# SUPREME COURT OF THE UNITED STATES

No. 92–1662

UNITED STATES, PETITIONER *v.* RALPH STUART GRANDERSON, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[March 22, 1994]

JUSTICE SCALIA, concurring in the judgment.

My view of this case is close to, but not precisely, that of JUSTICE KENNEDY. I agree with him, for the reasons he well expresses, that the only linguistically tenable interpretation of 18 U. S. C. §3565(a) establishes as a *floor* a sentence one-third of the sentence originally imposed, but leaves the district court free to impose any *greater* sentence available for the offense under the United States Code and the Sentencing Guidelines. Wherein I differ is that I do not believe (as he does) that only the probation element of the original sentence is to be considered—*i.e.*, as he puts it, "that the term `original sentence' refers to the sentence *of probation* a defendant received at the initial sentencing." *Post*, at 2 (emphasis added). (THE CHIEF JUSTICE also espouses this view, see *post*, at 3.) It seems to me that the term must refer to the *entire* original sentence; where that includes a fine in addition to the probation, the fine also is included. Thus, one-third of a sentence consisting of three years' probation and a $3,000 fine would be not merely one year's probation but a $1,000 fine as well. Even the majority, to maintain some measure of consistency in its strained interpretation of "original sentence," ought to consider, in addition to "the applicable Guidelines sentence of imprisonment," *ante*, at 15, the equally applicable range of fines set forth in the Guidelines, see United States Sentencing Commission, Guidelines

Manual §5E1.2(c)(3) (Nov. 1993).[1]

---

[1]The Court's reply to this is that since "[t]he term of probation . . . was imposed in lieu of a sentence of imprisonment, not in lieu of a fine," its revocation "implies replacing the sentence of probation with a sentence of imprisonment." *Ante*, at 15, n. 12. I do not know why an implication would inhere in the proviso which contradicts the body of §3565(a)(2) to which the proviso is attached. The latter provides that the court may "revoke the sentence of probation and impose *any other sentence that was available* . . . at the time of the initial sentencing" (emphasis added). Presumably the Court would concede that "any other sentence" includes a fine —in which case its discernment of some implication that revoked probation may be replaced by only prison time must be wrong.

JUSTICE KENNEDY makes a similar defense. He refuses to consider the fine component because "[t]he proviso instructs the district court to `revoke the sentence of probation,' but says nothing about the fine imposed at the original sentencing," *post*, at 2. There is, however, clearly no requirement that only what has been revoked can be the baseline for measuring the requisite minimum—for even the *un*revoked (because already served) portion of the probation period counts. JUSTICE KENNEDY's argument reduces, therefore, to the contention that for some unexplained reason the requisite minimum replacement for the revoked "probation component" of the original sentence can be measured only by that same component. This imperative is not to be found in the language of the statute; to the contrary, interchangeability of fines and probation is suggested by the body of §3565(a)(2) quoted above. Here, it seems to me, JUSTICE KENNEDY simply

Both under my analysis, and under JUSTICE KENNEDY's, there exists a problem of comparing the incomparable that ought to be acknowledged. Since Granderson's original sentence was 60 months' probation *plus a $2,000 fine*, I must, in order to concur in today's judgment, conclude, as I do, that the five extra months of prison (beyond the Guidelines' 6-month maximum imposable for the original offense) which Granderson has served are worth at least $667 (one-third the original fine) and that 11 months in prison are the equivalent of 20 months' probation plus a $667 fine—because otherwise I would have to consider imposing some or all of the $5,000 maximum fine imposable for the original offense, see USSG §5E1.2(c)(3), or indeed consider departing upward from the applicable Guidelines range, see 18 U. S. C. §3553(b), towards the 5–year imprisonment that is the statutory maximum for the offense, see 18 U. S. C. §1703(a). And JUSTICE KENNEDY, even if he takes only the probation into account for purposes of determining the "original sentence," must *still* conclude, it seems to me, that 11 months in prison is at least the equivalent of 20 months' probation—because otherwise he would have to consider imposing some or all of the available $5,000 fine or departing upward from the Guidelines.

It is no easy task to determine how many days' imprisonment equals how many dollars' fine equals how many months' probation. Comparing the incommensurate is always a tricky business. See, *e.g.*, *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U. S. 888, 897 (1988) (SCALIA, J., concurring in judgment). I frankly doubt that those who drafted and adopted this language intended to impose that task upon us; but I can neither pronounce the results

---

abandons the text and adopts an intuited limitation remarkably similar to those for which he criticizes the Court and the dissent.

reached by a straightforward reading of the statute utterly absurd nor discern any other self-evident disposition for which they are an obviously mistaken replacement. Cf. *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 527 (1989) (SCALIA, J., concurring in judgment). It seems to me that the other interpretations proposed today suffer, in varying degrees, the double curse of producing *neither* textually faithful results *nor* plausibly intended ones. It is best, as usual, to apply the statute as written, and to let Congress make the needed repairs. That repairs are needed is perhaps the only thing about this wretchedly drafted statute that we can all agree upon.

For these reasons, I concur in the judgment of the Court.