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 KENNEDY, concurring in the judgment.

The Court's holding that the drug proviso in 18 U. S. C. §3565(a) calls for a mandatory minimum sentence of two months in prison rests upon two premises: first, that the term "original sentence" means the maximum Guidelines sentence that the district court could have, but did not, impose at the initial sentencing; and, second, that the verb "sentence" means only "sentence to imprisonment." Neither premise is correct. As close analysis of the text and structure of the statute demonstrates, the proviso requires a mandatory minimum sentence of a probation term one-third the length of the initial term of probation. I concur in the judgment only because Granderson, under my reading of the statute, was entitled to release from prison.

Section 3565(a) provides, in relevant part:

> "If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may . . .
>
> "(1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or
>
> "(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.
>
> "Notwithstanding any other provision of this

section, if a defendant is found by the court to be in possession of a controlled substance, thereby violating the condition imposed by section 3563(a)(3), the court shall revoke the sentence of probation and *sentence* the defendant to not less than one-third of the *original sentence*." (Emphasis supplied.)

The Court construes the term "original sentence" to refer to the maximum sentence of imprisonment available under the Guidelines at the initial sentencing. I accept, in substantial part, THE CHIEF JUSTICE's critique of the Court's strained interpretation, and agree with him that "original sentence" refers to the sentence of probation a defendant in fact received at the initial sentencing. It is true that the term ``original sentence,'' standing alone, could be read to encompass the entire original sentence, including any fine imposed. When considered in context, however, it is preferable to construe the term to refer only to the original sentence of probation. The proviso instructs the district court to ``revoke the sentence of probation,'' but says nothing about the fine imposed at the initial sentencing. Given this, the subsequent reference to ``one-third of the original sentence'' is better read to mean the probation component of the original sentence, and not the whole sentence.

I disagree with both the Court and THE CHIEF JUSTICE, however, in their conclusion that the verb "sentence" in the proviso means only "sentence to imprisonment." Given the statutory text and structure, the verb "sentence" can mean either "sentence to probation" or "sentence to imprisonment." It follows, in my view, that the drug proviso calls for a mandatory minimum sentence equal to a probation term one-third the length of the original term of probation.

Before 1984, fines and imprisonment were the only sentences in the federal system; probation, by contrast, was an alternative to sentencing. See 18 U. S. C. §3651 (1982). In the Sentencing Reform Act of 1984, Congress altered this understanding and

made probation a kind of sentence. See §3561(a) (defendant "may be sentenced to a term of probation"); United States Sentencing Commission, Guidelines Manual ch. 7, pt. A2(a), at 379 (Nov. 1993) ("[T]he Sentencing Reform Act recognized probation as a sentence in itself"). Probation no longer entails some deviation from a presumptive sentence of imprisonment, as the facts of this case illustrate. Granderson's conviction for destruction of mail, when considered in light of his criminal history category, placed him in Zone A of the Guidelines Sentencing Table, which carries a presumptive sentence of 0 to 6 months. The Sentencing Guidelines authorize a sentence of probation for defendants falling within Zone A, see USSG §5B1.1(a)(1), and set a maximum probation term of five years for the subset of Zone A defendants of which Granderson is a member, see §5B1.2(a)(1). For defendants like Granderson, then, probation is a sentence available at the initial sentencing, no less so than a sentence of imprisonment. See 18 U. S. C. §3553(a)(4) (the court, in determining sentence, "shall consider . . . the *kinds of sentence* and the sentencing range established for the applicable category of offense . . . as set forth in the guidelines") (emphasis supplied). Because the term "to sentence," if left unadorned, can bear any one of three meanings, Congress took care, as a general matter, to specify the type of punishment called for when it used "sentence" as a verb in Chapter 227 of Title 18, the sentencing provisions of the criminal code. See, *e.g.*, §3561(a) ("sentenced to a term of probation"), §3572(e) ("sentenced to pay a fine"), §3583(a) ("impos[e] a sentence to a term of imprisonment").

Congress was less careful when drafting the provision now before us, which does not specify whether the district court should impose a fine, imprisonment, or another term of probation when revoking the original term of probation on account of drug possession. The Government brushes aside this significant ambiguity, contending that "the language of the statute, in context," demonstrates that Congress "plainly intended" to require imprisonment. Brief for Respondent 14, 15. The Government is correct to say that we must examine the context of the proviso to ascertain its meaning. See *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989). Close attention to that context, however, leads me to conclude that Congress did not intend to require imprisonment upon revocation of the original term of probation.

Congress enacted the drug proviso as §7303(a)(2) of the Anti-Drug Abuse Act of 1988 (1988 Act). Pub. L. 100–690, 102 Stat. 4181, 4464. Section §7303(b)(2) of the 1988 Act, which concerns defendants serving a term of supervised release, provides that "[i]f the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant *to serve in prison* not less than one-third of the term of supervised release." 102 Stat. 4464, codified at 18 U. S. C. §3583(g) (emphasis supplied).

Sections 7303(a)(2) and (b)(2) are, as the Government puts it, "parallel and closely related." Brief for United States 26. Both pertain to the consequences of drug possession for defendants under some form of non-custodial supervision. They differ, of course, in one fundamental respect: Section 7303(b)(2) explicitly provides for a revocation sentence of imprisonment, while §7303(a)(2) does not. The difference is significant. "`[W]here Congress includes particular language in one section

of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Gozlon-Peretz* v. *United States*, 498 U. S. 395, 404 (1991), quoting *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (internal quotations omitted). The presumption loses some of its force when the sections in question are dissimilar and scattered at distant points of a lengthy and complex enactment. But in this case, given the parallel structure of §§7303(a)(2) and (b)(2) and the fact that Congress enacted both provisions in the same section of the same Act, the presumption is strong. The disparate use of the term "to serve in prison" is compelling evidence that Congress intended to mandate incarceration as a revocation punishment in §7303(b)(2), but not in §7303(a)(2) (the §3565(a) drug proviso).

The Government interposes a structural argument of its own. Before enactment of the drug proviso in the 1988 Act, §3565(a) consisted only of subsections (a)(1) and (a)(2), which, for all relevant purposes, took the same form as they do now. Those provisions grant courts two options for defendants who violate probation conditions that do not involve drugs or guns. Section 3565(a)(1) permits a court to continue the defendant on probation, with or without extending the term or modifying or enlarging the conditions. As an alternative, §3565(a)(2) permits a court to "revoke the sentence of probation and impose any other sentence that was available . . . at the time of the initial sentencing." According to the Government, the two provisions make clear that the consequence of revocation under §3565(a)(2) is that, in light of §3565(a)(1), the court must impose a sentence other than probation, namely imprisonment. The meaning borne by the phrase "revoke the sentence of probation" in §3565(a)(2), the Government concludes, must carry over when the

same phrase appears in the drug proviso.

This argument, which the Court accepts, see *ante*, at 5, is not convincing. The conclusion that §3565(a)(2) demands imprisonment upon revocation of the original sentence of probation does not rest upon anything inherent in the phrase "revoke the sentence of probation." Rather, it follows from the structure of §§3565(a)(1) and (a)(2). Congress set off subsection (a)(2) as an alternative to subsection (a)(1), which provides for every conceivable probation option. Thus, in order to make sense of the statutory scheme, §3565(a)(2) should be read to require a punishment of something other than probation: imprisonment. That consequence, however, is due to the juxtaposition of subsection (a)(2) with subsection (a)(1), not to Congress' use of the phrase "revoke the sentence of probation" in §3565(a)(2). Taken by itself, that phrase requires termination of the original sentence of probation, but does not indicate the kind of sentence that must be imposed in its place. The meaning assumed by the phrase "revoke the sentence of probation" in the particular context of §3565(a)(2), then, does not travel when the same phrase appears in a different context.

The Government's argument that "revoke the sentence of probation," standing alone, must import a sentence of imprisonment also fails to account for how similar language is used in §7303(b)(2) of the 1988 Act. That provision, as noted above, states that "the court shall terminate the term of supervised release and require the defendant to *serve in prison* not less than one-third of the term of supervised release" if a defendant is found in possession of drugs. 18 U. S. C. §3583(g) (emphasis supplied). The statutory text suggests that a subsequent sentence of imprisonment is not implicit in the phrase "the court shall terminate the term of supervised release"; had it been, Congress would not have felt it necessary to mandate imprisonment in an explicit

manner. So there is little reason to think that Congress believed imprisonment to be implicit in the parallel phrase "the court shall revoke the sentence of probation" in the §3565(a) drug proviso, §7303(a)(2) of the 1988 Act.

The Government's view suffers from a final infirmity. The term "original sentence" refers to the sentence of probation imposed at the initial sentencing. So if the proviso imposed a minimum punishment of incarceration, the length of incarceration must be tied to the length of the revoked sentence of probation. That would be an odd result. "[I]mprisonment is an `intrinsically different' form of punishment" than probation. *Blanton* v. *North Las Vegas*, 489 U. S. 538, 542 (1989), quoting *Muniz* v. *Hoffman*, 422 U. S. 454, 477 (1975). Without belaboring the point, probation is a form of "conditional liberty," *Black* v. *Romano*, 471 U. S. 606, 611 (1985), while imprisonment is nothing of the sort. Transforming a sentence of probation into a prison term via some mathematical formula would, in the words of one court to have considered this issue, constitute a form of "legal alchemy." *United States* v. *Gordon*, 961 F. 2d 426, 433 (CA3 1992). In all events, it is not what one would expect in the ordinary course.

THE CHIEF JUSTICE is correct, of course, to say that it would not be irrational for Congress to tie a mandatory minimum sentence of imprisonment to the length of the original probation term. *Post*, at 7. He is also correct to observe that Congress would have been within its powers to write such a result into law, and that Congress indeed provided for a similar result in §7303(b)(2) of the 1988 Act, 18 U. S. C. §3583(g). *Post*, at 8. But these observations do not speak to the only relevant question: whether Congress did so in the text of the §3565(a) drug proviso, viewed in light of the statutory structure. For all of the above reasons, in my view it did not.

In sum, the drug proviso does not mandate incarceration, but rather must be read to permit a revocation sentence of probation. Concluding that the mandatory minimum sentence is a term of imprisonment would be inconsistent with this reading, and would also lead to the anomaly of tying the length of the mandated prison term to the original term of probation. It follows that the mandatory minimum sentence required by the drug proviso is a probation term equal to one-third the length of the original term of probation. Given that Congress did not eliminate the possibility of incarceration (for example, by drafting the proviso to require a "sentence of probation"), the proviso gives the district court the discretion to impose any prison term otherwise available under the other portions of §3565(a), which is more severe than the mandatory minimum sentence of probation.

It is unfortunate that Congress has drafted a criminal statute that is far from transparent; more unfortunate that the Court has interpreted it to require imprisonment when the text and structure call for a different result; but most unfortunate that the Court has chosen such a questionable path to reach its destination. I speak of the Court's speculation that Congress drafted the §3565(a) drug proviso with the pre-1984 federal sentencing regime in mind. See *ante*, at 13–14. Reading the proviso to require Granderson to serve a 2-month mandatory minimum sentence of imprisonment, the Court reasons, "would fit the [pre-1984] scheme precisely." *Id.*, at 14. And viewing the proviso in that light, the Court adds, would avoid problems with both Granderson's and the Government's interpretations. See *ibid*. Although the Court purports not to place much reliance upon this venture in interpretive archaeology, its extended discussion of the matter suggests otherwise.

This interpretive technique, were it to take hold, would be quite a novel addition to the traditional rules that govern our interpretation of criminal statutes. Some members of the Court believe that courts may look to "the language and structure, legislative history, and motivating policies" when reading a criminal statute in a manner adverse to a criminal defendant. See *United States* v. *R. L. C.,* 503 U. S. ___, ___ (1992) (plurality opinion) (slip op., at 13) (internal quotation marks omitted). Others would eschew reliance upon legislative history and nebulous motivating policies when construing criminal statutes. See *id.,* at ___–___ (SCALIA, J., concurring) (slip op., at 2–3). But, to my knowledge, none of us has ever relied upon some vague intuition of what Congress "might . . . have had in mind" (*ante,* at 13) when drafting a criminal law. And I am certain that we have not read a criminal statute against a criminal defendant by attributing to Congress a mindset that reflects a statutory framework that Congress itself had discarded over four years earlier.

Of course, the Court thinks it has done Granderson and probationers like him a great favor with its guess-work: Assuming that the drug proviso mandates incarceration, the Court's intuitions lead it to conclude that the mandatory minimum sentence of imprisonment here is 2, rather than 20, months. But in its rush to achieve what it views as justice in this case, the Court has missed a broader point: The statute, by word and design, does not mandate a punishment of imprisonment on revocation. In my respectful submission, had the Court adhered to the text and structure of the statute Congress enacted and the President signed, rather than given effect to its own intuitions of what might have been on Congress' mind at the time, it would have come to a different conclusion. See *Deal* v. *United States,* 508 U. S. ___, ___ (1993) (slip op., at 7–8). And the fortuity that Granderson himself does not contend that the

proviso permits a revocation sentence of probation, see *ante*, at 15, n. 12, is no reason to overlook that option here, given that our interpretation of the statute binds all probationers, not just Granderson. Cf. *Elder* v. *Holloway*, ___ U. S. ___, ___, and n. 3 (1994) (slip op. at 4–6, and n. 3).

Perhaps the result the Court reaches today may be sensible as a matter of policy, and may even reflect what some in Congress hoped to accomplish. That result, however, does not accord with the text of the statute Congress saw fit to enact. Put in simple terms, if indeed Congress intended to require the mandatory minimum sentence of imprisonment the Court surmises, Congress fired a blank. See *Puerto Rico Dept. of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U. S. 495, 501 (1988) ("[U]nenacted approvals, beliefs, and desires are not laws"). It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think, perhaps along with some members of Congress, is the preferred result. See *Smith* v. *United States,* 508 U. S. ___, ___, n. 4 (1993) (slip op., at 7, n. 4) (SCALIA, J., dissenting) ("Stretching language in order to write a more effective statute than Congress devised is not an exercise we should indulge in"); *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U. S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it"); *United States* v. *Locke*, 471 U. S. 84, 95 (1985) ("[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do"). This admonition takes on a particular importance when the Court construes criminal laws. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity," *United States* v. *Bass*, 404 U. S.

336, 348 (1971), and set the punishments therefor, see *Bifulco* v. *United States*, 447 U. S. 381 (1980).

Under any of the three interpretations set forth in the opinions filed today, there are bound to be cases where the mandatory sentence will make little sense or appear anomalous when compared with sentences imposed in similar cases. Some incongruities, however, are inherent in any statute providing for mandatory minimum sentences.

In my view, it is not necessary to invoke the rule of lenity here, for the text and structure of the statute yield but one proper answer. But assuming, as the Court does, that the rule comes into play, I would have thought that it demands the interpretation set forth above. For these reasons, I concur only in the judgment.