8 before would serve as obstacles to their doing so.

9 CHIEF JUSTICE ROBERTS: And my point is that
10 they shouldn't under your theory. The fact that he
11 waived it at the earlier sentencing under your theory
12 should not matter at all, because your theory is that
13 this is a whole new sentencing, so who cares what went
14 on in the prior sentencing?

15 MS. FREELAND: I disagree, Your Honor, that
16 my theory does not encompass that part of the rule. And
17 I think with respect to our criminal history issue that
18 we've raised that's precisely what we've said, that
19 there are errors that a district court may not be able
20 to correct in a 3582(c) proceeding --

21 JUSTICE SCALIA: Well, why do you -- why do
22 you pick on -- on Booker as -- as not carrying over? I
23 mean, if you say that there carries over from the prior
24 sentencing his failure to raise the equal protection
25 claim, why can't you say it's also law of the case that

1 the Booker objection doesn't stand? It's law of the case.
2 It was decided before Booker, and that's the law of the
3 case as far as that's concerned.

4 MS. FREELAND: Well, Your Honor, if the law
5 of the case were in place before Booker were decided, the
6 new law would be an exception to the law of the case if
7 Mr. Dillon were resentenced as he were after the Court's
8 decision in Booker.

9 I'm not sure if that answers your question
10 precisely. For Mr. Dillon, Booker is new law at his new
11 sentencing. He did not have an opportunity to raise a
12 Booker objection or ask for a sentence below the
13 guideline range at his original sentencing.

14 JUSTICE SOTOMAYOR: Under your theory,
15 there's no bar to an upward sentence by the -- by the
16 judge, because if it's a brand new hearing subject to
17 Booker, which mandates complete discretion under 3553,
18 the judges define the sentence that fits the crime and
19 the defendant. So you don't mind an upward --

20 MS. FREELAND: Well, under 3582(c), Your
21 Honor, statute -- the statute provides that it --

22 JUSTICE SOTOMAYOR: I know you want --

23 MS. FREELAND: -- a sentence be only reduced

24 JUSTICE SOTOMAYOR: You only want part of
25 -- the statute, not the whole statute?

1 MS. FREELAND: Your Honor, I think we want
2 the whole statute, the statute that allows --

3 JUSTICE SOTOMAYOR: If you want the whole
4 statute, then it's a new sentence. You can't beg and say
5 the statute limits up and down, but I only want the
6 down --

7 MS. FREELAND: Your Honor --

8 JUSTICE SOTOMAYOR: -- and I want a new sentence.
9 It doesn't make sense.

10 MS. FREELAND: I think I understand your
11 point. The -- the problem is with the statute. 3582(c)
12 does not authorize a court to increase the sentence.

13 The fact that a sentence cannot be increased
14 does not divest the proceeding at which it's imposed --

15 JUSTICE BREYER: So what's -- what's the --
16 the words in the statute is that it may reduce the term.
17 You can't change the term -- you cannot change a
18 sentence, except that you can reduce the term if such
19 reduction is consistent with applicable policy
20 statements.

21 MS. FREELAND: That's correct, Your Honor.

22 JUSTICE BREYER: Do you see anything --
23 what's -- what's unconstitutional about that? Then they
24 issue a policy statement, and the policy statement says
25 you can't reduce it except insofar as our new --

1 whatever the new thing is -- applies.

2 If you're arguing that that violates the
3 Constitution, what I'm missing is why? What violates
4 the Constitution in that?

5 MS. FREELAND: Your Honor, post-Booker, what
6 violates the Constitution is the policy statement's use
7 of the word "shall." That's a -- that's a
8 significant change --

9 JUSTICE BREYER: I don't remember --

10 MS. FREELAND: -- in the wording of 1.10

11 JUSTICE BREYER: I thought in Booker --
12 and I have to go back and look at it, but I thought in
13 Booker the Court held that certain specific -- like
14 certain specific words in certain specific provisions
15 of the -- the sentencing statutes were unconstitutional
16 because of Apprendi and because of the other part,
17 Booker itself.

18 Well, 3582 wasn't one of them. So -- so
19 there must be something unconstitutional if you're
20 right. I don't see how you get around this statute.

21 MS. FREELAND: Your Honor, in our view
22 3582(c) is not unconstitutional. It --

23 JUSTICE BREYER: All right. If it's not
24 unconstitutional, then why don't you have to follow it?
25 Because what it says is, you cannot get a reduction

1 except in respect to what the policy guideline says.
2 And the policy guideline says you don't get a reduction,
3 except insofar as we've reduced a sentence in a
4 particular respect.

5 What's unconstitutional about that? I'm --
6 I'm not saying there isn't. I want to know what your
7 argument is that it is unconstitutional.

8 MS. FREELAND: Justice Breyer, post-Booker,
9 if 3582(c) is interpreted as you just said, that the
10 sentence -- the reduction in sentence must be consistent
11 with applicable policy statements absolutely --

12 JUSTICE BREYER: Well, that's what it says.
13 I don't know how you'd interpret it some other way --

14 MS. FREELAND: And that the --

15 JUSTICE BREYER: -- if that's what it says.

16 MS. FREELAND: And that the policy statement
17 then requires the court to impose a mandatory guideline
18 sentence --

19 JUSTICE BREYER: No, it just says what we're
20 doing is we're reopening the sentencing in respect to
21 the particular way we reduce people's sentence, not in
22 respect to something else. That's what I read the
23 policy statement to say. That if there were 19 things
24 that were considered in the sentence and one of those 19
25 is changed in a downward direction, then it says we make

1 an exception, says the policy statement. You can reopen
2 number 19, but not the first 18.

3 Now, why is that unconstitutional? What in
4 the Constitution prohibits doing that?

5 MS. FREELAND: The -- Your Honor, if I could,
6 the constitutional problem with section 1B1.10(b)(2)(A)
7 is that it requires the district court to impose a
8 sentence within the guideline range. Therein lies
9 the problem. The requirement, a mandatory guideline
10 sentence based on a judicially enhanced range --
11 therein lies the problem.

12 Section 3582(c) does not mandate guideline
13 sentencing. It's 1B1.10.

14 JUSTICE GINSBURG: Ms. Freeland, what would
15 happen if the -- the motion is made with respect to the
16 crack cocaine, and the judge said, I'm -- I'm not going
17 to -- I deny the motion? Would the judge then have to
18 go on and consider Booker and say, now, on this piece,
19 I deny the motion, but now I can just do whatever I want
20 with the rest of it?

21 MS. FREELAND: Your Honor, if I could, if a
22 judge is presented with a 3582(c) motion and denies the
23 motion, all the court has done is enter an order denying
24 a motion.

25 It's not until the district court decides to

1 grant the 3582(c) motion and reduce the defendant's
2 sentence that 3553(a) factors come into play, the policy
3 statements come into play, and a new sentence is
4 thereafter imposed.

5 JUSTICE GINSBURG: Well, if -- suppose
6 Congress and the Sentencing Commission had made it
7 crystal clear that they are authorizing a reopening but
8 only with respect to one piece. You say -- you say no
9 matter how clear it is, as a matter of constitutional
10 law, because Booker has been decided, the whole sentence
11 is up for --

12 MS. FREELAND: Justice Ginsburg --

13 JUSTICE GINSBURG: -- consideration?

14 MS. FREELAND: Justice Ginsburg, that's
15 correct. And the reason is because 3582(c) is a
16 provision that is used by courts to correct sentences.
17 Once the court decides that the defendant is worthy of a
18 correction, that the sentence should be corrected, it
19 grants a motion extinguishing the old sentence and
20 imposes a new sentence.

21 Our position is simply that when it imposes
22 the new sentence, it must comply with Booker's
23 constitutional and remedial holdings.

24 JUSTICE SCALIA: I have a better answer to
25 Justice Breyer's question. You want my better answer?

1 MS. FREELAND: Please, Justice Scalia.

2 JUSTICE SCALIA: Sure.

3 (Laughter.)

4 JUSTICE SCALIA: It's -- it's -- it's not --
5 it's not section 3582 that's unconstitutional, and it
6 isn't even the provision for being guided by a policy
7 statement of the Sentencing Commission that's
8 unconstitutional. It is the nature of the Sentencing
9 Commission's policy statement that is unconstitutional.

10 Surely, if the Sentencing Commission had a
11 policy statement which said you will reduce it for white
12 prisoners but not for black prisoners, that would surely
13 be unconstitutional, right?

14 MS. FREELAND: Absolutely, Your Honor.

15 JUSTICE SCALIA: And your point here is that
16 the policy statement which says you effectively will
17 disregard Booker is unconstitutional?

18 MS. FREELAND: I agree.

19 JUSTICE SCALIA: That works, doesn't it?

20 MS. FREELAND: I agree. And, Justice
21 Breyer --

22 JUSTICE BREYER: You agree. Now -- now,
23 what -- that's what I -- I could understand that if 3582
24 said to the judge you resentence him. But it doesn't
25 say that. So there's a sentence in effect, and what

1 3582 says is a -- a sentence can be reduced just as if,
2 to go back to the beginning, Congress passed a statute
3 or the Commission said everybody's sentence will be
4 reduced. That doesn't change what the sentence was. It
5 says there's a reduction, like for good -- good time.

6 So it says a defendant, if he has been
7 sentenced based on factor 19 in the case, the court may
8 reduce the term of imprisonment, the term of
9 imprisonment there under the sentence. So I'm back to
10 my question.

11 What's unconstitutional about that?

12 MS. FREELAND: Justice --

13 JUSTICE BREYER: And what the court just says
14 is the court -- the Commission says: That's right. You
15 may reduce it in respect to what we've considered; you
16 may not reduce it in respect to something which is
17 not considered.

18 So I'm still puzzled about the constitutional
19 problem.

20 MS. FREELAND: And, Justice Breyer, I
21 apologize because I may not be --

22 JUSTICE BREYER: No, no, you don't have to
23 apologize.

24 MS. FREELAND: -- I may not be understanding
25 your question.

1 JUSTICE BREYER: I understand your argument
2 now. And I didn't quite and now I do. So there's nothing
3 to apologize for.

4 MS. FREELAND: Okay. I'd like to --

5 JUSTICE BREYER: You wanted to get the idea
6 in my mind. I'm not expressing that in my question, but
7 I got your answer.

8 MS. FREELAND: Okay, thank you.

9 (Laughter.)

10 MS. FREELAND: A couple of points, though,
11 that I -- that -- from reading the text of the statute
12 that I'd like to point out. Justice Breyer, notice
13 it doesn't say "sentence." It says "term of
14 imprisonment." "Term of imprisonment" is -- is a term
15 of art in the Federal Code. A "term of imprisonment"
16 is an authorized sentence under 3551 of the United
17 States Code. And under 3621, the Bureau of Prisons
18 cannot hold someone in custody absent a sentence of
19 imprisonment.

20 And in this case, there are two judgments,
21 two sentences of imprisonment. The Bureau of Prisons
22 would not have been able to hold Mr. Dillon for
23 270 months under the 1993 judgment, and the Bureau of
24 Prisons certainly cannot hold Mr. Dillon for 322 months
25 under the --

1 CHIEF JUSTICE ROBERTS: I'm sorry. Why --

2 MS. FREELAND: -- the June 2008 judgment.

3 CHIEF JUSTICE ROBERTS: Why could they --
4 the first part of that, why could they not hold him for
5 the term under the 1993 sentence?

6 MS. FREELAND: Under 3621, it's very clear
7 that the -- the Bureau of Prisons, absent a reduction
8 under 3624(b) for good time, is directed to hold the
9 defendant in the custody of Bureau of Prisons for the
10 term of imprisonment on the judgment.

11 In this case, following the --

12 JUSTICE SCALIA: What -- what if the
13 President reduces the sentence using his pardon
14 power? He cuts it back; he cuts it in half. The Bureau
15 of Prisons has to hold him for the full term of the
16 imprisonment? No, that can't be true.

17 MS. FREELAND: Justice Scalia, I'm certain
18 that that's not true. And I mean, there -- I'm not
19 familiar --

20 JUSTICE SCALIA: So why is this any
21 different?

22 MS. FREELAND: -- with those provisions.

23 JUSTICE SCALIA: Why is this any different?
24 I mean, there are obviously -- what it proves is that
25 there are exceptions to that requirement that they hold

1 him for the term of imprisonment. They -- they have to
2 hold him for the term of imprisonment unless it has been
3 shortened, right, by -- by pardon or remission of part
4 of the term by the President or what the argument for
5 the government is, or by application of this retroactive
6 rule by -- by the Commission.

7 MS. FREELAND: And again, Your Honor, I'm
8 not familiar with the clemency and commutation
9 procedures. I would have to think that some piece of
10 paper, some order directing the Bureau of Prisons to
11 reduce the sentence, just as a new judgment in a 3582(c)
12 is a new sentence of 270 months, would have to be
13 presented so that the Bureau of Prisons would release.

14 But -- but that aside, the -- the real point
15 here is that the new judgment is a new judgment; it is a
16 new sentence. This is not a reduction in the old
17 sentence. It --

18 JUSTICE BREYER: Well, that's what it says.
19 It's -- the other thing that has bothered me, to tell you
20 the truth, is -- is the part of the point that was brought
21 up previously, that it is up to the Commission whether to
22 make it retroactive. It is.

23 MS. FREELAND: I agree.

24 JUSTICE BREYER: I don't know why they
25 couldn't take into account that to make any drug-related

1 change, you see, and then make that retroactive, is
2 going to reopen the sentencing for every single person
3 who has already been convicted of a drug crime in the
4 Federal courts, of which there are probably tens of
5 thousands.

6 And -- and I think they would properly take
7 that into account. And, therefore, they might properly
8 say, we're not going to make this retroactive.

9 MS. FREELAND: Your Honor, the -- the
10 practice in the court of appeals post-Booker of
11 remanding all of the cases that were in the pipeline
12 shows that the Federal courts are able to handle
13 revisiting thousands of sentences imposed under a
14 mandatory system to revisit them under 3553(a). And as
15 Justice Walton said in testifying before the Sentencing
16 Commission with respect to this issue, that the courts
17 are fully prepared to handle any administrative burden
18 and believes that such a burden would be sufficiently
19 justified for people like Mr. Dillon who are deserving.

20 JUSTICE KENNEDY: I'll make this brief
21 because your -- your rebuttal light is on. Your answer
22 made sense when we talk about term as opposed to
23 sentence, if you just look at (c). But (b) says,
24 "Notwithstanding the fact that a sentence to imprisonment
25 can be modified ... a judgment of conviction that

1 includes such a sentence constitutes a final judgment."
2 Does (b) not apply to (c)?

3 MS. FREELAND: (b) does apply to (c), Your
4 Honor, and I'm glad that you raised that because 3582(b)
5 is significant in that it does not distinguish the
6 effect of finality of remands, modifications under
7 3582(c); it's the judgment of conviction -- the
8 conviction that remains final. The sentence is no
9 longer final if modified under any of the provisions
10 listed in 3582(b).

11 If there are no further questions, I'd
12 like to reserve the remainder of my time.

13 CHIEF JUSTICE ROBERTS: Thank you, Ms.
14 Freeland.

15 Ms. Kruger.

16 ORAL ARGUMENT OF LEONDRA R. KRUGER

17 ON BEHALF OF THE RESPONDENT

18 MS. KRUGER: Mr. Chief Justice, and may it
19 please the Court:

20 The provisions of the Sentencing Reform Act
21 at issue in this case, unlike the provisions that were
22 at issue in Booker, do not govern the imposition of
23 sentence. They instead provide a discretionary
24 mechanism for the exercise of leniency for defendants
25 who have already been sentenced. The district court in

1 this case properly exercised its authority under the
2 statute to reduce Petitioner's sentence by a little bit
3 more than 4 years, which was the maximum amount of
4 reduction that was consistent with the Sentencing
5 Commission's specification under section 994(u) about
6 whether and to what extent its crack cocaine amendments
7 warranted reductions in already imposed sentences.

8 The district court had neither a further
9 obligation nor indeed the authority to set Petitioner's
10 sentence aside altogether and resentence Petitioner
11 under the advisory guidelines regime announced in
12 Booker.

13 JUSTICE GINSBURG: Does that extend to --
14 which was part of this case -- the court notices that
15 there was a technical error; it was a calculation error
16 the first time, and the judge says, well, I'll fix
17 that up, too. That was an arithmetic error.

18 MS. KRUGER: Yes, Justice Ginsburg, the same
19 rule applies to the calculation error that Petitioner is
20 raising.

21 Section 3582(c)(2) wasn't designed by
22 Congress to serve as effectively a less restrictive
23 substitute for raising such challenges on direct appeal
24 or where otherwise available under section 2255. It was
25 instead designed for the limited purpose of providing an

1 opportunity to extend leniency to defendants whose
2 sentences are otherwise final, nonappealable, and
3 therefore not subject to any modification.

4 Justice Sotomayor, you had asked earlier
5 whether this provision was designed as an act of
6 clemency or was instead designed as a kind of adjunct to
7 the court's judicial review power, a kind of 2255-type
8 power. We think the answer is clearly that it was
9 designed as a mechanism for the exercise of a type of
10 clemency power. I think that's particularly clear if
11 you look at the parallel provisions in section
12 3582(c)(1), which are reprinted at pages 3a and 4a of the
13 appendix to the government's brief.

14 Those provisions also provide for similar
15 types of sentence reductions in cases where the director
16 of the Bureau of Prisons makes a motion for sentence
17 reduction based either on extraordinary and compelling
18 reasons or because the defendant is over the age of 70
19 and has served more than 30 years in prison.

20 In all of these cases, the district court
21 exercises a discretionary power to reduce the sentence
22 in the exercise of leniency, not because of legal error
23 but for equitable reasons.

24 JUSTICE SOTOMAYOR: Well, that gets tied up,
25 doesn't it, to your argument that this is not a part of

1 the criminal prosecution, that this is a -- not a Sixth
2 Amendment proceeding, but -- not a Sixth Amendment
3 proceeding, so it doesn't require constitutional
4 protection?

5 MS. KRUGER: That's correct, Justice
6 Sotomayor. We think that what Congress has called for
7 in all of the sentence reduction provisions of section
8 3582(c) is a kind of discretionary mechanism for
9 reducing sentences that are already final and
10 nonappealable and can't be modified in any other respect.
11 It hasn't called for a de novo plenary resentencing so
12 to allow defendants in the position that Petitioner is
13 in to come into court and reopen every aspect of their
14 sentence, requiring reconsideration of guidelines
15 determinations made in this case more than a decade ago
16 or requiring application of intervening changes in the
17 law.

18 JUSTICE STEVENS: Am I correct in
19 understanding that 3582(c) was enacted prior to our
20 decision in Booker?

21 MS. KRUGER: Yes, it -- it was.

22 JUSTICE STEVENS: And is it clear that it
23 should be construed as though the system was mandatory
24 before the decision in Booker, rather than construed in
25 the light of the remedial decision in Booker?

1 MS. KRUGER: Well, I think there are two
2 questions that are raised here about how this statutory
3 scheme comports with Booker. One is the Sixth Amendment
4 question, whether this is a statutory provision that
5 calls for a resentencing, at which Booker and its
6 decision about the Sixth Amendment would apply.

7 And then the second question is even if you
8 think there is no constitutional problem with reading
9 the statute in accordance with its plain terms, whether
10 Booker's remedial analysis requires treating the
11 reference to the policy statements in section 3582(c)(2)
12 as purely advisory.

13 We think with respect to that question, not
14 even Petitioner is quite willing to embrace the full
15 consequences of that argument. It would mean severing
16 and excising the portion of 3582(c)(2) that requires
17 consistency with the applicable policy statements.

18 JUSTICE STEVENS: Right. Is that any more
19 a dramatic change than was made in the Booker remedial
20 opinion itself?

21 MS. KRUGER: I'm not sure whether or not
22 it's a more dramatic change in terms of the number of
23 cases that would be affected, but it's --

24 JUSTICE STEVENS: But the remedial opinion
25 basically rewrote the whole statute on -- except first

1 it didn't have to reach 3582(c), but it certainly
2 changed the -- the nature of the mandatory provisions
3 that were previously in the statute.

4 MS. KRUGER: That's true, and it did so in
5 order to solve the constitutional difficulties that were
6 created by a mandatory guidelines system with respect to
7 the imposition of sentence.

8 Without that same kind of Sixth Amendment
9 violation in the context of discretionary sentence
10 reduction proceedings, we think there is no basis in
11 Booker's analysis for severing and excising any portion
12 of 3582(c)(2), but I would note that the consequence of
13 severing and excising the requirement of consistency with
14 the applicable policy statements would be to free
15 district courts not only from the Sentencing
16 Commission's specifications about how much to reduce
17 sentences, but also which of its amendments to the
18 guidelines would justify retroactive application,
19 because it is after all in a policy statement, section
20 1B1.10, that the Sentencing Commission has specified
21 which of its amendments, among many, justify sentence
22 reductions under 3582(c)(2). That would mean that every
23 time the Sentencing Commission revises its guidelines
24 and reduces applicable sentencing ranges, any number of
25 defendants would be free to come to the district courts

1 and ask them to make their own independent judgment
2 about whether or not they should be effectively
3 resentenced as a consequence. And that would certainly
4 provide a significant disincentive for the Sentencing
5 Commission ever to revise sentencing guidelines in a
6 downward direction.

7 JUSTICE GINSBURG: Have there been other
8 guidelines ranges that have been reduced, and, if so,
9 were those also retroactive?

10 MS. KRUGER: There have -- there have been
11 many guidelines ranges that have been reduced over the
12 course of the existence of the sentencing guidelines. I
13 believe that right now, the current number of -- of
14 guidelines amendments the Sentencing Commission has made
15 retroactive stands at 27.

16 This was the -- one of the first decisions
17 that the Sentencing Commission made about retroactivity
18 in the wake of Booker, and it did so with full
19 consciousness of the potential for broadly reopening
20 sentences. And it certainly weighed very heavily in the
21 Sentencing Commission's deliberations that the
22 traditional understanding, existing long before Booker
23 was ever decided, was that 3582(c)(2) proceedings do not
24 constitute plenary resentencings that incorporate all
25 intervening changes to the law.

1 JUSTICE BREYER: Can -- can I ask you a
2 different question on the secondary argument that they
3 make? When I read the secondary argument, that there
4 was an error in the calculation of the guidelines and
5 she would like to have that error corrected, I didn't
6 see anything in the policy statement that would prevent
7 her from getting that correction.

8 JUSTICE GINSBURG: I think you told me -- I
9 asked you that question, and you told me it could not be
10 corrected, because everything was final.

11 MS. KRUGER: That's correct --

12 JUSTICE BREYER: But why?

13 MS. KRUGER: -- and the policy statement
14 actually also --

15 JUSTICE BREYER: What in the policy
16 statement? Because what it says is: What you're
17 supposed to do is: Judge, you go and look at the
18 guidelines that were applied. Now, substitute the
19 new one reducing the sentence for the old one, and
20 then go apply it.

21 And, therefore, that seems to me not to
22 block a claim that would say, when you apply these
23 guidelines with the new one substituted for the old one,
24 apply them; that is, if, in fact, there was an error
25 the first time.

1 Now, she may have a hard time showing that,
2 but if she can show it, what in the words that are right
3 there in (b)(1) stops her from getting that correction?

4 MS. KRUGER: It's on page -- if you look at
5 page 8a of the appendix --

6 JUSTICE BREYER: I have it.

7 MS. KRUGER: -- in the government's brief --

8 JUSTICE BREYER: I have it in front of me.

9 MS. KRUGER: In the final sentence, it says,
10 "In making such determination, the court shall
11 substitute only the amendments listed in subsection (c)" --

12 JUSTICE BREYER: That's right.

13 MS. KRUGER: -- "for the corresponding provisions
14 that were applied" ---

15 JUSTICE BREYER: That's right.

16 MS. KRUGER: -- "and shall leave all other
17 guideline application decisions unaffected."

18 JUSTICE BREYER: Well, all other guideline
19 application decisions, and the claim is that they just
20 made an error, like a clerical error, a clear error,
21 manifest injustice, in that first math. Do you think
22 that this would leave them unaffected?

23 MS. KRUGER: I do.

24 JUSTICE BREYER: Yes. I see.

25 MS. KRUGER: I think that that is the plain

1 meaning of the Sentencing Commission's directive there.

2 I would say that the question --

3 JUSTICE SCALIA: I guess they also made a
4 mistake in not applying Booker, right?

5 (Laughter.)

6 MS. KRUGER: Well, the premise of that
7 question, I think, assumes two things. It assumes that
8 3582(c)(2) proceedings are plenary sentencings at which
9 Booker applies, which the Sentencing Commission, based
10 on a very long history of rejections and precisely
11 that parameter.

12 JUSTICE BREYER: No, no. I would have thought
13 the objection to that is: No, they didn't make a mistake
14 in applying Booker, because this Court has said that Booker
15 isn't retroactive.

16 MS. KRUGER: Well --

17 JUSTICE BREYER: And, of course, they did make
18 a mistake if it is retroactive. And then the Court should
19 have said it is retroactive, in which case there would
20 be no problem.

21 MS. KRUGER: Well, if Booker were
22 retroactive, I think that our position would still be
23 that this is not the proper vehicle for applying it,
24 that the proper vehicle would be to file a motion for --
25 to vacate or set aside the sentence under section 2255.

1 Congress didn't intend these sentence
2 reduction proceedings to serve essentially the same
3 purpose. It -- it intended them to serve simply the
4 purpose of reducing otherwise final, nonappealable
5 sentences. I would say --

6 JUSTICE BREYER: I know my word was: It
7 shall leave all other guideline application decisions.
8 Well, that's -- that's -- their claim is not that the
9 guideline -- it's that they -- they chose the wrong
10 guideline or they didn't apply the right words. You
11 see, so they weren't applying that -- they just applied
12 the wrong thing. Now you say I'm working too hard.
13 Okay.

14 MS. KRUGER: I think you may be working a
15 little hard, Justice Breyer.

16 (Laughter.)

17 MS. KRUGER: I would say that, on that
18 point, we also fundamentally disagree with Petitioner's
19 submission that there was any error in the calculation
20 of his criminal history score in 1993.

21 But to the extent that Petitioner wanted to
22 raise any challenges to that determination, we think the
23 appropriate time and place to do that would have been on
24 direct appeal of that sentencing decision, rather than
25 waiting a decade and attempting to use the 3582(c)(2)

1 proceedings as a kind of vehicle for collaterally
2 reopening that aspect of his sentence.

3 JUSTICE KENNEDY: When the judge considers
4 the adjustment motion under the -- under the section,
5 does he consider how the prisoner has behaved in prison;
6 i.e., if he has behaved very badly, he doesn't give
7 the -- the reduction?

8 MS. KRUGER: The district court can consider
9 any disciplinary proceedings that have occurred in the
10 course of the defendant's imprisonment, yes.

11 JUSTICE KENNEDY: But he -- but he can't go
12 below.

13 The -- the Petitioner makes the argument
14 metaphysically that there's just a new sentence. In
15 your view, is that refuted by the language of (c)(2)
16 because they talk about in the case of a defendant who
17 has been sentenced to a term of imprisonment, and then
18 they say the term can be reduced, and it doesn't use the
19 words "a new sentence shall be imposed"? I assume that's
20 your argument.

21 MS. KRUGER: I mean, I think that that
22 certainly reinforces the conclusion that I think also
23 arises from other aspects of the provision, that what
24 Congress had in mind wasn't the imposition of a
25 brandnew sentence, but simply a discretionary reduction

1 of the old one. I think that's right, Justice Kennedy.

2 CHIEF JUSTICE ROBERTS: I'm troubled by
3 your response to Justice Kennedy's previous question,
4 that the judge can take into account conduct in prison
5 and all these other things. It does seem to open it up
6 to other factors than the crack cocaine disparity, and
7 once you're looking at other factors, why not look at
8 everything?

9 MS. KRUGER: Well, I think the answer to
10 that question is resolved by looking at the plain text
11 of 3582(c)(2), Mr. Chief Justice, which directs that
12 district courts have a discretion to reduce sentences in
13 a manner that's consistent with applicable policy
14 statements, but after considering these statutory
15 sentencing factors under section 3553(a), which
16 include, of course, the need to protect the public from
17 future crimes committed by the defendant, as well as the
18 history and characteristics of the prisoner.

19 The reference to 3553(a) guides district
20 courts' discretion in deciding whether or not to grant a
21 reduction that's authorized by the Sentencing Commission
22 in the course of its statutory duty under 994(u) to
23 specify whether and to what extent its amendments
24 justify retroactive application.

25 JUSTICE KENNEDY: So, it's a one-way ratchet?

1 MS. KRUGER: Effectively. I mean, it works
2 in both directions. It can justify granting a
3 reduction; in the case of Petitioner, the district court
4 thought that the 3553(a) factors clearly pointed in
5 favor of granting the reduction. But it also -- those
6 factors can work in the direction of denying an
7 otherwise available reduction.

8 JUSTICE KENNEDY: The Petitioner's brief
9 opens with a statement about his rehabilitation. We
10 don't know if that has been contested. You don't
11 respond to it. But let's assume that's all true. He
12 established schools, and he helped young people and so
13 forth.

14 Does the Justice Department ever make
15 recommendations that prisoners like this have their
16 sentence commuted?

17 MS. KRUGER: I am not aware of the answer to
18 that, Justice Kennedy. It is certainly true that
19 evidence of that type of rehabilitation factored into
20 the government's recommendation in this case that
21 Petitioner --

22 JUSTICE KENNEDY: And isn't the population
23 of prisoners in the Federal prisons about 185,000 now?

24 MS. KRUGER: I think --

25 JUSTICE KENNEDY: I think it is. And were

1 there -- how many commutations last year? None. How many
2 commutations the year before? Five.

3 Does this show that something is not working
4 in the system? 185,000 prisoners? I think that's the
5 number.

6 MS. KRUGER: I -- I'm not prepared to speak
7 to that question today, Justice Kennedy. I can tell you
8 that the government very much takes those considerations
9 into account when making recommendations about available
10 sentence reductions under section 3582(c)(2).

11 And, indeed, in this case, the government
12 agreed that the Petitioner should receive the full
13 measure of the benefit that the Sentencing Commission
14 had made available when it decided to make the crack
15 cocaine amendments retroactive, based in large part on
16 Petitioner's conduct in prison and his other
17 characteristics.

18 JUSTICE STEVENS: May I ask this question?
19 Accepting the point that there's no constitutional
20 compulsion that they had to open up for a full new
21 sentencing, and I understand one reason for not doing it
22 is that you don't impose too much work on the district
23 courts for doing it, but could you explain to me why
24 as -- just as a matter of policy and good judgment, the
25 Commission would say, well, you can take a look at all

1 the negative factors that would argue against reduction,
2 but you cannot look at any of the factors that would show
3 why you should have had the same sentence that if -- why
4 you should get the kind of sentence you would have
5 gotten if you had been sentenced in the first place
6 today?

7 Because I guess this particular man is
8 going to be -- spend 22 more years in jail than if he
9 -- if he had been sentenced today.

10 MS. KRUGER: The reason why the Commission
11 doesn't do that is because it wouldn't comply with its
12 statutory mandate under 28 U.S.C. 994(u) to specify both
13 which guidelines amendments justify retroactive
14 application and the amount by which sentences may be
15 reduced.

16 The Sentencing Commission would have no
17 power to simply say in its policy statement: District
18 courts, you are free to reduce sentences by however
19 much amount you believe is appropriate.

20 JUSTICE STEVENS: You think the statute
21 would have prohibited a more generous policy statement,
22 then?

23 MS. KRUGER: I do think the statute would
24 have prohibited such a policy statement. Yes, that's
25 correct, Justice Stevens.

1 JUSTICE SCALIA: But I -- I still don't
2 understand how you fit into that your answer to the
3 Chief Justice earlier that, in fact, the court can
4 consider other factors in -- in 3553 when it's making
5 the reduction.

6 MS. KRUGER: Justice Scalia, I think the
7 answer is simply that the 3553(a) factors and their
8 consideration under 3582(c)(2) is designed for a
9 different purpose than for the consideration that goes
10 into the initial imposition of the sentence.

11 The point of considering the 3553(a)
12 factors, to the extent they are applicable, to use the
13 words of 3582(c)(2) --

14 JUSTICE SCALIA: Yes.

15 MS. KRUGER: -- is just to determine whether
16 or not the district court will grant a reduction that is
17 authorized, to the extent it is authorized, by applicable
18 policy statements. It's not to determine whether the
19 resulting sentence, as an original matter, is greater
20 than necessary to comport with the statutory sentencing
21 factors. It's simply for the limited purpose of
22 deciding whether to exercise discretion to reduce the
23 sentence in a manner that's authorized by the statute.

24 JUSTICE SCALIA: I see. But -- but I
25 thought you said you could take into account good

1 behavior in that determination? But that isn't --
2 that isn't a factor that would cause you to disallow
3 the reduction. It's a factor that --

4 MS. KRUGER: It's a factor that would cause
5 you to permit the reduction, presumably. It's one of
6 the many considerations that a district court can take
7 into account in deciding that it will, in fact, exercise
8 its discretion to reduce the sentence to the extent that
9 that's permitted by Congress and applicable policy
10 statements.

11 CHIEF JUSTICE ROBERTS: But it -- it's also
12 a factor that would -- might guide the district court to
13 a decision not to reduce the sentence.

14 MS. KRUGER: That's correct. It can point
15 in either direction in any given case.

16 But the critical point is that Congress has
17 set the parameters for the district court's exercise of
18 discretion in these proceedings. Whatever the district
19 court chooses to do has to be consistent with applicable
20 policy statements, including the Commission's policy
21 statement in which it's implemented its statutory
22 authority to specify whether and to what extent its
23 guidelines amendments will justify retroactive
24 application.

25 If the Court has no further questions, we

1 would ask that the judgment of the court of appeals be
2 affirmed.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 Ms. Kruger.

5 Ms. Freeland, have you 3 minutes remaining.

6 MS. FREELAND: I'm sorry, Mr. Chief Justice
7 -- how many minutes?

8 CHIEF JUSTICE ROBERTS: Three.

9 REBUTTAL ARGUMENT OF LISA B. FREELAND

10 ON BEHALF OF THE PETITIONER

11 MS. FREELAND: Three minutes, thank you.

12 A couple of points. I wanted to answer
13 Justice Kennedy's question. The court is not only
14 permitted to consider bad behavior in prison; under
15 1B1.10, the court is required. The word is "shall."
16 And, so, all of these things and many of your questions
17 point to the fact that this is an adversarial
18 proceeding.

19 Section 3582(c) describes a sentencing. It
20 requires the court to consider all of the 3553(a)
21 factors. It requires the court to be consistent with
22 policy statements. It requires the court to impose a new
23 sentence.

24 And the word "modification" that's used in
25 3582(c) connotes correction, not leniency, not grace.

1 Those are the functions of the executive branch, not of the
2 judicial branch. And, in this context, the court decided,
3 after the Commission reduced the sentencing -- the
4 sentencing guidelines for crack offenders, that a
5 correction was warranted. There was an error in the
6 prior sentence that 3582(c) permitted the district court
7 to correct, and when it imposed a new sentence, that new
8 sentence has to comport with current law.

9 JUSTICE GINSBURG: Can I get you to go back
10 to -- you said something that only the executive can grant
11 clemency or ought. What -- what about a program where a
12 district judge says I'm going to have this person undergo a
13 course -- a drug addiction course, and if the defendant
14 successfully passes the course, then I'll give a
15 lighter sentence? That -- that --

16 MS. FREELAND: Justice Ginsburg -- I'm
17 sorry.

18 JUSTICE GINSBURG: Did your answer exclude
19 that -- that possibility?

20 MS. FREELAND: Justice Ginsburg, your
21 hypothetical -- the court is imposing a sentence or
22 conditions of a sentence, and once those conditions have
23 been met, the defendant is relieved, just as when the
24 conditions of a sentence of imprisonment have been met,
25 the defendant is released from prison.

1 One point that I'd like to get back to,
2 because there were many questions about it, is this
3 consistent with policy statements? Policy statements by
4 definition do not bind. The Sentencing Commission in
5 this case changed the 1B1.10 to say that the sentencing
6 court could not, shall not, impose a sentence below the
7 guideline range. 1B1.10 for all of the 26 retroactive
8 amendments that preceded the crack amendment read
9 district courts should sentence within the amended
10 guideline range, and that's appropriately a policy
11 statement. 1B1.10(b)(2)(A) is not a policy statement.
12 It purports to be a binding rule. And as this Court
13 knows, policy statements do not bind.

14 JUSTICE BREYER: Yes, but they do if
15 Congress says they do.

16 MS. FREELAND: When Congress says consistent
17 with policy statements -- and, Your Honor, I would
18 direct you -- I see my red light is on, if I could
19 finish --

20 CHIEF JUSTICE ROBERTS: You can answer
21 Justice Breyer's question.

22 MS. FREELAND: I would direct you to the
23 amicus brief on behalf of the defenders, at pages 23 and
24 24, and our reply brief, at pages 25 and 26, for an
25 excellent --

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 MS. FREELAND: Thank you very much.

3 CHIEF JUSTICE ROBERTS: The case is

4 submitted.

5 (Whereupon, at 11:00 a.m., the case in the

6 above-entitled matter was submitted.)

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