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 NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit organization formed to assist African Americans in securing their rights through litigation and other forms of advocacy. Its mission is to transform the promise of equality into reality for African Americans and, ultimately, all individuals, in areas such as education, political participation, economic justice and criminal justice. For many years, its attorneys have represented parties and LDF has participated as *amicus curiae* in this Court, in the lower federal courts, and in state courts.

LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on the "War on Drugs" in particular. LDF has represented defendants in, *inter alia*: *United States v. Smith*, 229 F.3d 1145 (4th Cir. 2000) (per curiam) (unpublished table decision); *United States v. Smith*, No. 2:93CR00162-001 (E.D. Va. June 14, 2005) (granting Motion for Early Termination of Supervised Release); *People v. Worthy*, Index No. 3550/97 (Sup. Ct. N.Y. County, Sept. 16, 2005); *Williams v. State*, No. B-3340-9907-CR (Dist. Ct. Swisher County, Tex. June 16, 2003) (granting bail and immediate release from incarceration in case involving the arrests of 35 defendants in Tulia, Texas).[2] LDF also appeared as *amicus*

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[1] Pursuant to S. Ct. R. 37.6, *amicus* here affirms that no counsel for either party authored any part of this brief, and that no person or entity other than LDF and its counsel provided financial support for preparation or submission of this brief. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

[2] The defendants in Tulia, Texas were ultimately pardoned by Governor Rick Perry on August 22, 2003. *See* Release, Rick Perry, Office of the Governor, *Governor Perry Grants Pardons to 35 Tulia Defendants* (Aug. 22, 2003), available at http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2003-08-22.0734/view.

curiae in *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Johnson v. California*, 545 U.S. 162 (2005); *Banks v. Dretke*, 540 U.S. 668 (2004); and *Miller-El v. Cockrell*, 537 U.S. 322 (2003), among others. LDF has observed the unfortunate effects of America's War on Drugs, including the mechanical application of the Federal Sentencing Guidelines, on African American communities, and believes its perspective would be helpful to the Court in resolving the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

On four separate occasions, the United States Sentencing Commission ("Commission") has determined that the Sentencing Guidelines ("Guidelines") overstate the seriousness of crack cocaine offenses, fail to provide just punishment for such offenses, and, as a result, promote disrespect for the law. Specifically, the Commission found that the Guidelines' differentiation between crack and powder cocaine offenses lacks penological justification because crack cocaine is not more harmful or addictive than powder cocaine, does not cause more violent behavior than powder cocaine, and is not more likely than powder cocaine to coincide with or increase the likelihood of other crimes. The Commission also concluded that the Guidelines' crack/powder distinction has had a uniquely negative impact on the African American community. Specifically, the Commission found that African Americans are disproportionately subjected to the higher Guidelines sentences for crack cocaine offenses and that the high incarceration rate contributes to the devastating poverty and disenfranchisement disproportionately suffered by African Americans.

These serious questions about the legitimacy of the Guidelines' crack/powder sentencing disparity have increasingly led the African American community, the legal

community, and the public at large to view the criminal justice system with skepticism, resentment, and disrespect. They have also led the Commission repeatedly to recommend lowering the Guidelines range for crack offenses because, with such an adjustment, the crack sentences would better comply with the statutory purposes of punishment embodied in 18 U.S.C. § 3553(a).

In light of the Sentencing Commission's findings and recommendations, it is entirely reasonable for a sentencing judge to impose a below-Guidelines sentence for a crack offense if the sentencing judge determines that a Guidelines sentence fails to comport with the statutory purposes of the criminal law set forth in § 3553(a). The above described evidence of racial disparity and its concomitant harm is an appropriate consideration for that assessment because it is relevant to the district court's determination of what sentence length is "sufficient, but not greater than necessary . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," § 3553(a)(2)(A), "to afford adequate deterrence to criminal conduct," § 3553(a)(2)(B), and "to protect the public from further crimes of the defendant," § 3553(a)(2)(C). As this Court recently observed, "when [a] judge's discretionary decision accords with the Commission's view of the appropriate application of §3553(a) . . . , it is probable that the sentence is reasonable." *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007).

Such a conclusion is also consistent with this Court's holdings in *United States v. Booker*, 543 U.S. 220 (2005), and *Rita*, 127 S. Ct. 2456, that the Guidelines are advisory, not mandatory; that there is no "presumption of unreasonableness" when a district court reaches a below-Guidelines sentence after considering the § 3553(a) factors, *id.* at 2467; and that judges are permitted to sentence below

the Guidelines range when that range reflects "unsound judgment," *id.* at 2468, fails to "generally treat certain defendant characteristics in the proper way," *id.*, or "fails properly to reflect § 3553(a) considerations," *id.* at 2465. A contrary holding -- that a district judge may not consider application of the crack Guidelines as excessive in individual sentencing decisions -- would render the crack Guidelines mandatory, and contradict the mandates of *Booker, Rita*, and the plain language of 18 U.S.C. § 3553(a).

ARGUMENT

I. THE RACIAL DISPARITIES PRODUCED BY APPLICATION OF THE CRACK COCAINE SENTENCING GUIDELINES PROMOTE DISRESPECT FOR THE LAW

A. The Crack Cocaine Sentencing Guidelines Have Resulted in Vast Racial Disparities.

The Anti-Drug Abuse Act of 1986 established a 100:1 ratio of powder cocaine to crack cocaine, 21 U.S.C. § 841(b)(1)(B), treating one gram of crack cocaine as the equivalent of one hundred grams of powder cocaine. The Sentencing Commission used the same 100:1 ratio in setting then-mandatory drug penalties in the initial Sentencing Guidelines that became law in November 1987. *See* U.S.S.G. § 2D1.1. Since the implementation of the Guidelines, African Americans have consistently and disproportionately suffered a panoply of direct and indirect harms.

There is no doubt, for example, that African Americans are incarcerated for federal crack-related offenses in vastly higher numbers and proportions than whites. In 1995, the Sentencing Commission reported to Congress that the federal government's 1991 "National Household Survey

on Drug Abuse" found that even though 52% of reported crack users were white, whites represented only 10.3% of federal convictions for simple crack possession.[3] U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, at 34, 152 (1995) ("1995 Report"). African Americans, on the other hand, represented 38% of crack users but 84.5% of federal convictions for simple crack possession. 1995 Report at 152. "[R]esearch on drug market patterns demonstrates that drug users generally purchase drugs from sellers of the same racial or ethnic background." The Sentencing Project, *Federal Crack Cocaine Sentencing* 4 (2007) (citing Dorothy Lockwood, Anne E. Pottieger, & James A. Inciardi, *Crack Use, Crime by Crack Users, and Ethnicity*, *in* ETHNICITY, RACE AND CRIME 21 (Darnell F. Hawkins ed., 1995)). The disparities are even more severe in the context of trafficking offenses, which form the bulk of the federal drug convictions.[4] Among those sentenced in federal court for crack trafficking offenses, over 88% were African American, whereas only 4.1% were white. 1995 Report at 152. These racial disparities continue to plague the system. *See, e.g.*, U.S. Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics,* Table 34 (2003).

Moreover, the mechanical application of the 100:1 ratio through the Guidelines has also contributed to racial disparities in sentence length. In 1986, prior to the institution of the 100:1 ratio and the Guidelines, the average federal drug sentence for African Americans was 11% higher than

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[3] Simple possession refers to cases where the defendant is accused of possessing less than 5 grams of crack cocaine, an amount associated with personal use. Possession of 5 grams or more is presumed to be associated with trafficking in drugs.

[4] 96% of federal drug cases involve trafficking charges. *See* U.S. Sentencing Commission, 2006 Annual Report, at Figure I (2006), available at http://www.ussc.gov/ANNRPT/2006/figi.pdf.

for whites. Four years later, and after the institution of the Guidelines, the average federal drug sentence for African Americans was 49% higher. *See* Barbara Stone Meierhoefer, Federal Judicial Center, *The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentence Imposed* 20 (1992). Between 1994 and 2003, the average time served by an African American for a drug-related offense increased by 77%, whereas the average sentence of white offenders increased only by 28%. Bureau of Justice Statistics, *Compendium of Federal Justice Statistics*, 1994 (1998).[5] The Sentencing Commission, crediting a Bureau of Justice Statistics study covering the period from 1986 to 1990,[6] concluded that "[t]he 100-to-1 crack cocaine to powder cocaine quantity ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants." 1995 Report at 154.

The results of these disparities for African Americans have been devastating. For the individuals unfairly sentenced, of course, the lengthy confinement is itself unconscionable. But by requiring lengthy prison terms for crack offenses, the Guidelines also subject countless African Americans to a host of consequences which far exceed the initial sentence:

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[5] Notably, "African Americans now serve virtually as much time in prison for a drug offense (58.7 months) as whites do for a violent offense (61.7 months)." The Sentencing Project, *Federal Crack Cocaine Sentencing*, at 4 (2007), available at http://www.sentencingproject.org/Admin/Documents/publications/dp_cracksentencing.pdf (citing Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2003*, at 112 & Table 7.16 (2004)).

[6] U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter?* (Nov. 1993), cited in the 1995 Report at 153.

Dilution of Voting Rights. Forty-six states and the District of Columbia deny incarcerated prisoners the right to vote. *See* Human Rights Watch and The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* § II (1998), available at http://www.hrw.org/reports98/vote/usvot98o.htm#FELONY. In thirty-two states, convicted offenders may not vote while they are on parole, and twenty-nine of these states disenfranchise offenders on probation. *Id.* Only fifteen of these states disenfranchise all ex-felons, *id.*, thus sentence length is the critical factor that determines how long an individual remains disenfranchised. The Guidelines' exponentially longer crack cocaine sentences therefore contribute to the diminution of African American voting power by exacerbating the problem of African American felon disfranchisement.

Impaired Capacity for Re-Entry. Longer sentences also undermine even first-time offenders' capacity for successful community reintegration. Because, for example, prolonged incarceration frequently causes attenuated family and community relationships, the deterioration of a defendant's strong support network makes reintegration and reentry upon release more difficult. *See* James P. Lynch & William J. Sabol, *Prisoner Reentry in Perspective*, 3 CRIME POL'Y REP. 1, 17-19 (2001), available at http://www.urban.org/UploadedPDF/410213_reentry.PDF.

Other Harms to the Community. The lengthy prison terms associated with crack cocaine offenses also reach beyond individual families and contribute to the breakdown of community social structures like churches and schools that face a shortage of male

leaders. *See* Steven Rickman, *The Impact of the Prison System on the African Community*, 34 HOW. L.J. 524, 526 (1991); Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 259 (2002).

There is, in short, no doubt that the harms imposed on African Americans by the 100:1 ratio are disproportionate and severe.

B. The Racial Disparities Associated with the Crack Cocaine Sentencing Guidelines Have Caused Widespread Distrust of the Law.

The Guidelines' 100:1 sentencing disparity has engendered near universal criticism, causing widespread disrespect for the law and undermining the goals of the Sentencing Reform Act.

First and foremost, the U.S. Sentencing Commission itself has expressly disavowed the 100:1 ratio. Indeed, on four separate occasions, including in a report issued this year, the Commission has articulated its "consistently held position that the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act." U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy*, at 7-8 (2007) ("2007 Report"); *see also* U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* (2002) ("2002 Report"); U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, at 8 (1997) ("1997 Report"); 1995 Report (issued after a review of cocaine penalties as directed by Pub. L. No. 103-322, § 280006) (all reports available at http://www.ussc.gov/ reports.htm).

In reaching that conclusion, the Commission relied on not only the vast racial disparities described above, but also the lack of any penological justification for the 100:1 ratio. When the Guidelines were created in 1986, it was widely assumed that crack and powder cocaine were significantly different drugs. The 100:1 ratio was therefore designed to address the increased risks of harm and violence purportedly presented by crack cocaine as compared to powder cocaine. As the Commission has recognized, however, in the years since the development of these crack/powder Guidelines, extensive research has demonstrated that the critical supposed distinctions between these two drugs are in fact non-existent. It is now generally accepted that: (1) crack cocaine is not more instantly addictive than powder cocaine, *see* 2007 Report at B-19, 67; (2) crack cocaine does not engender a greater propensity for more violent behavior than powder cocaine, *see* 1995 Report at 184-87; and (3) crack cocaine use by expectant mothers does not carry greater risk of birth defects than powder cocaine use, *see* 2007 Report at 69; 1995 Report at 45; *see also* D.K. Hatsukami & M.W. Fischman, *Crack Cocaine and Cocaine Hydrochloride. Are the Differences Myth or Reality?*, 279 JAMA 1580 (1996) (finding that the psychological and psychoactive effects of cocaine are similar regardless of whether it is in the form of powder or crack); Barry Zuckerman et al., *Overview of the Effects of Abuse and Drugs on Pregnancy and Offspring*, 149 NAT'L INST. ON DRUG ABUSE 16, 19 (1995).

Because it is now clear that crack cocaine poses no greater threat of harm than powder cocaine, the Commission concluded that the fact that African Americans continue to be disproportionately subjected to these irrationally harsh sentences significantly contributes to the perception that the law is unfair and that the criminal justice system is biased, and thus requires a change in the 100:1 ratio.

Those same points have been echoed repeatedly by members of the federal judiciary, who witness first hand the unfairness that the Guidelines currently impose. Even in the years before *Booker*, the federal courts repeatedly concluded that the crack Guidelines are "greater than necessary" to accomplish the purposes of punishment. In 1997, for example, 27 federal judges, all of whom had previously served as U.S. Attorneys, sent a letter to the U.S. Senate and House Judiciary Committees stating that "[i]t is our strongly held view that the current disparity between powder cocaine and crack cocaine, in . . . the guidelines can not be justified and results in sentences that are unjust and do not serve society's interest." Letter from Judge John S. Martin, Jr. to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, and Congressman Henry Hyde, Chairman of the House Judiciary Committee (Sept. 16, 1997), reprinted in 10 FED. SENT'G REP. 195 (1998). More recently, U.S. Circuit Judge Michael McConnell of the Tenth Circuit has called the crack Guidelines "virtually indefensible," *United States v. Pruitt*, 487 F.3d 1298, 1315 n.3 (10th Cir. 2007) (McConnell, J., concurring), and numerous other courts – both district courts and the Courts of Appeals – have likewise questioned the fairness of the Guidelines.[7] Indeed, these views are

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[7] *See also, e.g., United States v. Ricks*, No. 05-4832, -- F.3d --, 2007 WL 2068098, at *7 (3d Cir. July 20, 2007) (100:1 ratio "leads to unjust sentences"); *United States v. Moore*, 54 F.3d 92, 102 (2d Cir. 1995) (concluding that crack disparity "raise[s] troublesome questions about the fairness of the crack cocaine sentencing policy"); *United States v. Singleterry*, 29 F.3d 733, 741 (1st Cir. 1994) (concluding that "[a]lthough Singleterry has not established a constitutional violation, he has raised important questions about the efficacy and fairness of our current sentencing policies for offenses involving cocaine substances"); *United States v. Walls*, 841 F. Supp. 24, 31 (D.D.C. 1994) ("[T]he disparity between the crack and powder penalties and the heavy impact of that disparity on black defendants is manifestly unfair."), *aff'd in part*, 70 F.3d 1323 (D.C. Cir. 1995); *United States v. Willis*, 967 F.2d 1220, 1226

widely shared throughout the legal community: as the Commission itself recognized, the crack Guidelines have been roundly condemned by "representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups" alike. 2007 Report at 2.[8]

Just as telling, this same belief that the Guidelines are fundamentally unfair is shared by the public at large. As part of its mission to evaluate the Guidelines in terms of the § 3553(a) factors, the Sentencing Commission contracted with two outside researchers, Dr. Peter H. Rossi of the University of Massachusetts, Amherst, and Dr. Richard A. Berk of the University of California at Los Angeles, to assess public opinion on federal sentences. Rossi and Berk found that the public is highly critical of the heavy Guidelines sentences for crack offenses and, instead, believes that cocaine and crack offenses deserve identical terms of imprisonment. *See* Peter H. Rossi & Richard A. Berk, U.S.

(8th Cir. 1992) (Heaney, J., concurring) (affirming 15-year crack sentence but suggesting that Congress had no "sound basis to make the harsh distinction between powder and crack cocaine," and quoting with approval district judge's description of the sentence as a "tragedy"); *United States v. Clary*, 846 F. Supp. 768, 792 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994); *United States v. Patillo*, 817 F. Supp. 839, 843-44 & n.6 (C.D. Cal. 1993).

[8] *See, e.g.*, William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1835 (1998) ("If there is anything at all to the proposition that biased enforcement and punishment undermine the law's normative force, this sentencing disparity ought to be abolished, or at least dramatically reduced."); *see also* Alfred Blumstein, *The Notorious 100:1 Crack: Powder Disparity -- The Data Tell Us that It Is Time to Restore the Balance*, 16 FED. SENT'G REP. 87, 87 (2003); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751 (1999); William J. Spade, Jr., *Beyond the 100:1 Ratio: Towards A Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1255 (1996); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1288-99 (1995)

Sentencing Commission, *A National Sample Survey: Public Opinion on Sentencing Federal Crimes* ch. 4 at 66-67 & Table 4.7, & ch. 5 at 80 (1995), available at http://www.ussc.gov/nss/jp_exsum.htm (noting that there is "little support in public opinion for especially severe sentences for drug trafficking and little support for singling out crack cocaine for special attention"). In general, "the public does not regard trafficking in [crack cocaine] as more serious than dealing in either powder cocaine or heroin . . . [and] trafficking in crack cocaine should not be singled out for especially severe punishments." *Id.*, ch. 4 at 78.

The result, as the Commission realized, is a perversion of the criminal justice system and the goals of the Sentencing Reform Act. The widespread perception of the crack Guidelines as unjust results in a disrespect for the law which may actually increase crime and make law enforcement more difficult. *See, e.g.*, Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143, 1165 (2006) (explaining that "prominent legal theorists" and "a broad array of recent empirical studies" support the notion that "[w]hen citizens perceive the state to be furthering injustice . . . they are less likely to obey the law, assist law enforcement, or enforce the law themselves"); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 597-98 (2003); *see also* Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1399 (2005) (reviewing the literature and reporting new experimental evidence that "the perceived legitimacy of one law or legal outcome can influence one's willingness to comply with unrelated laws"); Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1185 (2004) ("As penalties increase, people may not be as willing to enforce them because of the disproportionate impact on those caught."); Tom R. Tyler, WHY PEOPLE OBEY

THE LAW 3-4 (1990) (explaining that cooperation with the law depends on the perception that the law is "just").

Moreover, the "perceived improper unwarranted disparity based on race fosters disrespect for and lack of confidence in the criminal justice system among those very groups that Congress intended would benefit from the heightened penalties for crack cocaine." 2002 Report at 103.

In short, the crack Guidelines represent a stain on the criminal justice system, disproportionately affecting African Americans without any legitimate penological justification and engendering a disrespect for the law that undermines the criminal justice system itself.

II. A DISTRICT COURT'S CONSIDERATION OF THE SEVERE RACIAL DISPARITIES RESULTING FROM APPLICATION OF THE FEDERAL SENTENCING GUIDELINES IS REASONABLE UNDER FEDERAL LAW.

A. Consideration of Racial Disparities in Cocaine Sentences is Consistent with *Booker*, *Rita*, and 18 U.S.C. § 3553(a).

In *Booker,* this Court held that mandatory application of the Guidelines violated the Sixth Amendment. 543 U.S. 220. The Court therefore held that the Guidelines must be treated as advisory, and as only one of a number factors that a sentencing court must consider pursuant to 18 U.S.C. § 3553(a). Judges are now required to determine the Guidelines sentence and "filter the Guidelines' general advice through § 3553(a)'s list of factors." *Rita*, 127 S. Ct. at 2469. It is the sentencing judge's obligation to "subject[] the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure." *Id*. at 2465.

As this Court acknowledged in *Rita*, a sentencing judge may entertain arguments that a sentence based solely on a Guidelines calculation reflects "unsound judgment," *id.* at 2468, fails to "generally treat certain defendant characteristics in the proper way," *id.*, or "fail[s] properly to reflect § 3553(a) considerations," *id.* at 2465, so long as the district court conducts an appropriately individualized analysis. According to § 3553(a), a district court must seek to ensure that the defendant's sentence "reflect[s] the seriousness of the offense, … promote[s] respect for the law, and … provide[s] just punishment for the offense," § 3553(a)(2)(A). It must also seek "to afford adequate deterrence to criminal conduct," § 3553(a)(2)(B), and "protect the public from further crimes of the defendant," § 3553(a)(2)(C). Under such circumstances, even if the sentence falls below the Guidelines, it may be upheld. *Rita*, 127 S. Ct. at 2467 (no "presumption of unreasonableness" for below-Guidelines sentences).

In light of these decisions, it is entirely reasonable for district court judges to consider the empirical studies and recommendations of the Sentencing Commission, including its findings regarding vast racial disparities, in fashioning appropriately individualized sentences that comport with the mandates of § 3553(a). This is because the "sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives . . . ." *Rita*, 127 S. Ct. at 2463. And, in fact, the Sentencing Commission originally drafted the Guidelines, including for crack cocaine sentences, with the considerations of § 3553(a) in mind. *See id.* (citing 28 U.S.C. § 994(f), 994(m)). Since 1995, however, the Commission has determined that the Guidelines as originally drafted do not carry out those purposes. *See supra* Section I(B) at 8-9.

Thus, when a district court sentences an individual crack cocaine offender to a below-Guidelines sentence based, in part, on consideration of the effects of the 100:1 ratio in the particular case, the court acts in concert with the opinions of the Sentencing Commission. This fact *bolsters* the likely reasonableness of the sentence. *See Rita*, 127 S. Ct. at 2465 ("[W]hen the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) . . . , it is probable that the sentence is reasonable."); *see also id.* at 2467 ("[W]here judge and Commission *both* determine that the Guidelines sentences is an appropriate sentence for the case at hand, that sentence likely reflects the § 3553(a) factors (including its 'not greater than necessary' requirement).").

B. Courts Can Properly Consider the Disparities Caused by the Crack Cocaine Guidelines as Part of an Individualized Sentence Determination Without Categorically Rejecting the Ratio or the Guidelines.

A panel of the Third Circuit recently articulated a standard that is fully consistent with *Booker*, *Rita*, and § 3553(a), in providing guidance to a district court on remand:

> Although district courts may not categorically reject the 100-to-1 ratio, they may . . . "consider the crack/powder cocaine differential in the Guidelines as a factor" when sentencing defendants. . . . They should first calculate the correct Guidelines range and rule on any departure motions . . . .[then,] considering the individual circumstances of a defendant and the specific crime, district courts should consider the relevant § 3553(a) factors. It is at this stage (step 3)

> that courts may consider the crack/cocaine differential as it applies to the particular case before them. . . . .
>
> While the views of the Sentencing Commission may not be used to justify a new ratio altogether, district courts may consider the analysis in the Commission's reports when applying the § 3553(a) factors to a specific case and defendant. For example, the Commission's reports, as well as other sources, can inform the § 3553(a) analysis of "the nature and circumstances of the offense" or "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, . . . to provide just punishment for the offense . . . [and] to afford adequate deterrence to criminal conduct."

Ricks, 2007 WL 2068098, at *6 (citations omitted). We urge the Court to adopt and apply this standard.

C. The District Court, in Sentencing Mr. Kimbrough, Engaged in an Individualized Evaluation of the Statutory Factors Consistent with Federal Law.

Under the standard articulated in *Ricks*, the sentencing decision of Judge Jackson below was reasonable. After calculating the sentence according to the advisory Guidelines, the court explicitly stated that it was evaluating the individual facts and record in terms of the § 3553(a) factors. After a review of the factors, Judge Jackson detailed how those case-specific factors, taken together, warranted a below-Guidelines sentence. See Pet. App. 24a-25a, C.A.J.A. 48-49 (explaining that "given the record here," a sentence calculated using only the Guidelines was excessive).[9] The

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[9] The district court sentencing Mr. Kimbrough explained:

> The Court is required to impose a sentence in this case to do several things: To reflect the seriousness of the offense, to

court considered factors such as the nature and circumstances of the offense, the defendant's family ties, and the defendant's military contributions. *Id.* The court also considered the Commission's recommendations and the effect of the 100:1 ratio on Mr. Kimbrough's sentence. *Id.* After considering a variety of contributing factors, the court explained that if it were to "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 in this case." Pet. App. 27(a), C.A.J.A. 51. The district court considered the need for the sentence to reflect the basic aims of sentencing and concluded that 180 months -- the mandatory minimum permitted by Congress -- was "clearly long enough under the circumstances." Pet. App. 28a, C.A.J.A. 52. In this particular case, a rote application of the Sentencing Guidelines did not comport with the mandate of § 3553(a). This was precisely the analysis the statute directs sentencing courts to perform when sentencing a defendant and that this Court described in *Rita*. It is also consistent with the standard outlined in *Ricks*.

Nevertheless, the Court of Appeals vacated the District Court's sentence because it was "based, in part, on the district court's disagreement with the disparity between sentences for crack and powder cocaine violations," Pet.

> afford adequate deterrence to Mr. Kimbrough's criminal conduct, to protect the public from further crimes committed by the defendant, to provide the defendant with needed education or vocational training, medical care or other correctional treatment in the most effective way. . . . One thing the statute tells the Court to do [is that] in fashioning a sentence, the Court is not to impose a sentence that is greater than necessary to accomplish the factors I have just outlined. . . . [T]o impose a sentence of 19 to 22 years in this case is ridiculous . . . [because] [i]t imposes more punishment, given the record here, than is necessary to accomplish what needs to be done.

Pet. App. 24a-25a, C.A.J.A. 48-49.

App. 2a, applying its ruling in *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006), that "a sentence that is outside the guidelines range is per se unreasonable when it is based [even in part] on a disagreement with the sentencing disparity for crack and powder cocaine offenses," Pet. App. 2a. The Fourth Circuit erred in so holding because it mischaracterized the district court's § 3553(a) determination as a "disagreement" with the Guidelines. To hold that a sentencing judge can never "disagree" with a sentence calculated using the 100:1 ratio makes the Guidelines mandatory. Such a holding is contrary to *Booker*, and also fails to give effect to Congress's intention that sentences reflect judges' evaluation of a series of additional factors set forth in 18 U.S.C. § 3553(a). Where, as here, a court considers, as one factor among others, the impact in an individual case of severe racial disparities resulting from a mechanical calculation of the Guidelines, the decision to deviate from those Guidelines is reasonable and consistent with federal law.

The court in this case evaluated the facts surrounding Mr. Kimbrough's individual case, determined that the Guidelines range failed to reflect the § 3553(a) factors, and imposed a sentence below the Guidelines range in order to better comport with the purposes of sentencing set forth in § 3553(a). The decision to do so was reasonable and should be affirmed.

CONCLUSION

For these reasons, *amicus* urges the Court to reverse the decision below.

Respectfully submitted,

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