

SCALIA, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 06–7949

**BRIAN MICHAEL GALL, PETITIONER *v.*
UNITED STATES**

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

[December 10, 2007]

JUSTICE SCALIA, concurring.

I join the opinion of the Court.

In *Rita v. United States*, 551 U. S. ____, ____ (2007), I wrote separately to state my view that any appellate review of sentences for substantive reasonableness will necessarily result in a sentencing scheme constitutionally indistinguishable from the mandatory Guidelines struck down in *United States v. Booker*, 543 U. S. 220 (2005). Whether a sentencing scheme uses mandatory Guidelines, a “proportionality test” for Guidelines variances, or a deferential abuse-of-discretion standard, there will be some sentences upheld only on the basis of additional judge-found facts.

Although I continue to believe that substantive-reasonableness review is inherently flawed, I give *stare decisis* effect to the statutory holding of *Rita*. The highly deferential standard adopted by the Court today will result in far fewer unconstitutional sentences than the proportionality standard employed by the Eighth Circuit. Moreover, as I noted in *Rita*, the Court has not foreclosed as-applied constitutional challenges to sentences. The door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.