No. 06-6330

IN THE

Supreme Court of the United States

DERRICK KIMBROUGH,

Petitioner,

—v.—

UNITED STATES,

Respondent.

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

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil-rights laws. Since its founding in 1920, fair and sound criminal sentencing has been a central concern of the ACLU, which has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*. Of particular concern here, the ACLU has joined the U.S. Sentencing Commission in criticizing the 100:1 disparity in federal sentencing for crack-cocaine and powder-cocaine offenses. The ACLU respectfully submits this *amicus* brief because that disparity and the sentencing issues it raises are central to the proper resolution of this case.

STATEMENT OF THE CASE

A federal grand jury in the Eastern District of Virginia charged Petitioner Derrick Kimbrough with, *inter alia*, conspiring to possess with intent to distribute both powder cocaine and crack, as well as with possession with intent to distribute both of those substances. JA 8-12. Petitioner pled guilty to the charges without signing a plea agreement. JA 29-37, 76. Based on Petitioner's possession of 92.1 grams of powder cocaine and 56 grams of crack cocaine, as well as his relatively minor criminal history, the

[1] Petitioner has submitted a blanket consent to the filing of *amicus* briefs. Respondent's consent to the filing of this *amicus* brief has been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus* state that no counsel for a party authored this brief in whole or in part and no person other than *amicus*, its members or counsel, made any monetary contribution to the preparation or submission of this brief.

Sentencing Guidelines ("Guidelines") for the cocaine offenses recommended a range of 168 to 210 months of imprisonment. JA 68.

Petitioner objected to the Guidelines calculation, primarily due to the severity of the sentence recommended by the Guidelines. JA 69-71. While he agreed that a mandatory-minimum sentence of 120 months would apply to his crack offenses pursuant to 21 U.S.C. § 841, Petitioner argued that any sentence that exceeded the mandatory minimum would not reflect the "seriousness of the offense," "promote respect for the law," "provide adequate proportionality," and "avoid unwarranted sentencing disparit[ies]." JA 70 (referencing the factors provided in 18 U.S.C. § 3553(a)(2)). Petitioner noted at the sentencing hearing:

> Even the U.S. Sentencing Commission admitted in its 2002 report to Congress that the current drug penalties exaggerate the relative harmfulness of crack cocaine, that they sweep too broadly and apply most often to lower-level offenders, they overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality, and the current penalty's severity mostly impacts minorities, which, of course, for the record Mr. Kimbrough is one.

JA 70.

The sentencing court agreed that the sentence recommended by the Guidelines, which was longer than the mandatory-minimum sentence, was excessive and unsound. JA 74-75. The court first recounted the goals of sentencing and then found that the crack Guideline both generally and as it related to

the Petitioner did not effectuate these goals. JA 72. It recognized that the Guideline for crack offenses "dr[ove] the offense level to a point higher than is necessary to do justice in this case." *Id.*; *see also* JA 74 (noting further that "when the Court goes back and calculates the offense in this case using powder cocaine, because we are dealing with cocaine at the end of the day in this case, the level, the guideline range comes down so significantly that it's unbelievable"). The court also acknowledged that "the Sentencing Commission [has] recognize[d] that crack cocaine has not caused the damage that the Justice Department alleges it has . . . ." JA 72. Accordingly, the sentencing court found that "should it follow the advisory guidelines, the penalty imposed would be clearly inappropriate and greater than necessary to accomplish what the statute says you should in fact accomplish . . . ." JA 74; *see also* JA 72 ("[T]o impose a sentence of 19 to 22 years in this case is ridiculous."). Accordingly, and abiding by the applicable mandatory-minimum sentence, the court imposed a sentence of ten years imprisonment for the drug offenses. JA 75.

The Government appealed the sentence to the United States Court of Appeals for the Fourth Circuit. JA 94-95. Prior to hearing Petitioner's case, the Fourth Circuit issued its opinion in *United States v. Eura*, 440 F.3d 625, 632-34 (4th Cir. 2006), which held that a district court commits reversible error when it imposes a sentence below the suggested Guideline range in a crack case due to disagreement with the crack Guideline or agreement with the Sentencing Commission's statements regarding that Guideline. In light of *Eura*, the Court of Appeals vacated Petitioner's sentence "[b]ecause the district court concluded that the crack to powder cocaine

disparity warranted a sentence below the applicable sentencing guideline range . . . ." JA 98.

SUMMARY OF ARGUMENT

This brief addresses three interconnected issues: (1) a sentencing judge's proper role in evaluating the soundness of the Sentencing Guideline for a category of offenses (in this case, crack sentences); (2) the criteria a sentencing judge should consider in making such an evaluation; and (3) the bases for rendering an appropriate sentence when the sentencing judge concludes that a particular Guideline sentence is unsound. Leaving to the parties and other *amici* the task of explicating the broader aspects of sentencing in this matter, this brief focuses on the ability of—and basis for—a sentencing court to reject the now-advisory guidance of the Sentencing Commission in imposing a sentence for crack offenses.

Because the advisory Sentencing Guideline for crack reflects an unsound judgment based on disproved assumptions, the district court here properly exercised discretion in imposing a sentence below the Guideline calculation. Federal courts and the Sentencing Commission have recognized that the Sentencing Guideline either generally recommends a sentence greater than necessary for crack offenders or, at the very least, recommends a sentence greater than necessary for many such offenders. When a sentencing court comes to this recognition, it is compelled by the plain meaning of the federal sentencing statute to impose a sentence below the Guideline recommendation.

In general, the Guidelines reflect an effort to construct sentences that are appropriate for mine-run

offenses[2] and mine-run offenders based on empirical evidence and historical sentencing practices. In calculating the Guideline sentence for any specific offense, Congress and the Sentencing Commission sought to understand both the ramifications of committing that offense and the prototypical person who engages in the offense. That methodology is not an issue in this case. Rather, this case presents the question of how sentencing courts deal with the crack Guideline, given the demonstrably false predicate understandings of the nature of that particular offense and the person who typically commits that offense.

Justice Breyer, writing for the Court in *Rita*, clarified that one aspect of the district court's current (i.e., post-*United States v. Booker*, 543 U.S. 220 (2005)) sentencing mandate is to address arguments "that the Guidelines reflect an unsound judgment." 127 S. Ct. at 2468. Evaluation of the soundness of a Guideline finds support in the residual federal sentencing statute, which compels a sentencing court to assess a number of factors that effectively test whether the Guideline recommends an appropriate sentence. Because the Guideline for crack offenses is premised on assumptions that are widely acknowledged to be factually incorrect, sentencing courts around the country have permissibly exercised their discretion by declining to impose a within-

[2] *See Rita v. United States*, 127 S. Ct. 2456, 2469 (2007) ("We acknowledge that the judge might have said more. He might have added explicitly that . . . he thought the Commission in the Guidelines had determined a sentence that was proper in the minerun of roughly similar perjury cases . . . ."); *id.* at 2476 (Stevens, J., concurring) ("[S]ome lengthy sentences will be affirmed (*i.e.*, held lawful) only because of the presence of aggravating facts, not found by the jury, that distinguish the case from the mine-run.").

Guideline sentence for mine-run crack offenses and on mine-run crack offenders.

I. *BOOKER*, *RITA*, AND THE FEDERAL SENTENCING STATUTE MAKE CLEAR THAT A SENTENCING JUDGE HAS DISCRETION TO ASSESS IF A GUIDELINE SENTENCE REFLECTS AN UNSOUND JUDGMENT.

As a result of *Booker*, sentencing courts have been accorded a substantial degree of discretion when imposing criminal sentences. This discretion, as provided in the residual sentencing statute and explicated in *Rita*, calls upon sentencing courts to assess if the applicable Guideline reflects an unsound judgment.

Prior to *Booker*, sentencing courts were required by Congress to impose sentences within the Guidelines range, *Booker*, 543 U.S. at 223, barring exceptional circumstances specific to the individual offender, *see, e.g.*, *id.* at 234 (citing 18 U.S.C. § 3553(b)). District courts were not permitted to account for instances when the Guideline sentence for a specific offense failed to effectuate the broad sentencing goals articulated by Congress in 18 U.S.C. § 3553(a). Even after the Sentencing Commission had rejected the soundness of the crack Guideline as a general matter, sentencing judges pre-*Booker* effectively had no choice but to follow the Guideline when sentencing a typical crack offender.

Booker substantially altered the landscape of sentencing. The "remedial opinion" in *Booker* struck from the federal sentencing statute the provision that mandated the imposition of within-Guidelines sentences. 543 U.S. at 259-60 (excising 18 U.S.C.

§ 3553(b) and a related sub-section concerning standards for appellate review). While allowing sentencing courts to continue to make factual findings, *Booker*'s remedial opinion cured the statute of constitutional infirmity by requiring that the Guidelines become merely advisory. The sentencing court can no longer "presum[e] that the Guidelines sentence should apply." *Rita*, 127 S. Ct. at 2465; *see also Cunningham v. California*, 127 S. Ct. 856, 866 (2007) (stating that a court is "no longer . . . tied to the sentencing range indicated in the Guidelines"); *Booker*, 543 U.S. at 259-60.

Although the full parameters of a district court's sentencing discretion remains a topic of broad debate, this Court recently clarified that one aspect of sentencing discretion includes the ability (if not the duty) to assess whether the Guideline applicable in a given case "reflect[s] an unsound judgment." *Rita*, 127 S. Ct. at 2468 (citing 18 U.S.C. § 3553(a)). The debate between the courts of appeals and the district courts has revolved around the substantive standard for assessing whether a particular Guideline is unsound, and how sentencing courts should proceed upon finding that the Guideline is in fact unsound for a particular offense or a particular offender. The remainder of *amicus*' brief is dedicated to addressing those questions.

II. THE SENTENCING GUIDELINES DERIVE THEIR SOUNDNESS—FOR MANY OFFENSES, BUT NOT CRACK OFFENSES—BY USING EMPIRICAL, HISTORICAL DATA.

The Guidelines stem from years of data collection, study, analysis and debate among the members of the Sentencing Commission, all with the

aim of creating sound sentencing ranges. For most offenses, the Guidelines are based on empirical and historical information gathered by the Commission, and the Guidelines attempt a sound sentencing range based on the objective, quantifiable information considered by the Sentencing Commission.

The Guideline for crack offenses, however, admittedly is not founded on such objective criteria. Instead, the Commission devised a Guideline that recommends exceedingly long sentences based on suppositions that have turned out to be false, providing cause for sentencing courts to reasonably question the soundness of the Guideline in crack cases.

A. The Sentencing Commission Developed Sentencing Guidelines For Most Offenses Based On Empirical, Historical Data.

Prior to the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, criminal sentences were indeterminate—for example, ten-to-thirty years, or not in excess of ten years imprisonment, with the actual release date within that span determined by a parole board. Within the statutory range, sentencing courts had discretion to impose whatever term of imprisonment they saw fit. No rule of law required sentencing courts to justify the sentences they imposed, and appellate review was effectively unavailable. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1687-90 (1992).

Sentencing courts presumably considered many of the factors that sentencing courts today are required to consider pursuant to the federal sentencing statute, 18 U.S.C. § 3553(a), but their assessments were based upon a limited and varied set of data—

and, to a considerable degree, upon each judge's own experience and accumulated anecdotes. *Blakely v. Washington*, 542 U.S. 296, 332 (2004) (Breyer, J., dissenting); *Mistretta v. United States*, 488 U.S. 361, 363 (1989). Each sentencing judge deployed his or her own sentencing philosophy, whether premised on deterrence, just deserts, rehabilitation, or the like. *See, e.g., Williams v. New York*, 337 U.S. 241, 248 n.13 (1949). Necessarily, each judge brought to bear a subjective notion of social harm attached to a given category of offenses. *Id.* In other words, each sentencing court was called upon to develop, for each offense, its own notion of a mine-run offense and mine-run offender; based on this anecdotal and subjective information, the court would then evaluate where a particular defendant fit within that scheme.

In 1984, Congress created a Sentencing Commission to "establish sentencing policies and practices . . . that assure the meeting of the purposes of sentencing . . . ." 28 U.S.C. § 991(b). The Commission, setting out to devise Guidelines for all federal offenses, embarked on a monumental empirical and historical examination regarding past sentencing practices, the harm that flows from the mine-run offense for that particular crime, and the mine-run offender who commits that crime. Adam Lamparello, *Implementing the "Heartland Departure" in a Post-*Booker *World*, 32 AM. J. CRIM. L. 133, 165 (2005); *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 7 n.50 (1987). To this end, it analyzed detailed data from 10,000 pre-sentence investigations and less detailed data from 100,000 criminal dispositions over a two-year period "in order to determine which [sentencing] distinctions are important in present practice." U.S. SENTENCING

GUIDELINES MANUAL, ch. 1, pt. A, introductory cmt. 3, at 1.4 (1987); *see also* U.S. Sentencing Comm'n, SUPPLEMENTAL REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 16-39 (1987) (explaining the Sentencing Commission's empirical approach to the initial Guidelines). Grounding the Guidelines in historical and empirical support lay at the foundation of the Commission's efforts to create sound sentencing policy.

B. The Sentencing Guideline For Crack Offenses Is Not Based On Empirical Data, But Rather On Assumptions That Are Now Widely Recognized As Demonstrably False.

The Guidelines for drug offenses, unlike the Guidelines for most offenses, are uniquely without grounding in objective empirical and historical criteria. For crack offenses, the Guideline is based on assumptions that are widely acknowledged—even by the Sentencing Commission itself—to be incorrect.

The Commission set out to create the Guidelines for drug offenses against the backdrop of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. Included as part of the 1986 Act was 21 U.S.C. § 841, which prescribed mandatory-minimum sentences for various drug-trafficking offenses. Importantly, the applicability of a mandatory-minimum sentence for a particular trafficking offense was triggered by the weight of the "mixture or substance containing a detectable amount" of the subject drug. 21 U.S.C. § 841(b).

As the D.C. Circuit recently recognized, this statutory scheme "created a problem for the Commission" because "mandatory minimum sentencing statutes are inconsistent with the objectives of the Guidelines to provide 'a substantial degree of individualization in determining the

appropriate sentencing range' and to impose 'graduated, proportional increases in sentence severity for additional misconduct or prior convictions.'" *United States v. Pickett*, 475 F.3d 1347, 1349 (D.C. Cir. 2007) (quoting U.S. Sentencing Comm'n, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 25 (1991)).

In other words, the Sentencing Commission encountered a structural problem unique to drug offenses. At least in setting the initial drug-offense Guidelines, the Sentencing Commission abandoned the methodology of describing the mine-run drug offense and mine-run drug offender for each type of drug offense, and then matching that prototypical offense and offender with a historical, empirical sentence. Rather, the Commission viewed its charge as creating a mechanical, ahistorical grid that takes as input only the quantity of drug, type of drug, and a mandatory-minimum sentence prescribed by Congress. Given that the mandatory-minimum statute contained a 100:1 ratio of triggering quantities for the crack form of cocaine compared to the powder form of cocaine, the Commission chose (though was not required) to adopt this same ratio.

The crack Guideline was necessarily based on even less information than the Guidelines for other drug offenses. Crack was a relatively new drug at the time that the Commission devised the crack Guideline. *See, e.g.*, U.S. Dep't of Justice, IDENTIFYING AND RESPONDING TO NEW FORMS OF DRUG ABUSE: LESSONS LEARNED FROM "CRACK" AND "ICE" 33 (1994) (noting that the first major news stories about crack appeared in 1985). The Commission—like the judiciary—had very little experience with crack when it set out to craft the Guideline for crack offenses. Accordingly, the

Commission did not have the benefit of much information about crack and prototypical crack offenders when it created the Guideline for this offense. *See, e.g.*, U.S. Sentencing Comm'n, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 122 (1995) ("1995 Report") ("At the time [1986], however, there were no prevalence statistics on the use of crack."). In attempting to create sound sentencing for crack offenses, therefore, the Commission had to make a number of assumptions about the harmfulness of crack, the mine-run crack offense, and the mine-run federal crack offender.

Specifically, the crack Guideline was based primarily on the following assumptions about crack and the mine-run crack offense: (1) crack was highly addictive relative to powder cocaine; (2) there was a direct relationship between crack trafficking and violent crime; (3) crack's pre-natal effects were relatively significant; (4) crack traffickers were co-opting youth into the trafficking operation; (5) crack distributors were selling crack to young people, which would cause a generation of Americans to become addicted to the substance; and (6) crack was a relatively pure form of cocaine with a relatively low cost per dose. U.S. Sentencing Comm'n, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 9-10 (2002). Furthermore, extraordinarily long sentences were deemed appropriate due to the assumption that mine-run federal crack offenders would be "kingpin" traffickers. 1995 Report, at 118.[3]

Twenty years after the promulgation of the 100:1 ratio, it is universally understood that these

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[3] See Brief of *Amicus Curiae* Sentencing Project for a thorough examination of the assumptions that underlie the crack Guideline.

assumptions were factually incorrect. With the benefit of further research, expert testimony, and more experience with crack offenses in the criminal-justice system, even the Sentencing Commission has concluded that the 100:1 ratio (1) seriously overstates the harm of crack offenses relative to powder-cocaine offenses, and (2) rests on an inaccurate profile of the mine-run federal crack offender.

In 2007, the Commission undertook a meticulous review of the bases for the crack Guideline, "thoroughly examin[ing] the results of its own extensive data research project, review[ing] the scientific and medical literature, consider[ing] written public comment and expert testimony at public hearings that included representatives of the Executive Branch, the Judiciary, the medical and scientific communities, state and local law enforcement, criminal justice practitioners, academics, and community interest groups, and survey[ing] state cocaine sentencing policies." U.S. Sentencing Comm'n, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 6-7 (2007). After this painstaking examination, the Commission came to the following four conclusions:

- The current quantity-based penalties overstate the relative harmfulness of crack compared to powder cocaine.
- The current quantity-based penalties sweep too broadly and apply most often to lower level offenders.
- The current quantity-based penalties overstate the seriousness of most crack offenses and fail to provide adequate proportionality.
- The current severity of crack penalties mostly impacts minorities.

Id. at 8.

III. WHERE A SENTENCING GUIDELINE FOR A PARTICULAR OFFENSE IS NOT BASED ON EMPIRICAL DATA, A COURT SHOULD MEASURE THE SOUNDNESS OF THE GUIDELINE BY ASSESSING IT IN LIGHT OF THE FACTORS SPECIFIED IN THE RESIDUAL SENTENCING STATUTE.

The residual sentencing statute left in place by *Booker* not only directs sentencing courts to assess the soundness of a Guideline sentence for a particular offense, but also provides a number of factors that sentencing courts should consider in order to determine the soundness of the Guideline. These factors must be accorded independent weight by a sentencing court and provide the means for the court to test the general soundness of the Guideline for a particular offense.

Booker, which excised 18 U.S.C. § 3553(b) from the federal sentencing statute, left in place a sentencing scheme whose only ultimate command is that the sentencing judge in each case "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of sentencing]." 18 U.S.C. § 3553(a). The residual sentencing statute provides guidance for the sentencing-court's assessment of whether a sentence is sound, listing seven factors for consideration.[4]

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[4] Title 18 U.S.C. § 3553(a) provides:

Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)

The residual statute mentions all seven factors on equal footing, none elevated over any other. *Id.* By the plain language of the statute, there is no "super-factor;" neither the Sentencing Guidelines nor any other factor predominates. This plain-language interpretation—that no factor is accorded greater significance than another—is conclusive. *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 507 (1993) (rejecting an interpretation of a statute because it was "at odds with [the statute's] plain language"); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89-90 (1821) ("[W]here the words of a law . . . have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense . . . .").

The Government has argued consistently in crack cases that the Guideline must be assigned significance beyond the six other § 3553 factors. This contention,

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of this subsection. The court, in determining the particular sentence to be imposed, shall consider-
(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(2) the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
(3) the kinds of sentences available;
(4) the kinds of sentence and the sentencing range established for (A) the applicable category of offense committed by the applicable category of defendant as set forth in the [sentencing] Guidelines . . .;
(5) any pertinent policy statement . . . issued by the Sentencing Commission . . .;
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

however, derives from a statute that no longer exists—the sentencing statute that, prior to *Booker*, included former section (b). *See* 18 U.S.C. § 3553(b) (making the Guidelines mandatory), *stricken as unconstitutional by Booker*, 543 U.S. at 260. With § 3553(b) excised, the residual statute must be read to put all of the factors on equal footing. *See* 18 U.S.C. § 3553(a); *see also Pickett*, 475 F.3d at 1353 ("[N]either the Supreme Court nor the statute assigns any weight or ranking to the factors.").

Many of the co-equal § 3553 factors ask sentencing courts to evaluate the Guidelines as they relate to an applicable offense *generally*, and not just to assess the *individual characteristics* of the particular offender being sentenced. These general factors provide benchmarks for sentencing courts to test whether the 100:1 ratio is generally supportable—whether the Commission's original assumptions about crack offenses have proven correct.

While certain of the § 3553 factors undoubtedly relate solely to the specific offender before the sentencing court, others just as clearly call for general observations about the suggested Guideline sentence for the particular offense. Included among the former category are 18 U.S.C. § 3553(a)(1) ("the history and characteristics of the defendant"), 18 U.S.C. § 3553(a)(2)(C) ("to protect the public from further crimes of the defendant"), and 18 U.S.C. § 3553(a)(7) ("the need to provide restitution to any victims of the offense"). On the other hand, even more § 3553 factors do not focus on the particulars of any one offender, and instead direct sentencing courts to assess whether the Guideline for a given offense is generally sound. For example, 18 U.S.C. § 3553(a)(2)(A) requires the sentencing court to consider whether the sentence "reflect[s] the

seriousness of the offense," "promote[s] respect for the law," and "provide[s] just punishment for the offense." Sub-section (a)(2)(B) requires that the sentence "afford adequate deterrence to criminal conduct. 18 U.S.C. § 3553(a)(2)(B). Another factor that a sentencing court must consider is "the nature and circumstances of the offense," 18 U.S.C. § 3553(a)(1), which is, importantly, listed separately from the "history and characteristics of the defendant," *id.* Additionally, the court is directed to consider policy statements of the Sentencing Commission concerning the Guideline for the offense that the defendant committed. 18 U.S.C. § 3553(a)(5).

The D.C. Circuit and numerous sentencing courts around the country have explicitly recognized that many § 3553 factors are not limited to the particular offender being sentenced, but encompass larger concerns about the Guideline for a specific offense. In *Pickett*, the D.C. Circuit noted that, "[w]ith the possible exception of § 3553(a)(2)(C) & (D), the broadly stated purposes of sentencing set forth in § 3553(a)(2) are not confined to any particular defendant's situation." 475 F.3d at 1352 n.4. A number of § 3553 factors, the court found, "do[] not rest on the particulars of any one offender." *Id.* at 1354. Sentencing courts across the country have arrived at similar conclusions. *See, e.g.*, *United States v. Williams*, 481 F. Supp. 2d 1298, 1304 (M.D. Fla. 2007) ("While the sale of crack cocaine is a serious offense, severity is a relative concept, and a guideline sentence of 30 years would be grossly disproportionate to the seriousness of this offense. It would not provide just punishment. Indeed, in this case, I find that it offends the very notion of justice. As such it would obviously not promote respect for the law. These factors therefore weigh heavily

against the imposition of a guideline sentence."); *United States v. Repp*, 464 F. Supp. 2d 788, 790 n.4 (E.D. Wis. 2006) ("Evaluation of the need for general deterrence involves what is, in effect, a policy consideration, i.e., what sort of sentence will be sufficient to deter others who may be tempted to engage in similar criminal conduct."); *United States v. Fisher*, 451 F. Supp. 2d 553, 563 (S.D.N.Y. 2005) ("I find that the 100:1 ratio creates unwarranted sentencing disparities and, in so doing, violates sections 3553(a)(2)(A) and (a)(6)."); *United States v. Hamilton*, 428 F. Supp. 2d 1253, 1258 (M.D. Fla. 2006) ("This arbitrary and discriminatory disparity between powder and crack cocaine implicates the Section 3553(a)(2)(A) factors."); *United States v. Perry*, 389 F. Supp. 2d 278, 304 (D. R.I. 2005) ("[W]hen a Guideline sentence involves a nearly impossible-to-justify disparity [between crack and powder-cocaine offenses], the sentence neither accurately reflects the seriousness of the offense, nor promotes general respect for the criminal justice system."); *United States v. Leroy*, 373 F. Supp. 2d 887, 892 (E.D. Wis. 2005) ("In light of these well-supported findings by the Commission, a court acts well within its discretion under § 3553(a) in sentencing below the guideline range to account for the unreasonable inflation of sentences called for in crack cases."); *Simon v. United States*, 361 F. Supp. 2d 35, 47, 49 (E.D.N.Y. 2005).

Acknowledging that many of the § 3553 factors require the sentencing court to assess the general soundness of a Guideline does not, as the Government will undoubtedly argue, thwart the "will of Congress."[5] Rather, Congress has expressly

[5] Nor does it ignore "the need to avoid unwarranted sentence disparities among defendants with similar records who have

authorized sentencing courts to test the soundness of the Guideline for any particular offense under the residual sentencing statute. Courts that recognize a systematic problem with the sentencing Guideline for crack offenses are not registering a policy or political disagreement with Congress or the Sentencing Commission; they are simply following a Congressional mandate to evaluate all sentences in light of the factors set forth in § 3553. These sentencing courts are not frustrating the will of Congress. To the contrary, they are abiding by the plain language of the residual sentencing statute, which expressly directs courts not to impose a sentence that is greater than necessary.

In *Pickett*, the D.C. Circuit directly confronted the Government's contention that rejecting the crack Guideline would "frustrate 'the will of Congress.'" 475 F.3d at 1354. The court of appeals held that congressional will was not impeded when sentencing courts "take into account the untoward results of the 100-to-1 ratio" so long as the court abides by the

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been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). While other *amici* will discuss at length the meaning of this factor, *amicus* notes that 21 U.S.C. § 841 applies in most crack-cocaine cases, U.S. Sentencing Comm'n, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 106, 324 (2006) (table 43) (reporting that approximately 80% of crack offenders are subject to a mandatory-minimum sentence), assuring a mandatory-minimum sentence for the vast majority of crack offenders and increasing the uniformity of crack sentences. With the mandatory minimum as a sentencing floor, most sentencing judges who find that the Guideline recommends an unsound sentence for crack offenses will elect merely not to elevate sentences further above the applicable mandatory minimum. As such, they have minimal impact on uniformity among crack sentences, while actually *lessening* the racial and other unwarranted disparities between sentences for crack and sentences for other similarly culpable or harmful conduct.

mandatory-minimum sentence prescribed by Congress. *Id.* at 1354-55. Indeed, that result respects both the mandatory-minimum statute and the plain language of the residual sentencing statute. *Cf. United States v. Gunter,* 462 F.3d 237, 249 (3d Cir. 2006).[6] In short, a sentencing court does not frustrate Congressional will when, based on the § 3553 factors, it rejects the Guideline for crack offenses, all the while imposing a period of incarceration that does not fall below any applicable mandatory-minimum sentence. What the Government labels as improper policy-making in defiance of Congressional intent turns out to be the only way to honor the plain language of the residual sentencing statute.

IV. SENTENCING COURTS HAVE BROAD DISCRETION TO IMPOSE A BELOW-GUIDELINE SENTENCE WHEN IT DEEMS A GUIDELINE SENTENCE UNSOUND.

After finding that the applicable Guideline calculation reflects an unsound judgment, a district court enjoys considerable discretion to discount the weight afforded the Guideline—or to assign it no weight at all—in crafting a sentence that accounts for the totality of factors enumerated in § 3553(a).

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[6] *Amicus* recognizes that some circuits have disagreed with this conclusion. *See, e.g., United States v. Ricks,* -- F.3d --, 2007 WL 2068098 (3d Cir. July 20, 2007); *United States v. Spears,* 469 F.3d 1166, 1178 (8th Cir. 2006) (en banc); *United States v. Pope,* 461 F.3d 1331, 1335-37 (11th Cir. 2006); *United States v. Castillo,* 460 F.3d 337, 357-60 (2d Cir. 2006); *United States v. Jointer,* 457 F.3d 682, 686-87 (7th Cir. 2006); *Eura,* 440 F.3d at 633-34; *United States v. Pho,* 433 F.3d 53, 62-63 (1st Cir. 2006). However, *amicus* believes that *Pickett* and *Gunter* provide the proper analysis and reach the correct result.

Although the Court was divided in *Rita* about the appropriate scope of *appellate* review after *Booker*, the Court was unanimous in its recognition that *Booker* bestowed upon *district courts* broad discretion in sentencing. 127 S. Ct. at 2465 ("[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."); *id.* at 2474 (Steven, J., concurring) ("I trust that those judges who had treated the Guidelines as virtually mandatory during the post-*Booker* interregnum will now recognize that the Guidelines are truly advisory."); *id.* at 2478 n.3 (Scalia, J., concurring) (stating that district courts' sentencing discretion "is a proper goal—indeed, an essential one to prevent the *Booker* remedy from effectively overturning *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)] and *Blakely*."); *id.* at 2488 (Souter, J., dissenting) ("[D]istrict courts [must] be assured that the entire sentencing range set by statute is available to them.") This broad sentencing discretion includes the authority to disagree with the Guidelines themselves.

In exercising discretion to discount or ignore an unsound Guideline, a judge contributes to an on-going, self-corrective mechanism. A Guideline does not represent embedded and permanent wisdom about any given category of sentences. Rather, Congress and the Commission "foresee continuous evolution helped by the sentencing courts . . . [who], applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence)." *Rita*, 127 S. Ct. at 2464. Sentencing "judges will set forth their reasons . . . [and] the Commission will collect and examine the results." *Id.* Thus, "the sentencing judge's explanation[s] should help the Guidelines constructively evolve over time, as both Congress and

the Commission foresaw." *Id.* at 2469; *see also id.* at 2483 (Scalia, J., concurring) (stating that as "district courts give reasons for their sentences, and more specific reasons when they decline to follow the advisory Guidelines range . . . the Sentencing Commission [can] perform its function of revising the Guidelines to reflect desirable sentencing practices of the district courts"). The evolution of the Guidelines is all the more important where, as here, the applicable Guideline is unmoored from any empirical evidence or historical sentencing practice.

In initially crafting the Guideline for any given offense, the Commission contended with the reality that "the goals of *uniformity* and *proportionality* often conflict." *Rita*, 127 S. Ct. at 2464 (emphasis in original). The Commission's "sometimes controversial effort," *id.* at 2463, was fraught with "the difficulties involved in developing a practical sentencing system that sensibly reconciles the two ends," *id.* at 2464. In the case of crack sentencing, the goal of uniformity trumped proportionality: Crack sentences march to a rigid, quantity-driven calculus, yielding sentences that are vastly disproportionate to other similarly culpable or harmful conduct.

District courts, in declining to follow the crack Guideline, need not undertake a full-scale evaluation of all that is flawed in this particular Guideline. Rather, the sentencing judge must demonstrate that "he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Id.* at 2468 (citing *United States v. Taylor*, 487 U.S. 326, 336-37 (1988)). The level of detail in this statement of reasons "depends upon circumstances" and "leaves much . . . to the judge's own professional judgment." *Id.* The sentencing court below, in finding the crack

Guideline unsound, acted against the backdrop of an ample, even robust, body of analysis; the judge (and the parties) were under no obligation to unearth new, original reasons. But, even when a critique is new or emerging, a judge must consider it when raised by the parties, and has broad discretion to reject a Guideline generally when that rejection is supported by reasoned analysis.

Sentencing courts have developed at least three ways of correcting for an unsound Guideline—all of them permissible in rendering appropriate sentences because they are anchored in the factors that Congress has instructed district courts to consider when imposing an appropriate sentence. First, the sentencing judge might assign a generically unsound Guideline no weight at all in any case involving that Guideline, and then proceed to apply the other factors under § 3553(a). Those other factors call on the district court to make the same judgments the Commission rendered in constructing the Guideline in the first place. *Id.* at 2463. If the district court deems a particular Guideline fundamentally unsound because it does not effectuate the purposes of sentencing pronounced in § 3553, then the court could reasonably conclude that the Guideline serves no purpose whatsoever as a starting point for calculating some lesser sentence.

Second, a sentencing judge might conclude that a Guideline is categorically (though perhaps not entirely) unsound, and then make a judgment about the degree of usefulness for that Guideline. Many district courts have adopted this approach in crack cases, typically with a judge substituting a ratio different from the 100:1 ratio utilized by the Sentencing Commission in comparing quantities of crack and powder cocaine that trigger identical

Guideline outcomes. *See, e.g.*, *Fisher*, 451 F. Supp. 2d at 562 ("I conclude that a 10:1 ratio is sufficient to punish crack cocaine dealers more harshly than those who deal in powder cocaine."); *Leroy*, 373 F. Supp. 2d at 892 ("I concluded that the 100:1 ratio did not produce a sentence consistent with the § 3553(a) factors, and that the 20:1 ratio last proposed by the Commission was reasonable."). While this approach generally has been rejected by the courts of appeals, *see* n.6, *supra*, the use of alternative ratios follows from a district court's authority to evaluate the soundness of a Guideline judgment and to fashion a sentence that is not "greater than necessary" to effectuate the purposes of sentencing. 18 U.S.C. § 3553(a). If, for example, the sentencing court believes that the 100:1 ratio does not—tracking a factor the court must consider—"reflect the seriousness of the offense," 18 U.S.C. § 3553(a)(2), but does believe that a 20:1 ratio would carry out this purpose of sentencing, then the court should be able to follow this Congressional directive and impose a sentence that takes that alternative ratio as a starting point for considering the offender-specific aspects of § 3553(a).

Third, the sentencing court might adopt a more limited position that a Guideline is flawed only insofar as it applies to the particular offender before the court. This approach appears to be the one endorsed in *Gunter* and *Pickett*, as well as potentially in *Jointer*, which held that a district court may consider the problems with the crack Guideline, but that such concerns must be "refracted through an individual defendant's case," 457 F.3d at 687-88. Sentencing courts must, at a minimum, be able to consider whether flaws in the crack Guideline make it unsound for the particular offender on whom the sentence will be imposed, even if leaving open the

possibility that the Guideline might be sound for some other crack offender. *See, e.g.*, *United States v. Willis*, 479 F. Supp. 2d 927, 937 (E.D. Wis. 2007) ("[T]he crack guideline was a poor fit given the specific circumstances of this case."). The Guideline could be unsound in an individual's case where, for instance, the offender does not fit the mine-run offender that the Sentencing Commission envisioned—high-level and/or violent dealers of crack—when crafting the Guideline.

In *Rita*, this Court approved of a sentencing judge accepting the "Commission's own reasoning that the Guidelines sentence is a proper sentence . . . in the typical case," and then imposing a Guideline sentence when the judge finds "that the case before him is typical." 127 S. Ct. at 2468. In *Rita* the parties did not argue that the perjury Guideline was inappropriate for the typical perjury offender, and the district court concluded that Mr. Rita was a typical offender. Crack sentencing, by contrast, turns this calculus on its head: Numerous judges have found that the crack Guideline fails to produce a proper sentence in the typical case *and* many offenders, like Mr. Kimbrough, are not typical offenders, in the sense that they bear little resemblance to the kind of offender anticipated by the Commission when it first formulated the crack Guideline. Mr. Kimbrough may be typical of the people actually prosecuted for crack offenses, but he (and his many contemporaries now in federal prison on crack charges) are far from the anticipated mine run of violent, kingpin distributors.

CONCLUSION

For the reasons stated herein, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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