No. 06-6330

In the Supreme Court of the United States

DERRICK KIMBROUGH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in sentencing a defendant convicted of trafficking crack cocaine, a district court may reduce the defendant's sentence based on its disagreement with the 100:1 ratio adopted by Congress and implemented in the Sentencing Guidelines for calculating sentences for trafficking crack and powder cocaine.

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OPINION BELOW

The opinion of the court of appeals (J.A. 96-98) is not published in the Federal Reporter, but is reprinted at 174 Fed. Appx. 798.

JURISDICTION

The judgment of the court of appeals (J.A. 99) was entered on May 9, 2006. A petition for rehearing was denied on June 6, 2006 (J.A. 100). The petition for a writ of certiorari was filed on September 5, 2006 (a Tuesday following a holiday), and was granted on June 11, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-52a.

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiring to distribute cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(iii) and (b)(1)(C), and 846; possessing 50 grams or more of cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii); possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c). Although petitioner's range on the drug counts under the United States Sentencing Guidelines (Sentencing Guidelines or Guidelines) was 168 to 210 months of imprisonment, the district court imposed the statutory minimum sentence of 120 months on the crack-cocaine counts, in part based on its disagreement with the disparity in sentences for trafficking crack and powder cocaine. The court sentenced petitioner to a total of 180 months of imprisonment, to be followed by five years of supervised release. The court of appeals vacated the sentence and remanded for resentencing. J.A. 96-98.

A. Background

1. In 1970, Congress passed the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, which repealed most prior drug laws and established a comprehensive

federal scheme to regulate the market in drugs generally, including cocaine. See *Gonzales* v. *Raich*, 545 U.S. 1, 10-14 (2005). The CSA classified drugs by schedules, according to their effects and potential for abuse; cocaine was classified as a Schedule II drug. As originally enacted, the CSA established penalties for illegal drug trafficking that were generally based on the type (but not the quantity) of drugs involved. See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, §§ 201-202, 401, 84 Stat. 1245-1252, 1260-1262. In 1984, Congress modified the CSA's penalty structure to add drug quantity as a factor; Congress did so by establishing quantities of specific drugs that would trigger enhanced penalties. For cocaine, the triggering quantity was one kilogram, which increased the maximum sentence from 15 to 20 years of imprisonment. See Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. V, 98 Stat. 2068 (21 U.S.C. 841(b)(1) (Supp. II 1984)).

2. By the early 1980s, the principal form of illegal cocaine in the United States was powder cocaine, which is produced by dissolving coca paste in hydrochloric acid and water. Users typically consume powder cocaine by snorting it through the nose. In the 1980s, however, another form of cocaine, crack cocaine, became increasingly common. Crack cocaine is usually produced by boiling powder cocaine in a solution of sodium bicarbonate and water, resulting in a solid "rock" of purer cocaine. Users typically consume crack cocaine by smoking it; because smoking ordinarily produces more immediate (and intense) effects than snorting, crack is thought to present a higher risk of addiction and personal deterioration than powder. See United States Sentencing Commission, *Report to the Congress: Co-*

caine and Federal Sentencing Policy 62-67 (2007) (2007 Report) <www.ussc.gov/r_congress/cocaine2007.pdf>; United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 9-14 (1995) (1995 Report) <www.ussc.gov/crack/exec.htm>.

In 1986, Congress passed the Anti-Drug Abuse Act (1986 Act), Pub. L. No. 99-570, 100 Stat. 3207. The 1986 Act substantially increased the penalties for the trafficking of controlled substances and, as is relevant here, established a three-tier penalty system for certain drugs, based on the quantity of the distributed substance. At the lowest quantity for each drug, the Act establishes a maximum sentence of 20 years of imprisonment for a first-time offender. See 21 U.S.C. 841(b)(1)(C). Once the amount of the drug reaches a designated threshold, the Act establishes a minimum sentence of five years and a maximum of 40 years. See 21 U.S.C. 841(b)(1)(B). And once the amount of the drug reaches a second threshold (which is set at ten times the first threshold), the Act establishes a minimum sentence of ten years and a maximum of life. See 21 U.S.C. 841(b)(1)(A). The Act specifies different threshold quantities for various drugs. See 21 U.S.C. 841(b)(1)(A)(i)-(viii) and (b)(1)(B)(i)-(viii).

In the 1986 Act, Congress distinguished for the first time between trafficking crimes involving crack and powder cocaine, and determined that crimes involving crack should be subject to considerably more severe penalties. See 21 U.S.C. 841(b)(1)(A)(ii)-(iii) and (b)(1)(B)(ii)-(iii). As the United States Sentencing Commission (Sentencing Commission or Commission) has explained, the legislative history of the 1986 Act indicates that Congress believed that crack cocaine was at

the forefront of the national drug epidemic. In addition, the legislative history reflects that Congress concluded that crack cocaine was more dangerous than powder cocaine, on the grounds that (1) crack was extremely addictive (and more addictive than powder); (2) crack was more closely correlated with the commission of other serious crimes; (3) crack had particularly serious physical effects; (4) crack was particularly likely to be used by young people; and (5) the use of crack was particularly likely to expand, in light of its potency, cost, and ease of distribution and use. See United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* 9-10 (2002) (2002 Report)<www.ussc.gov/r_congress/02crack/2002crackrpt.pdf>; 1995 Report 116-118.

Accordingly, in establishing the three-tier penalty system, the 1986 Act used different quantities for "cocaine" (*i.e.*, powder cocaine) and "cocaine base" (*e.g.*, crack cocaine) to establish enhanced sentences.[1] In setting the quantities of each type of cocaine required to trigger higher sentencing ranges, the Act used a 100:1 ratio of powder to crack cocaine: thus, the first threshold (for a sentence of five to 40 years) was set at 500 grams of powder but 5 grams of crack, see 21 U.S.C. 841(b)(1)(B)(ii)-(iii), and the second threshold (for a sen-

[1] While not defined in the 1986 Act, the phrase "cocaine base" plainly includes crack cocaine, which is by far the most commonly trafficked form of cocaine in its chemically base form. See 1995 Report 13-14; *United States* v. *Pho*, 433 F.3d 53, 54 n.1 (1st Cir. 2006). The courts of appeals are divided on whether "cocaine base" reaches other types of cocaine in base form besides crack. Compare, *e.g.*, *United States* v. *Barbosa*, 271 F.3d 438, 461-467 (3d Cir. 2001), cert. denied, 537 U.S. 1049 (2002), with *United States* v. *Edwards*, 397 F.3d 570 (7th Cir. 2005).

tence of ten years to life) was set at 5 kilograms of powder but 50 grams of crack, see 21 U.S.C. 841(b)(1)(A)(ii)-(iii). In adopting the 100:1 ratio, Congress considered but rejected bills that used lower ratios, including 50:1 and 20:1. See 2002 Report 7-8; 1995 Report 117; *United States* v. *Castillo*, 460 F.3d 337, 345 (2d Cir. 2006). As further evidence of its particular concern with crack cocaine, Congress subsequently enacted a provision imposing a minimum penalty (of five years of imprisonment) for simple possession of crack, even for first-time offenders—the only provision of its kind. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (21 U.S.C. 844(a)); 2002 Report 11; 1995 Report 123-125.

In 1987, the Sentencing Commission issued the initial version of the Sentencing Guidelines. See 52 Fed. Reg. 18,046. For drug-trafficking offenses, the Commission adopted sentencing ranges that would be consistent with the statutory minimum sentences mandated by Congress. See Guidelines § 2D1.1. Specifically, the Commission used the quantities of crack cocaine (and other specified drugs) that triggered the five- and ten-year minimum sentences as "reference points," and established offense levels for those quantities that (absent adjustments or a criminal history) would lead to sentences at or just above the statutory minimums. 1995 Report 126. Finding that "further refinement of drug amounts [was] essential to provide a logical sentencing structure for drug offenses," however, the Commission established graduated offense levels, whereby the offense level would increase (or decrease) in two-level increments as the amount of each drug increased (or decreased) from the threshold amounts. Guidelines § 2D1.1, comment. (backg'd). These additional base offense levels were "proportional to the levels established

by statute." *Ibid.*; see *id.* at comment. (n.10) ("The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)) as the primary basis for the guideline sentences."). With specific regard to crack cocaine, the consequence of this approach was to incorporate into the Guidelines the 100:1 powder-to-crack ratio that Congress used in adopting the statutory sentencing ranges. For example, while distribution of 5 grams of crack cocaine (or 500 grams of powder cocaine) would lead to a statutory minimum sentence of 60 months, and distribution of 50 grams of crack (or 5 kilograms of powder) would lead to a statutory minimum of 120 months, distribution of 20 grams of crack (or 2 kilograms of powder) would generate a base offense level of 28, which (absent adjustments or a criminal history) would lead to a Guidelines range of 78 to 97 months. See Guidelines § 2D1.1(c)(6); *id.* Ch. 5, Pt. A (sentencing table).

3. In 1995, the Sentencing Commission issued a report in which it concluded that "the 100-to-1 quantity ratio that presently drives sentencing policy for cocaine trafficking offenses should be re-examined and revised." 1995 Report 197. Shortly thereafter, the Commission, by a 4-3 vote, submitted a proposed amendment to the Guidelines that would have replaced the 100:1 ratio with a 1:1 ratio (and therefore imposed the same penalties on otherwise identical crimes involving crack and powder cocaine). See 60 Fed. Reg. 25,075-25,077 (1995); *Castillo*, 460 F.3d at 346-347.

For the first time in the history of the Guidelines, Congress exercised its authority to reject the proposed amendment. See Act of Oct. 30, 1995, Pub. L. No. 104-38, 109 Stat. 334. Congress explained that "the sentence imposed for trafficking in a quantity of crack cocaine

should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine." § 2(a)(1)(A), 109 Stat. 334. At the same time, however, Congress directed the Sentencing Commission to "submit to Congress recommendations (and an explanation therefor), regarding changes to the statutes and sentencing guidelines governing sentences for * * * trafficking of cocaine." § 2(a)(1), 109 Stat. 334. Congress specifically provided that the Commission "shall propose revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes and guidelines in a manner consistent with the ratios set for other drugs and consistent with the objectives set forth in [18 U.S.C. 3553(a)]." § 2(a)(2), 109 Stat. 335.

In the legislative history, Congress emphasized that the evidence continued to support the view that longer sentences were appropriate for crack-cocaine offenses. See, *e.g.*, H.R. Rep. No. 272, 104th Cong., 1st Sess. 3-4 (1995). Notably, Congress also expressed concern that the Sentencing Commission's proposed amendment would conflict with the sentencing structure it had imposed in the 1986 Act. Specifically, the House Report explained that, "if the Commission's guidelines amendments went into effect without Congress lowering the current statutory mandatory minimum penalties, it would create gross sentencing disparities," because "[s]entences just below the statutory minimum would be drastically reduced, but mandatory minimums would remain much higher." *Id.* at 4. As a result, the proposed amendment would "establish penalties for crimes that stand in sharp contrast with [the] statutory mandatory minimum penalties." *Ibid.* The principal sponsors of the statute expressed the same concern, and also indicated that any significant change in sentencing for

crack-cocaine offenses would require legislative action. See, *e.g.*, 141 Cong. Rec. 25,324 (1995) (statement of Sen. Abraham) (noting that "[t]he Commission's proposed changes are incompatible with the statutory mandatory minimum sentences that Congress has established," and that, "[r]ather than adjusting its guidelines to conform with congressional directives, * * * the Commission has instead elected to change the guidelines and ask Congress that it adjust the laws to accommodate the Commission's views"); *id.* at 27,202-27,203 (statement of Sen. Abraham) (noting that the statute "does not request the Commission to send new Guidelines changes" but "[r]ather * * * requests the Commission's recommendations for how the laws and guidelines should be changed"); *id.* at 27,203 (statement of Sen. Abraham) (explaining that "major changes in this area have to come from Congress, and until such changes are made the guidelines should conform with existing law"); *id.* at 28,359 (statement of Rep. McCollum) (contending that "[t]he Commission is to follow Congress' lead as Congress—not the Sentencing Commission—sets sentencing policy").

4. Since 1995, Congress has taken no action to alter the 100:1 ratio it adopted in the 1986 Act. In 1997, the Sentencing Commission, responding to Congress's rejection of its proposed amendment to the Guidelines, recommended that Congress "revise the federal statutory penalty scheme for both crack and powder cocaine offenses" by adopting a 5:1 ratio (and decreasing the quantity of powder cocaine necessary to trigger the statutory minimums). See United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 9 (1997) (1997 Report) <www.ussc.gov/r_congress/newcrack.pdf>. The Com-

mission did not propose a conforming amendment to the Sentencing Guidelines. In 2002, the Commission recommended that Congress adopt no higher than a 20:1 ratio (this time maintaining the quantity of powder cocaine necessary to trigger the statutory minimums). See 2002 Report 92. The Commission also recommended "using specific sentencing enhancements to target the minority of offenders who engage in the most harmful conduct that concerned Congress in 1986." *Id.* at 91-92. The Commission again did not formally propose an amendment to the Guidelines, but did include model revised guidelines in its report (based on the assumption that Congress would adopt a 20:1 ratio for the triggering quantities). See *id.* at A-1 to A-10. Although a number of bills to lower the 100:1 ratio were introduced in the wake of the Commission's 1997 and 2002 reports, none of the bills was enacted. See *Castillo*, 460 F.3d at 348, 350 (summarizing bills).[2]

B. Facts and Proceedings Below

1. On the evening of May 24, 2004, two police officers in Norfolk, Virginia, observed petitioner in the driver's seat of a vehicle parked in a well-known drug-trafficking area. Another individual was sitting in the passenger's

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[2] Earlier this year, the Sentencing Commission again recommended that Congress alter the ratio used in establishing the statutory minimum sentences for crack-cocaine offenses, although the Commission made no specific recommendation. See 2007 Report 8. The Commission also proposed an amendment to the Guidelines that would lower the base offense levels for those crimes (and subsequently sought comment on whether the amendment should be applied retroactively). See 72 Fed. Reg. 28,571-28,573 (2007); *id.* at 41,794-41,795. That amendment will take effect on November 1, 2007, unless it is modified or disapproved by Congress. See 28 U.S.C. 994(p). The amendment is discussed in further detail at p. 38 n.12, *infra*.

seat, and a third individual was crouched beside the driver's door. When the officers approached, the third individual fled. Petitioner had $125 on his lap; after petitioner agreed to a search of the vehicle, the officers found a bag containing 62 grams of powder cocaine and an additional $5,000. Petitioner and the passenger then attempted to flee; the officers apprehended them and found $1,823 and a magazine of bullets on petitioner's person, along with a loaded firearm that the passenger had dropped. A further search of the vehicle revealed 56 grams of crack cocaine, more powder cocaine, and a large quantity of additional cash. J.A. 30-32, 107-108.

2. On September 13, 2004, a grand jury in the Eastern District of Virginia returned an indictment charging petitioner with conspiring to distribute cocaine (*i.e.*, powder cocaine) and 50 grams or more of cocaine base (*i.e.*, crack cocaine), in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(iii) and (b)(1)(C), and 846; possessing 50 grams or more of cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii); possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c). J.A. 8-14. The indictment specified that petitioner was responsible for approximately 56 grams of crack cocaine and 92.1 grams of powder cocaine. J.A. 10, 11. Petitioner pleaded guilty to all four counts without entering into a plea agreement. J.A. 15-38.

3. Petitioner was sentenced after this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005). In *Booker*, the Court held that the Sixth Amendment applies to the federal Sentencing Guidelines, *id.* at 226-244, and that, as a remedial matter, two provisions of the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*,

should be severed, which would render the Guidelines advisory rather than mandatory, 543 U.S. at 244-268. Petitioner was subject to a statutory sentencing range of ten years to life on the crack-cocaine counts, see 21 U.S.C. 841(b)(1)(A)(iii), and a mandatory consecutive sentence of five years on the firearm-possession count, see 18 U.S.C. 924(c). Based on petitioner's conceded responsibility for 56 grams of crack cocaine and 92.1 grams of powder (which in total, based on the Guidelines' drug equivalency table, was the equivalent of 56.921 grams of crack or 5692.1 grams of powder), see J.A. 36, the presentence report (PSR) determined that petitioner's base offense level under the Guidelines was 32—the same base offense level that petitioner would have received if he had trafficked only 50 grams of crack cocaine (the triggering quantity for the ten-year statutory minimum). J.A. 109; see Guidelines §§ 2D1.1(c)(4), 2D1.1 comment. (n.10). The PSR recommended a two-level upward adjustment for obstruction of justice based on petitioner's false testimony at his co-defendant's trial. J.A. 110. Based on a total offense level of 34 and a criminal history category of II, petitioner's Guidelines sentencing range on the crack-cocaine counts was 168 to 210 months of imprisonment. Guidelines Ch. 5, Pt. A (sentencing table).

In his brief at sentencing, petitioner contended that, in the wake of *Booker*, the district court had the authority to address "the impact of the powder-crack cocaine disparity," J.A. 50, and that "the crack cocaine sentencing scheme with its 100-to-1 ratio generates unjustifiable disparities in sentencing." J.A. 51. Arguing that the district court "need no longer blindly adhere" to the 100:1 ratio, J.A. 52 (citation omitted), petitioner asked the district court to sentence him to the statutory mini-

mum of ten years (or 120 months) on the crack-cocaine counts (for a total sentence, including the mandatory consecutive sentence on the firearm count, of 180 months). J.A. 53. At the sentencing hearing, petitioner additionally argued that the court should vary downward from the Guidelines range because his prior convictions were for misdemeanor offenses and because he had a work history that was without incident. J.A. 70-71.

The district court agreed with the PSR that petitioner's Guidelines sentencing range on the drug counts was 168 to 210 months of imprisonment, but nevertheless sentenced petitioner to the statutory minimum of 120 months on the crack-cocaine counts. J.A. 67-68, 72-76. The court stated that "[i]t is the Court's humble view that to impose a [total] sentence of 19 to 22 years in this case is ridiculous." J.A. 72. Such a sentence, the court reasoned, would "impose[] more punishment, given the record here, than is necessary to accomplish what needs to be done." *Ibid.* The court asserted that, "[w]hile the Congress, the Sentencing Commission recognizes that crack cocaine has not caused the damage that the Justice Department alleges it has, the Justice Department has yet to recognize the disproportionate and unjust effect that crack cocaine guidelines have in sentencing." *Ibid.* "This case," according to the court, "is another example of how the crack cocaine guidelines are driving the offense level to a point higher than is necessary to do justice." *Ibid.* The court added that "[i]t's amazing 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 guidelines range comes down so significantly that it's unbelievable." J.A. 74. The

court reasoned that a lower sentence was necessary in order to "avoid imposing an unwarranted disproportionate sentence." *Ibid.*

Although the district court primarily relied, in imposing sentence, on its disagreement with the disparity in sentences for crimes involving crack and powder cocaine, the court also cited petitioner's limited criminal history, his work history, and his prior military service. J.A. 73, 74. The court expressed the view that the resulting sentence was still "too long," but acknowledged that it was bound by the statutory minimum on the crack-cocaine counts. J.A. 75. When the government sought to preserve its objection to the sentence, the court stated that it "f[ou]nd it absolutely ridiculous [that] the Department of Justice demands the heart and lungs, feet, and everything else in a case on these facts." J.A. 77.

4. In an unpublished per curiam opinion, the court of appeals vacated the sentence and remanded for resentencing. J.A. 96-98. Citing its then-recent decision in *United States* v. *Eura*, 440 F.3d 625 (4th Cir. 2006), petition for cert. pending, No. 05-11659 (filed June 20, 2006), in which it had held that "a sentence that is outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses," the court of appeals reasoned that the district court erred by "conclud[ing] that the crack to powder cocaine disparity warranted a sentence below the applicable sentencing guideline range." J.A. 98.

In *Eura*, the district court had calculated the defendant's sentence for a crime involving crack cocaine as if "the Commission's 2002 recommendation [of a 20:1 ratio] [had] been adopted by Congress." 440 F.3d at 631 n.6.

The court of appeals concluded that the sentence was unreasonable. *Id.* at 632. The court of appeals explained that "giving a sentencing court the authority to sentence a defendant based on its view of an appropriate ratio between crack cocaine and powder cocaine would inevitably result in an unwarranted disparity between similarly situated defendants." *Id.* at 633. Such disparities, the court of appeals reasoned, "tell us that sentencing courts should not be in the business of making legislative judgments concerning crack cocaine and powder cocaine." *Ibid.*

The court of appeals then observed that "Congress has made a decision to treat crack cocaine dealers more severely than powder cocaine dealers" and "has also decided to instruct sentencing courts to avoid disparate sentences for crack cocaine dealers." *Eura*, 440 F.3d at 633. Based on those observations, the court concluded that "it simply would go against two explicit Congressional directives to allow sentencing courts to treat crack cocaine dealers on the same, or some different judicially-imposed, plane as powder cocaine dealers." *Ibid.* The court added that "allowing sentencing courts to subvert Congress' clearly expressed will certainly does not promote respect for the law, provide just punishment for the offense of conviction, or result in a sentence reflective of the offense's seriousness as deemed by Congress." *Ibid.* The court noted that "it does not follow that *all* defendants convicted of crack cocaine offenses must receive a sentence within the advisory sentencing range," but that, in imposing a below-Guidelines sentence, "a sentencing court must identify the *individual* aspects of the *defendant's case* that fit within the [statutory sentencing] factors." *Id.* at 634.

Judge Michael concurred in part and concurred in the judgment in *Eura*, reasoning that a court could not *solely* rely on its disagreement with the disparity in sentences for trafficking crack and powder cocaine in imposing a below-Guidelines sentence. 440 F.3d at 634-639.

SUMMARY OF ARGUMENT

A. Congress has the power to prescribe the appropriate level of punishment for criminal offenses. It may not only set minimum and maximum penalties for an offense, but also restrict the courts' exercise of discretion within the statutory sentencing range. Where Congress imposes such restrictions, and where those restrictions do not violate the Constitution, courts are bound to abide by them. That is true even though courts otherwise have broad discretion in imposing sentence under the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, as modified by this Court in *United States* v. *Booker*, 543 U.S. 220 (2005). The Sentencing Guidelines are now advisory, and courts may vary based solely on policy considerations, including disagreements with the Guidelines. But where Congress has made a specific policy determination concerning a particular offense (or offense or offender characteristic) that legally binds sentencing courts, and the Commission (as it must) incorporates that policy judgment into the Guidelines in order to maintain a rational and logical sentencing structure, that specific determination restricts the general freedom that sentencing courts have to apply the factors set forth in 18 U.S.C. 3553(a). Congress did not intend for the general standards in Section 3553(a) to trump specific policy determinations that Congress itself directs to sentencing courts. *Booker* provides for

review of sentences for "reasonableness," and a sentencing court does not act reasonably when it rejects a specific congressional mandate.

B. As almost all of the courts of appeals that have addressed the issue have held, Congress has made a binding policy determination with regard to the relative severity of trafficking crimes involving crack and powder cocaine. Congress has determined, first, that, in sentencing a defendant for a crack-cocaine offense, a court should take into account the quantity of crack involved, and second, that a court should do so in a manner that respects the 100:1 ratio of powder to crack used by Congress in establishing the sentencing ranges for offenses involving those two substances. Congress's policy determination is embodied in the structure of the Anti-Drug Abuse Act of 1986 (1986 Act), Pub. L. No. 99-570, 100 Stat. 3207, which establishes that, in sentencing defendants who distribute quantities of crack cocaine (or other regulated drugs), courts should take the quantities into account and sentence defendants accordingly. That determination is not limited solely to the specific mandatory minimum sentences that Congress linked to the 100:1 ratio. Rather, the Commission incorporated that determination into the relevant provisions of the Sentencing Guidelines, which establish different sentencing ranges based on differing quantities in order to provide a logical and coherent sentencing structure. The 100:1 ratio in the Guidelines is thus a direct and necessary consequence of the directions Congress gave to sentencing courts in the 1986 Act.

To the extent there was any doubt, however, Congress subsequently made clear, in rejecting the Sentencing Commission's proposed amendment that would have replaced the 100:1 ratio with a 1:1 ratio, that any change

in the ratio must come from Congress, not the Commission. Because Congress has left the 100:1 ratio in place—even in the face of sustained criticism of that ratio from the Commission and repeated legislative proposals to amend it—courts must impose sentence in a manner that respects the ratio. Under petitioner's contrary understanding of the relevant congressional policy, courts would be free to form whatever judgments they like about the comparative severity of crack-cocaine and other drug offenses, seemingly including use of 5:1, 20:1, or other judge-specific ratios, subject only to the applicable statutory minimum and maximum sentences and reasonableness review. That approach is a recipe for widespread disparity, and the Court should reject it as inconsistent with congressional intent.

C. Because *Congress* has made a binding policy determination concerning sentencing for crack-cocaine offenses that applies to both sentencing courts and the Commission, this case does not present the issue whether district courts may vary from the *Sentencing Guidelines* standing alone based on a reasoned disagreement with Commission policy. This case involves a sentencing structure created by Congress directly, not solely through the medium of the Commission's now-advisory work. Courts therefore may not second-guess the 100:1 ratio as a policy matter. But Congress's policy determination about the relative severity of crack and powder offenses does not effectively render the Guidelines mandatory for crack-cocaine offenses; courts remain free to vary from the Guidelines sentencing range in crack-cocaine cases based on *other* policy considerations (or on relevant facts), subject to subsequent reasonableness review. For largely the same reasons, Con-

gress's establishment of a policy on this one issue does not raise Sixth Amendment difficulties.

D. Because the district court in this case relied on an impermissible factor in sentencing petitioner, *i.e.*, its disagreement with and rejection of the 100:1 ratio adopted by Congress, the court of appeals correctly held that the district court committed error. On remand, the district court should be required to resentence petitioner without reliance on that invalid consideration.

ARGUMENT

A DISTRICT COURT MAY NOT REDUCE A DEFENDANT'S SENTENCE BASED ON ITS DISAGREEMENT WITH THE 100:1 RATIO ADOPTED BY CONGRESS FOR CALCULATING SENTENCES FOR CRIMES INVOLVING CRACK AND POWDER COCAINE

Under the Constitution, Congress has the power to set sentencing policy. With regard to crack-cocaine and powder-cocaine offenses, Congress has determined that crack offenders should receive significantly greater penalties than powder offenders, and it has directed courts to apply a 100:1 ratio used in setting the statutory sentencing ranges. The same ratio is incorporated in the Sentencing Guidelines in order to establish a proportional and consistent sentencing structure. As the overwhelming majority of courts of appeals to have addressed the issue have held,[3] when a sentencing court

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[3] See *United States* v. *Ricks*, No. 05-4832, 2007 WL 2068098, at *5 (3d Cir. July 20, 2007); *United States* v. *Leatch*, 482 F.3d 790, 791-792 (5th Cir. 2007) (per curiam), petition for cert. pending, No. 06-12046 (filed June 21, 2007); *United States* v. *Spears*, 469 F.3d 1166, 1176-1178 (8th Cir. 2006) (en banc), petition for cert. pending, No. 06-9864 (filed Mar. 2, 2007); *United States* v. *Castillo*, 460 F.3d 337, 361 (2d Cir. 2006); *United States* v. *Jointer*, 457 F.3d 682, 687 (7th Cir. 2006), petition for

bases its sentence in whole or in part on its categorical disagreement with Congress's policy determination, the resulting sentence is necessarily unreasonable. The district court did precisely that in this case, and the court of appeals therefore correctly vacated the sentence.

A. Congress's Policy Determinations Concerning The Appropriate Level Of Punishment For Criminal Offenses Are Binding On Sentencing Courts

1. This Court has long recognized that the Constitution assigns to Congress the power to define criminal offenses and to prescribe the appropriate level of punishment for those offenses. As Chief Justice Marshall explained, "the power of punishment is vested in the legislative, not in the judicial department," and "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); accord *Whalen* v. *United States*, 445 U.S. 684, 689 (1980); *Gore* v. *United*

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cert. pending, No. 06-7600 (filed Oct. 27, 2006); *United States* v. *Williams*, 456 F.3d 1353, 1369 (11th Cir. 2006), cert. dismissed, 127 S. Ct. 3040 (2007); *United States* v. *Eura*, 440 F.3d 625, 633-634 (4th Cir. 2006), petition for cert. pending, No. 05-11659 (filed June 20, 2006); *United States* v. *Pho*, 433 F.3d 53, 64 (1st Cir. 2006); see also *United States* v. *McCullough*, 457 F.3d 1150, 1172 (10th Cir. 2006) (dictum), cert. denied, 127 S.Ct. 988 (2007). By contrast, the District of Columbia Circuit has held that a district court errs when it concludes that it lacks discretion to *consider* the 100:1 ratio in imposing sentence. See *United States* v. *Pickett*, 475 F.3d 1347, 1351-1356 (2007), petition for cert. pending, No. 07-218 (filed Aug. 20, 2007). The Third Circuit had similarly held in *United States* v. *Gunter*, 462 F.3d 237 (2006), but it qualified that holding in *United States* v. *Ricks*, *supra*, by making clear that a sentencing court cannot categorically replace the 100:1 ratio with one of its own.

States, 357 U.S. 386, 393 (1958); *United States* v. *Evans*, 333 U.S. 483, 486 (1948).

Congress may exercise its power to prescribe the appropriate level of punishment either by specifying the penalty for an offense or by setting minimum and maximum penalties for the offense (and leaving it to judicial discretion to choose a sentence within the statutory sentencing range). See, *e.g.*, *Chapman* v. *United States*, 500 U.S. 453, 467 (1991). Should Congress provide a statutory sentencing range, it may impose restrictions on the manner in which courts exercise their discretion within the range. Typically, Congress has "delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within [a] * * * wide [statutory] range." *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989). But this Court has emphasized that "the scope of judicial discretion with respect to a sentence is subject to congressional control." *Ibid.*; cf. *Harris* v. *United States*, 536 U.S. 545, 567 (2002) (plurality opinion) (explaining that, "[w]ithin the range authorized by the jury's verdict, * * * the political system may channel judicial discretion").[4]

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[4] Occasionally, Congress has provided explicit guidance about the exercise of judicial discretion in sentencing within a range. For example, in 27 U.S.C. 91 (1934), Congress provided that, in sentencing within the five-year maximum for certain violations of the Prohibition laws, "it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law." Guidance of that type reflects only what it is implicit in Congress's provision of a sentencing range, *i.e.*, that courts should graduate sentences within the range according to the degree of the defendant's culpability. Indeed, "the only rational purpose in prescribing maximum and minimum penalties is to enable just such discrimination, and, so far as human judgment can effect it, to fit the punishment

When Congress makes policy determinations concerning the appropriate level of punishment for criminal offenses—whether it does so by specifying the penalty for the offense, setting minimum and maximum penalties, or by limiting the exercise of judicial discretion within the statutory sentencing range—courts are bound to adhere to those determinations. That principle is rooted in the separation of powers, because determinations concerning the appropriate level of punishment are no different from other legislative determinations that courts are obliged to respect. See, *e.g.*, *Ewing* v. *California*, 538 U.S. 11, 29 (2003) (plurality opinion) (noting that courts must "accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions"); *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 541 (1989) (concluding that "[t]he judiciary should not substitute its judgment as to seriousness [of an offense] for that of a legislature, which is far better equipped to perform the task") (internal quotation marks and citation omitted); *Harmelin* v. *Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (observing that "[d]eterminations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions" and that "the responsibility for making these fundamental choices and implementing them lies with

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to the particular offense." *Foster* v. *United States*, 47 F.2d 892, 892-893 (7th Cir. 1931). Accordingly, *Foster* rejected a claim that Congress's direction to the sentencing court in former Section 91 infringed the right to jury trial, explaining that "[t]he judge who, having power and discretion to fix the penalty within the prescribed statutory limits, would not in all circumstances discriminate between casual or slight violations and those which are more serious, would be unworthy of his high office." *Id.* at 892.

the legislature"). Courts may refuse to follow congressional policy determinations concerning sentencing only when those determinations violate the Constitution, *e.g.*, by imposing cruel and unusual punishment or a constitutionally excessive fine. See *United States* v. *Bajakajian*, 524 U.S. 321 (1988).

2. In the Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3551 *et seq.*, Congress established general considerations that courts must take into account in exercising their sentencing discretion. Specifically, Congress directed courts, "in determining the particular sentence to be imposed," to consider seven factors:

(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 * * * the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines * * * issued by the Sentencing Commission";

(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."

18 U.S.C. 3553(a) (2000 & Supp. IV 2004). Congress further required courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth" in paragraph (2). *Ibid.*

While Congress in the SRA directed courts to consider the enumerated factors in exercising their sentencing discretion, Congress also *required* courts to impose the sentence set forth in the Sentencing Guidelines (unless there was a basis for departing from the Guidelines range). 18 U.S.C. 3553(b)(1) (Supp. IV 2004). In *United States* v. *Booker*, 543 U.S. 220 (2005), the Court held that the Sixth Amendment applies to the federal Sentencing Guidelines, *id.* at 226-244, and that, as a remedial matter, Section 3553(b)(1), which had made the Guidelines mandatory, should be severed, *id.* at 244-268. As modified by *Booker*, "[the SRA] makes the Guidelines effectively advisory"; "[i]t requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." *Id.* at 245-246 (citations omitted). The Court also severed an appellate-review provision, 18 U.S.C. 3742(e) (2000 & Supp. IV 2004), which required de novo review of decisions to depart from the Guidelines, and required instead that courts of appeals determine "whether the sentence 'is unreasonable' with regard to [18 U.S.C. § 3553(a)]." 543 U.S. at 261.

In the wake of *Booker*, district courts must consider the broad factors enumerated in Section 3553(a) in imposing sentence. In considering those factors, however, district courts do not have limitless discretion, but are bound by any specific policy determinations that Congress has directed sentencing courts to observe concerning particular offenses (or offense or offender characteristics). Where Congress has made such specific policy determinations, they will not ordinarily conflict with the generally applicable sentencing factors in Section 3553(a); instead, Congress's determinations will simply give content to, and inform the application of, those factors. See, *e.g.*, *United States* v. *Castillo*, 460 F.3d 337, 357 (2d Cir. 2006) (noting that "courts do not operate in a vacuum" in applying the Section 3553(a) factors). But if a specific mandatory policy that Congress directs to sentencing courts does create a conflict with what a district court believes to be the general charge of Section 3553(a), the specific expressions of Congress's will must control, under the familiar canon of construction that the specific governs the general. See, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2348 (2007); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *Guidry* v. *Sheet Metal Workers Pension Fund*, 493 U.S. 365, 375 (1990); *Simpson* v. *United States*, 435 U.S. 6, 15 (1978).[5] Congress cannot be thought to have licensed courts under the general guise of Section 3553(a) to disagree with, and thus nullify, specific policy directions that Congress itself has also given to sentencing courts. Thus, when a court disagrees with specific

[5] That is not to say that there will always be a conflict between specific and general statutes, because the Section 3553(a) factors themselves accommodate the specific judgments of Congress concerning, *inter alia*, "the seriousness of the offense." 18 U.S.C. 3553(a)(2)(A).

statutory policies embodied in directions to the sentencing court (and the court relies on that disagreement in imposing sentence), the resulting sentence will necessarily be unreasonable.[6]

For example, in considering the directive in Section 3553(a)(2)(A) to take into account "the need for the sentence imposed * * * to reflect the seriousness of the offense" (or the directive in Section 3553(a)(1) to take into account "the nature and circumstances of the offense"), a sentencing court is bound by any congressional policy determination directed to the sentencing court concerning the seriousness of a particular offense or offense characteristics—just as a sentencing court would be bound by a statute specifying the penalty for that offense. If Congress were to provide that a court should ordinarily sentence a defendant convicted of armed bank robbery toward the top of the statutory sentencing range where the defendant was found to have committed the robbery with an automatic rifle, a district court could not sentence the defendant at the bottom of the range based on its own view that bank robberies committed with automatic rifles are categorically no more "serious" than other armed bank robberies. So too the courts are bound by Congress's judgment that

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[6] As this Court recently explained in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), "appellate 'reasonableness' review merely asks whether the trial court abused its discretion." *Id.* at 2465. A disagreement with a congressional policy determination constitutes a legal error giving rise to an abuse of discretion. See *Koon* v. *United States*, 518 U.S. 81, 100 (1996) (noting that "[t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions"); *Rita*, 127 S. Ct. at 2483 n.6 (Scalia, J., concurring) (explaining that reasonableness review "includes the limiting of sentencing factors to permissible ones").

crack-cocaine offenses are much more serious than offenses involving comparable amounts of powder cocaine.

Similarly, in considering the directive in Section 3553(a)(6) to take into account "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," a sentencing court is bound by any congressional policy determination concerning the similarity of certain conduct to other conduct (and the appropriateness of a sentencing disparity)—just as a sentencing court would be bound by statutes specifying different penalties for each type of conduct. See, *e.g.*, *United States* v. *Sebastian*, 436 F.3d 913, 916 (8th Cir. 2006) (concluding that "[t]he command that courts should consider the need to avoid 'unwarranted sentence disparities' * * * emanates from a statute, and it is thus within the province of the policymaking branches of government to determine that certain disparities are warranted, and thus need not be avoided"). If Congress were to provide that, for sentencing purposes, a court should treat an armed robbery committed with an automatic rifle the same as an armed robbery committed with a silenced pistol, a district court could not sentence a defendant who used an automatic rifle more harshly based on its own view that such an armed robbery is not "similar" to an armed robbery with a silenced pistol, or that a disparity in sentencing between the two types of armed robbery is "warranted." Moreover, freedom to disregard such congressional judgments and allow each judge to assess the relative severity of certain conduct is an invitation to disparity that Section 3553(a)(6) charges courts to avoid.

Nothing in this Court's decision in *Booker* altered a sentencing court's obligation to adhere to specific congressional policy determinations in sentencing. See,

e.g., *United States* v. *Cannon*, 429 F.3d 1158, 1161 (7th Cir. 2005) (concluding that "*Booker* does not permit courts to make independent decisions about the wisdom of legislation"). While sentencing courts are to treat the Guidelines as advisory and to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth" in Section 3553(a)(2), that general responsibility does not authorize a sentencing court to contravene a congressional policy determination.

3. Like sentencing courts, the Sentencing Commission itself is bound by specific congressional policy determinations. For the most part, Congress delegated discretionary authority to the Sentencing Commission to formulate Guidelines for classes of offenses and offenders in order to effectuate the goals of sentencing set out in the SRA. See *Rita* v. *United States*, 127 S. Ct. 2456, 2463 (2007); *Mistretta*, 488 U.S. at 374. That discretion is not unlimited, however, because Congress provided substantial guidance to the Commission about the general principles to incorporate into the Guidelines. For example, Congress required the Commission to provide sentences at or near the statutory maximum for certain career offenders, 28 U.S.C. 994(h); to require substantial terms of imprisonment for certain drug offenders, 28 U.S.C. 994(i)(5); and to reflect the fact that many pre-SRA sentences had not accurately captured the seriousness of the offense, 28 U.S.C. 994(m). See *Mistretta*, 484 U.S. at 377 (noting that, "although Congress granted the Commission substantial discretion in formulating guidelines, in actuality it legislated a full hierarchy of punishment—from near maximum imprisonment, to substantial imprisonment, to some imprisonment, to alternatives—and stipulated the most important offense and

offender characteristics to place defendants within these categories").

When the Commission acts under such congressional guidance, the guidelines it produces are, under *Booker*, best understood as advisory. A district court may therefore sentence based on policy considerations that differ from those reflected in the Guidelines (subject to reasonableness review on appeal). See U.S. Br. at 35-37, *Gall* v. *United States*, No. 06-7949. The same appears to be true even if Congress imposes a specific mandate on the Commission to write a particular guideline or if Congress writes language in the Guidelines manual itself. As long as Congress expresses its will wholly through the Guidelines system, the policies in the Guidelines will be best understood as advisory under *Booker* and subject to the general principles of sentencing in Section 3553(a).[7]

Matters are different when Congress expresses its policy not wholly through the Guidelines, but through *direct* sentencing requirements imposed on courts. In that situation, the Guidelines *must* reflect and incorporate Congress's policy judgments because of the necessity of coordinating the Guidelines with sentencing statutes. The resulting "guideline" is essentially just a reflection of the direct congressional policy mandate to sentencing courts. Only by incorporating the direct congressional sentencing mandate to the district courts into such a guideline can the Commission both conform to Congress's will and provide a coherent sentencing

[7] Of course, as the United States noted in its brief in *Gall* (at 37 n.11), the nature and specificity of policy judgments in the Guidelines can also inform the substantive reasonableness review envisioned by *Booker* and *Rita*. A policy-based variance from the Guidelines is not entitled to as much deference on reasonableness review as a fact-based variance.

scheme that avoids unwarranted disparities. But the resulting guideline differs from ordinary guidelines. A sentencing court that purports to reject such a guideline for policy reasons would be disagreeing not just with the action of the Commission, but with a direct mandate of Congress.

Two critical features combine to distinguish guidelines that simply implement the SRA from guidelines that incorporate congressional policy in a manner that binds district courts even after *Booker*. First, Congress has directed the Commission to promulgate guidelines that are "consistent with all pertinent provisions of any Federal statute." 28 U.S.C. 994(a). When those provisions contain sentencing directives that bind district courts, the Commission cannot override or ignore them. Cf. *United States* v. *LaBonte*, 520 U.S. 751, 757 (1997) (invalidating amendment to the career offender guideline, Guidelines § 4B1.1, that violated 28 U.S.C. 994(h)'s provision that the Commission must "assure" that a career offender receive a sentence "at or near the maximum term authorized," and explaining that the Commission's discretion "must bow to the specific directives of Congress"). Second, the Commission, like Congress, has an obligation to provide a "rational sentencing scheme." *Chapman* v. *United States*, 500 U.S. 453, 465 (1991) (upholding the rationality of 21 U.S.C. 841(b), which "assigns more severe penalties to the distribution of larger quantities of drugs"). The Commission cannot formulate a rational guidelines scheme without logically linking its penalties to the sentencing directions that Congress has given directly to the courts. An irrational disconnect between the guidelines and Congress's directions to sentencing courts would undermine the sentencing statutes and create an unworkable and incoherent system. Accordingly, when Congress establishes a sentencing pol-

icy that binds both the Commission and the courts, individual judges cannot lawfully impose sentences based on disagreements with that policy.

B. Congress Has Determined That, In Sentencing A Defendant For A Crack-Cocaine Offense, A Court Should Take Into Account The Quantity Of Crack Involved And Sentence The Defendant In A Manner That Respects The 100:1 Ratio

Congress has established precisely such a binding sentencing policy with regard to the relative severity of trafficking crimes involving crack and powder cocaine. Specifically, Congress has made clear, first, that, in sentencing a defendant for a crack-cocaine offense, a court should take into account the quantity of crack involved, and second, that, a court should do so in a manner that respects the 100:1 ratio of powder to crack used by Congress in establishing the sentencing ranges for offenses involving those two substances. Petitioner's attempt to limit Congress's policy merely to statutory minimum terms is unsustainable.

1. In the Anti-Drug Abuse Act of 1986 (1986 Act), Pub. L. No. 99-570, 100 Stat. 3207, Congress established a three-tier penalty system for certain drugs, based on the quantity of the distributed substance. In setting the threshold quantities required to trigger the top two tiers of sentencing ranges, the 1986 Act first adopted the 100:1 ratio of powder to crack cocaine, such that each threshold for powder was set at 100 times the corresponding threshold for crack. See 21 U.S.C. 841(b)(1)(A)(ii)-(iii) and (b)(1)(B)(ii)-(iii).[8] In doing so, Congress

[8] The 100:1 ratio refers only to the relative *quantities* necessary to trigger the same *sentences* for trafficking crimes involving crack and powder cocaine, not to the relative *sentences* imposed for crimes involving the same *quantity*. See *Pho*, 433 F.3d at 55 n.2. Although the

clearly intended to impose significantly greater penalties on distributors of crack cocaine than similarly situated distributors of powder cocaine. See *United States* v. *Williams*, 456 F.3d 1353, 1367 (11th Cir. 2006) (noting that "Congress's decision to punish crack cocaine offenders more severely than powder cocaine offenders is plainly a policy decision" and "reflects Congress's judgment that crack cocaine poses a greater harm to society than powder cocaine"), cert. dismissed, 127 S. Ct. 3040 (2007); see generally *Frank* v. *United States*, 395 U.S. 147, 148 (1969) (explaining that "[t]he most relevant indication of the seriousness of an offense is the severity of the penalty authorized for its commission"). Accordingly, any sentence that purports to equate the severity of an offense involving crack cocaine to that of an offense involving a similar amount of powder cocaine cannot be squared with Congress's policy mandate.

Nor does the scheme leave any doubt as to how much more severely offenses involving crack are to be treated. Congress chose a 100:1 ratio. Contrary to petitioner's contention (Br. 24), in enacting the 1986 Act, Congress did not simply establish *minimum* sentences for crack-cocaine offenses. Implicit in the 1986 Act was a structural determination for courts and the Commission, as they dealt with defendants who distributed quantities of crack cocaine that were below, between, or above the two specified "reference points." Specifically, the Act

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sentence for a crime involving a given quantity of crack cocaine is typically substantially longer than the sentence for a crime involving the same quantity of powder cocaine, that disparity is invariably much smaller than 100:1. See *ibid.* (citing United States Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* 19 (2002) <www.usdoj.gov/olp/pdf/crack_powder2002.pdf>); United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* 12-14 (2007) (2007 Report).

contemplates graduated sentencing that would maintain a proportional, quantity-based progression around the minimum sentences specified for the threshold amounts of crack. Such sentences would necessarily respect the 100:1 ratio of powder to crack, because, as one court has explained, "it would be illogical to set the maximum and minimum sentences on one construct and then to use some other, essentially antithetic construct as the basis for fashioning sentences within the range." *United States* v. *Pho*, 433 F.3d 53, 63 (1st Cir. 2006); cf. *United States* v. *Pickett*, 475 F.3d 1347, 1355 (D.C. Cir. 2007) (acknowledging that "[i]t may be logical to suppose that, given the structure of § 841, the greater the weight of the mixture containing the drug, the greater the sentence should be"), petition for cert. pending, No. 07-218 (filed Aug. 20, 2007).

Perhaps most significantly, a sentencing method that either did not take into account the quantity of crack involved or did so in a manner inconsistent with the 100:1 ratio would lead to drastic and obviously unwarranted sentencing disparities, or "cliffs," based on insignificant differences in drug quantities. Under such a method, a defendant who was responsible for a quantity of crack cocaine that was just below the triggering quantity for a statutory minimum sentence—*e.g.*, 49 grams—could receive a considerably lower sentence than an otherwise identically situated defendant who was responsible for the triggering quantity (and thus subject to the statutory minimum). While Congress did not *expressly* "direct[] the Sentencing Commission to incorporate the 100:1 ratio in the Guidelines" (Pet. Br. 15), it would be logically incoherent to read the 1986 Act not to require the Commission and sentencing courts to apply a graduated penalty structure that takes drug quantity into ac-

count (and does so in a manner that respects the 100:1 ratio).

Notably, when the Sentencing Commission established the relevant Sentencing Guidelines for drug-trafficking offenses in 1987, it read the 1986 Act the same way. The Commission adopted sentencing ranges that used the triggering quantities of crack cocaine (and other drugs subject to the three-tier system) as "reference points"; set offense levels for those quantities that would presumptively lead to sentences at or just above the statutory minimums; and established graduated offense levels, whereby the offense level would increase (or decrease) in two-level increments as the amount of the drug increased (or decreased) from those quantities. See Guidelines § 2D1.1(c). The consequence of that approach was to carry forward the 100:1 powder-to-crack ratio that Congress used in the statutory sentencing ranges.[9] Critically, the Commission explained that the "further refinement of drug amounts" reflected in the Guidelines was "essential to provide a logical sentencing structure for drug offenses" in light of the statutory minimums adopted in the 1986 Act. Guidelines § 2D1.1, comment. (backg'd). The Commission thereby recognized that, in the wake of the 1986 Act (and its own obligation to "reduc[e] unwarranted sentence disparities," 28 U.S.C. 994(f)), it "was left no choice but to employ the same ratio in crafting the various Guidelines ranges within th[e] statutory ranges." *Williams*, 456 F.3d at 1368.

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[9] The Commission used the same ratios in devising the drug equivalency table, which is used where (as here) a defendant is responsible for quantities of multiple drugs. See Guidelines § 2D1.1 comment. (n.10).

2. In 1995, Congress rejected the Commission's proposal to amend the Guidelines and replace the 100:1 ratio with a 1:1 ratio (thus imposing the same penalties on otherwise identical offenses involving crack and powder cocaine). See Pub. L. No. 104-38, 109 Stat. 334.[10] Congress expressed the view that the 1:1 ratio proposed by the Commission was too low, emphasizing that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine." § 2(a)(1)(A), 109 Stat. 334.

In rejecting the Commission's proposed amendment, however, Congress not only disapproved of the 1:1 ratio, but went further and made clear what was implicit in the structure of the 1986 Act: *i.e.*, that the 1986 Act required the Commission (and sentencing courts) to take drug quantities into account, and to do so in a manner that respects the 100:1 ratio. Specifically, while Congress "authorized consideration of alternative approaches" (Pet. Br. 26) by inviting the Commission to propose a more modest revision to the 100:1 ratio, Congress indicated that any such revision would require changes not only to the relevant guidelines, but also to the 1986 Act itself—thereby reflecting Congress's understanding that the 1986 Act mandated adherence to the 100:1 ratio in imposing sentence. See, *e.g.*, Pub. L. No. 104-38, § 2(a)(1), 109 Stat. 334 (directing the Commission to "submit to Congress recommendations (and

[10] The Sentencing Commission had issued its proposed amendment in response to a congressional directive to provide a report that "address[es] the differences in penalty levels that apply to different forms of cocaine and include any recommendations that the Commission may have for retention or modification of such differences in penalty levels." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280006, 108 Stat. 2097.

an explanation therefor), regarding changes to *the statutes and sentencing guidelines* governing sentences for * * * trafficking of cocaine") (emphasis added); § 2(a)(2), 109 Stat. 335 (providing that the Commission "shall propose revision of the drug quantity ratio of crack cocaine to powder cocaine under *the relevant statutes and guidelines* in a manner consistent with the ratios set for other drugs and consistent with the objectives set forth in [18 U.S.C. 3553(a)]") (emphasis added). Congress's rejection of the proposed amendment therefore constituted "a clear statement of Congressional belief that changing the Guidelines ratio without changing the mandatory minimums would result in an unwarranted disparity, while retaining the ratio at 100:1 would not." *Castillo*, 460 F.3d at 358.

The legislative history to the 1995 statute confirms that Congress understood that any proposed sentencing system that takes drug quantity into account in a manner inconsistent with the 100:1 ratio would conflict with the structure of the 1986 Act. The House Report expressed concern that the proposed amendment would give rise to sentencing "cliffs" near the triggering quantities—a concern that, as explained above, would exist whenever a sentencing system was based on a ratio other than 100:1 (but the statutory minimums based on the 100:1 ratio remained). See H.R. Rep. No. 272, 104th Cong., 1st Sess. 4 (1995) (noting that, if the "amendments went into effect without Congress lowering the current statutory mandatory minimum penalties, it would create gross sentencing disparities" around the statutory minimum and thereby "establish penalties for crimes that stand in sharp contrast with statutory mandatory minimum penalties"). And the principal sponsors of the statute stated not only that the proposed amendment was inconsistent with the 1986 Act, but that any

significant change in sentencing for crack-cocaine offenses would require legislative action. See pp. 8-9, *supra* (quoting statements of Sen. Abraham and Rep. McCollum).[11]

In 1997 and 2002, the Sentencing Commission issued reports criticizing the 100:1 ratio. Notably, however, in both of those reports, the Commission, consistent with the view expressed by Congress in rejecting the Commission's proposed amendment in 1995, seemingly acknowledged that Congress would need to take action before the Commission could deviate from the 100:1 ratio, and duly recommended that Congress do so (on the understanding that the Commission would then make conforming changes to the relevant guidelines). See, *e.g.*, United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 9 (1997) (recommending that Congress "revise the federal statutory penalty scheme for both crack and powder cocaine offenses" by, *inter alia*, adopting a 5:1 ratio); United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* 92 (2002) (recommending, *inter alia*, that Congress "decreas[e] the residual quantity-based penalties that apply to all crack cocaine offenders" by adopting no higher than a 20:1 ratio); but cf. *id.* at 90 (stating that "the legislative history is ambiguous as to whether Congress intended the penalty structure for crack cocaine offenses to fit within the general two-tiered, five and ten-year penalty structure for serious and major traf-

[11] Cf. H.R. Rep. No. 460, 103d Cong., 2d Sess. 5 (1994) (noting that, under "safety valve" provision, the least culpable offenders would receive two-year sentences, and "[the] Guideline ranges for other offenders would be expected to increase progressively, in proportion to indicia of culpability or seriousness, from the floor of the two year guideline range").

fickers created by the 1986 Act"). Those reports confirm the Commission's understanding, dating from the initial Guidelines on drug quantity in 1987, that the Commission, like courts, is required to take drug quantities into account in setting sentences for crack-cocaine offenses, and that it is required to do so in a manner that respects the 100:1 ratio. *A fortiori*, by the Commission's own reasoning, the Commission's criticism of the 100:1 ratio in its reports cannot defeat Congress's *adoption* of the 100:1 ratio in the 1986 Act.[12]

3. Since 1995, Congress has taken no action to alter the 100:1 ratio, despite the Sentencing Commission's reports criticizing that ratio. Although a number of bills

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[12] Earlier this year, the Sentencing Commission again recommended that Congress alter the ratio used in establishing the statutory minimum sentences for crack-cocaine offenses, although the Commission made no specific recommendation. See 2007 Report 8. In doing so, the Commission reiterated that "establishing federal cocaine sentencing policy, as underscored by past actions, ultimately is Congress's prerogative." *Id.* at 9. The Commission simultaneously proposed an amendment to the Guidelines that would lower base offense levels for crack-cocaine offenses by two levels (and make conforming changes to the drug equivalency table)—with the result that, at quantities that trigger a statutory minimum sentence, the statutory minimum sentence would fall near the top, rather than at the bottom, of the resulting Guidelines sentencing range. See 72 Fed. Reg. 28,571-28,573 (2007). Although the Commission makes no reference in its accompanying report to the effect of the proposed amendment on the ratio, the amendment implements a ratio of powder to crack cocaine that varies (at different offense levels) from 25:1 to 80:1. That amendment will take effect on November 1, 2007, unless it is modified or disapproved by Congress. See 28 U.S.C. 994(p). Should Congress allow the amendment to take effect, it could apply in this case only if it were made retroactive, see 18 U.S.C. 3582(c)(2); 18 U.S.C. 3742(g)(1) (Supp. IV 2004); 72 Fed. Reg. 41,794-41,795 (2007) (requesting comment on proposal to make amendment retroactive), and if it were held to be valid, see *LaBonte*, 520 U.S. at 757.

to lower the 100:1 ratio have been introduced, none of those bills has been enacted. See *Castillo*, 460 F.3d at 348, 350 (summarizing bills). While members of Congress have "acknowledged that the [100:1] ratio is problematic" (Pet. Br. 15)—and, indeed, Congress has invited the Commission to propose revisions to that ratio—it is well established that "[c]ongressional inaction cannot amend a duly enacted statute." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989).

4. Petitioner's contrary understanding of congressional policy—under which Congress has done nothing more than establish statutory minimums for certain drug offenses, see Pet. Br. 24—would leave courts free not only to impose *lower* sentences for crimes involving crack cocaine (on the basis that the 100:1 ratio embodied in the Guidelines is not congressionally mandated and is excessive), but also to impose *higher* sentences for crimes involving *powder* cocaine (on the same basis). See *id.* at 29 (contending that "a district court not only may, but should, conduct its own evaluation of the 100:1 ratio"). Indeed, it would leave courts free to adopt whatever views they wished about the comparative severity of drugs (subject only to the statutory sentencing ranges and reasonableness review) in cases involving *any* of the drugs subject to Congress's three-tier quantity-based system. Courts thus could register their disagreement with Congress's relative treatment of any combination of those drugs (as reflected in the triggering quantities in the 1986 Act). That is because, as petitioner acknowledges, it necessarily follows from petitioner's understanding of congressional policy that a court could conclude that trafficking in any of those drugs constitutes "similar conduct" for purposes of Section 3553(a)(6) (and impose sentence accordingly), subject only to whatever limits are imposed by appellate reasonableness review.

See *id.* at 30 (contending that "[t]he term 'similar conduct' is broad enough to include all drug offenses"); cf. FPCD Br. 19 (contending that "a sentencing court might appropriately identify *all* cocaine defendants distributing comparable quantities" as having engaged in "similar conduct"). As a result, "the entire drug quantity table could be effectively discarded as courts express differing opinions as to the relative harmfulness of different drugs." *Castillo*, 460 F.3d at 359.

The end result of giving courts the discretion to modify or disregard the 100:1 ratio would be considerable disparities in sentencing for drug offenses. If each sentencing judge is permitted to adopt whatever policy he deems appropriate with regard to individual drugs (subject only to the statutory sentencing ranges), defendants with identical real conduct will receive markedly different sentences, depending on nothing more than the particular judge drawn for sentencing. And each judge could formulate his own ratio—with the result that one judge might use 5:1, another 20:1, and yet a third 100:1.[13] Insofar as a judge adopts ratios of his own or even concludes that trafficking in different quantities of the same drug (within the same statutory range) constitutes "similar conduct" warranting similar sentences, the same judge could end up imposing wildly different sentences based on insignificant variations in drug quantity around the statutory triggers, resulting in sentenc-

[13] While petitioner shrinks from that suggestion, see Br. 32 & n.9, one of his amici embraces it. See ACLU Br. 24 ("If, for example, the sentencing court believes that the 100:1 ratio does not * * * '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).").

ing "cliffs" of varying severity depending on the ratio employed by any particular judge in that judge's courtroom.

The ultimate flaw with petitioner's approach, beyond the "discordant symphony" that would ensue from adopting it, *Booker*, 543 U.S. at 263, is that it cannot be reconciled with the 1986 Act. Under that approach, a court could give a distributor of heroin a lower sentence on the ground that distributors of identical amounts of marijuana and heroin should be given the same sentences; the only difference between that case and one in which a court gives a distributor of crack cocaine a lower sentence is that there may be stronger policy grounds on which to disagree with Congress's judgment concerning the relative severity of crack and powder offenses than its judgment concerning the relative severity of marijuana and heroin offenses.[14] Both of those judg-

[14] Petitioner and his amici contend (Pet. Br. 44; NAACP Br. 4-13; NACDL Br. 23-24; Sentencing Project Br. 22-23) that the 100:1 powder-to-crack ratio disproportionately imposes longer sentences on minorities (especially blacks). Cf. 2007 Report 15-16 (noting that, as of 2006, 81.8% of crack-cocaine offenders are black, 8.8% are white, and 8.4% are Hispanic, whereas 57.5% of powder-cocaine offenders are Hispanic, 27.0% are black, and 14.3% are white). Petitioner and his amici do not contend, however, that use of the 100:1 powder-to-crack ratio would be unconstitutional on that basis, and all of the courts of appeals have long since rejected similar contentions. See, *e.g.*, *United States* v. *Johnson*, 40 F.3d 436, 439-441 (D.C. Cir. 1994), cert. denied, 514 U.S. 1041 (1995); *United States* v. *Singleterry*, 29 F.3d 733, 741 (1st Cir.), cert. denied, 513 U.S. 1048 (1994); *United States* v. *Moore*, 54 F.3d 92, 96-99 (2d Cir. 1995), cert. denied, 516 U.S. 1081 (1996); *United States* v. *Frazier*, 981 F.2d 92, 95 (3d Cir. 1992), cert. denied, 507 U.S. 1010 and 507 U.S. 1011 (1993); *United States* v. *D'Anjou*, 16 F.3d 604, 612 (4th Cir.), cert. denied, 512 U.S. 1242 (1994); *United States* v. *Watson*, 953 F.2d 895, 897-898 (5th Cir.), cert. denied, 504 U.S. 928 (1992); *United States* v. *Lloyd*, 10 F.3d 1197, 1220 (6th Cir. 1993), cert. denied, 511 U.S. 1043 (1994); *United States* v. *Chandler*, 996 F.2d 917,

ments, however, are ones that Congress made in the 1986 Act—and courts therefore lack the discretion to disagree with them. See, *e.g.*, *United States* v. *Gaines*, 122 F.3d 324, 330 (6th Cir.) (noting that "[r]easonable minds can differ as to whether Congress * * * chose the best policy, but as long as the 100:1 ratio does not violate the Constitution, it is for Congress to make the policy choice"), cert. denied, 522 U.S. 962 (1997).

In sum, because "Congress incorporated the 100:1 ratio in the statutory scheme, rejected the Sentencing Commission's 1995 proposal to rid the guidelines of it, and failed to adopt any of the Commission's subsequent recommendations for easing the differential between crack and powdered cocaine," it is clear that "[t]he decision to employ a 100:1 crack-to-powder ratio rather than a 20:1 ratio, a 5:1 ratio, or a 1:1 ratio is a policy judgment, pure and simple." *Pho*, 433 F.3d at 62-63. That policy determination is one that courts, no less than the Sentencing Commission, are bound to respect.

C. Requiring Courts To Adhere To Congress's Policy Determinations Concerning Sentencing For Crack-Cocaine Offenses Would Not Reestablish Mandatory Guidelines Or Violate The Sixth Amendment

1. Petitioner and his amici repeatedly contend that the question presented in this case is whether district courts may disagree *with the Sentencing Guidelines* in imposing sentence for crack-cocaine offenses. See, *e.g.*, Pet. Br. 13; ACLU Br. 20-25; NACDL Br. 5, 11-13. That

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918-919 (7th Cir. 1993) (per curiam); *United States* v. *Lattimore*, 974 F.2d 971, 975-976 (8th Cir. 1992), cert. denied, 507 U.S. 1020 (1993); *United States* v. *Coleman*, 24 F.3d 37, 38-39 (9th Cir.), cert. denied, 513 U.S. 901 (1994); *United States* v. *Angulo-Lopez*, 7 F.3d 1506, 1508-1509 (10th Cir. 1993), cert. denied, 511 U.S. 1041 (1994); *United States* v. *King*, 972 F.2d 1259, 1260 (11th Cir. 1992) (per curiam).

contention fails, however, for the simple reason that, in adopting the relevant guidelines, the Sentencing Commission itself was bound by, and duly implemented, Congress's policy direction to sentencing courts with respect to the 100:1 ratio. Because this case involves a court's disagreement with a policy determination made by *Congress* in enacting sentencing statutes directed to the courts (and implemented by the Commission), not one made by the Commission in carrying out its general responsibility to implement the SRA, petitioner cannot bring himself within this Court's recognition that district courts may vary from the Guidelines based on a reasoned disagreement with Commission policy. See, *e.g.*, *Rita*, 127 S. Ct. at 2465 (noting that the parties may argue "that the Guidelines sentence should not apply * * * because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations"). Contrary to petitioner's contention (Br. 22), there is nothing peculiar about a regime that "allows sentencing courts to evaluate Commission judgments in the Guidelines, but prohibits them from taking into consideration the Commission's public and persistent declaration that the 100:1 ratio is flawed," in light of the fact that the 100:1 ratio was adopted (and thus can only be altered) by Congress.

2. A rule that prohibited district courts from reducing a defendant's sentence based on their disagreement with the 100:1 ratio would not "effectively reinstate the mandatory nature of the guideline applicable to [crack-cocaine] cases," as petitioner suggests (Br. 34). While the Sentencing Guidelines establish a base offense level for crack-cocaine offenses based on the 100:1 ratio, the ultimate Guidelines sentencing range remains advisory, and district courts may vary from that range based on any other consideration besides their disagreement with the 100:1 ratio, provided that the consideration is consis-

tent with Section 3553(a) (and upheld in subsequent reasonableness review). See, *e.g.*, *Castillo*, 460 F.3d at 361 (emphasizing that "district courts may give non-Guidelines sentences * * * because of case-specific applications of the § 3553(a) factors"). Specifically, district courts may rely on any facts, including (but not limited to) facts already reflected in the jury verdict or in the defendant's admissions, or on other policy considerations, in determining that an above- or below-Guidelines sentence is justified. See, *e.g.*, *Rita*, 127 S. Ct. at 2466 (emphasizing that a judge may sentence above the Guidelines range "in the absence of the special facts * * * which, in the view of the Sentencing Commission, would warrant a higher sentence within the statutorily permissible range"). Thus, for example, a court could disagree with the Guidelines' treatment of a crack offender's role in the offense, or (as was seemingly the case here) with the Guidelines' treatment of the offender's prior military service. The mere fact that there may be cases in which no such facts or policy considerations exist does not render the guideline for crack-cocaine cases "mandatory," any more than it does for the guidelines for any other types of offense.[15]

Contrary to petitioner's contention (Br. 14), courts would not be entirely prohibited from considering the Sentencing Commission's reports concerning sentencing

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[15] Petitioner contends (Br. 34 n.11) that there is "no practical difference" between the above standard and the standard under 18 U.S.C. 3553(b)(1) (Supp. IV 2004), the provision excised by *Booker*. That contention lacks merit. Under Section 3553(b)(1), a court could depart from the otherwise mandatory Guidelines range only if it found a fact not adequately taken into account by the Guidelines; under the above standard, a court can vary from the Guidelines range based on *any* fact or reasonable policy determination, other than a policy determination inconsistent with Congress's determination concerning the 100:1 ratio.

for crack-cocaine offenses. While courts could not rely on those reports as a basis for *categorically* disagreeing with the 100:1 ratio, courts could properly consider those reports in determining whether a *particular defendant's* commission of a crack-cocaine offense implicates the policy reasons underlying Congress's harsher treatment of crack offenses. See *United States* v. *Ricks*, No. 05-4832, 2007 WL 2068098, at *6 (3d Cir. July 20, 2007); *United States* v. *Jointer*, 457 F.3d 682, 687 (7th Cir. 2006), petition for cert. pending, No. 06-7600 (filed Oct. 27, 2006); *Williams*, 456 F.3d at 1369. For example, one of the justifications for the 100:1 ratio was that crack cocaine is more closely correlated with the commission of other serious crimes (based on the greater propensity of individuals trafficking in crack to carry weapons). See, *e.g.*, United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 184-185 (1995). Accordingly, it would not be inconsistent with congressional policy for a court to conclude that, based on the individualized circumstance that a crack offender did not carry a weapon or otherwise threaten violence in connection with the offense, a downward variance would be appropriate.

3. Petitioner erroneously asserts (Br. 34-35) that a rule that prohibited district courts from reducing a defendant's sentence based on their disagreement with the 100:1 ratio would violate the Sixth Amendment. This Court has found guidelines systems inconsistent with the Sixth Amendment when they mandate some range, lower than the statutory maximum for the relevant offense, that the judge may lawfully exceed only by finding a fact beyond the "facts reflected in the jury verdict or admitted by the defendant." *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (emphasis omitted); see *Cunningham* v. *California*, 127 S. Ct. 856, 869 (2007) (explain-

ing that the Sixth Amendment is violated "[i]f the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term"). A court need not find any additional fact to sentence a crack offender outside the Guidelines range; instead, the court may vary upward (or downward) based on its own judgment about proper sentencing policy, as long as its policy judgment does not conflict with that of Congress (and is found valid on subsequent reasonableness review). Nothing in this Court's Sixth Amendment decisions requires that *every* conceivable policy judgment be available to the sentencing court. As long as the district court can sentence above the Guidelines range without finding an additional *fact*, a rule that takes a single policy consideration off the table presents no Sixth Amendment difficulty.

D. Because The District Court Reduced Petitioner's Sentence Based On Its Disagreement With The 100:1 Ratio, The Resulting Sentence Was Unreasonable

1. As explained above, see p. 26 & n.6, *supra*, where a court fails to comply with a congressional policy determination in imposing sentence, the resulting sentence will necessarily be unreasonable. In this case, although petitioner was subject to a statutory minimum sentence of 120 months on the crack-cocaine counts, petitioner's advisory Guidelines sentencing range was 168 to 210 months (with the increase from the statutory minimum resulting almost entirely from an adjustment for obstruction of justice and from petitioner's criminal history). In sentencing petitioner to the statutory minimum on the crack-cocaine counts, however, the court primarily relied on its disagreement with the disparity in sentences for crimes involving crack and powder cocaine. The court cited the "disproportionate and unjust

effect that crack cocaine guidelines have in sentencing." J.A. 72. "This case," according to the court, "is another example of how the crack cocaine guidelines are driving the offense level to a point higher than is necessary to do justice." *Ibid.* The court added that "[i]t's amazing 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 guidelines range comes down so significantly that it's unbelievable." J.A. 74. The court reasoned that a lower sentence was necessary in order to "avoid imposing an unwarranted disproportionate sentence." *Ibid.* The district court therefore evidently sentenced petitioner in significant part based on its rejection of the 100:1 ratio adopted by Congress.

Petitioner seemingly (and tellingly) concedes (Br. 32 n.9) that it would be improper for a sentencing court to announce a different ratio of its own, but nevertheless contends that the district court acted reasonably because it did not do so here. But where, as here, a sentencing court rejects the 100:1 ratio, it does not matter whether the court acts transparently in announcing the ratio that it is applying, applies a different ratio *sub silentio*, or implicitly adopts an unspecified ratio; in all of those cases, the court effectively "revise[s] the 100:1 ratio." *Ibid.* Although it is impossible in this case to isolate the ratio that the district court used (in light of the fact that the district court did not articulate a ratio and relied in addition on other factors in imposing sentence), it is clear that the district court's disagreement with the congressional policy formed a critical factor that drove its analysis. The Court emphasized the disparity created by the differential treatment of crack and powder cocaine, even though both are "cocaine at the end of the day." J.A. 74. Indeed, the district court sug-

gested that, were it not bound by the statutory minimum, it would have applied a 1:1 ratio. *Ibid.* Where a sentencing court relies in whole or in part on its disagreement with the 100:1 ratio, regardless whether it articulates an explicit alternative ratio of its own, it commits legal error.

2. As petitioner notes (Br. 45-46), the district court also cited petitioner's limited criminal history, his work history, and his prior military service in imposing a below-Guidelines sentence. J.A. 73, 74. Because the district court primarily relied on its disagreement with the disparity in sentences for crimes involving crack and powder cocaine, however, the court of appeals correctly vacated the sentence and remanded for resentencing. Cf. *Williams* v. *United States*, 503 U.S. 193, 203 (1992) (holding that, when a court of appeals concludes that the district court "relied upon an invalid factor at sentencing," it should remand for resentencing unless it concludes that "the error did not affect the district court's selection of the sentence imposed"). On remand, the district court should consider whether the remaining factors on which it relied justify a below-Guidelines sentence, and, if so, the extent of an appropriate variance. Should the district court conclude that a downward variance is warranted, that sentence will be subject to reasonableness review in any subsequent appeal.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. Section 3553 of Title 18 of the United States Code (2000 & Supp. IV 2004) provides:

Imposition of a sentence

(a) 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) 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 guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or

policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(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.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—

(1) In general.

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[1] So in original. The period probably should be a semicolon.

Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses

(A)[2] Sentencing

In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

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[2] So in original. No subpar. (B) has been enacted.

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in

camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

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[3] So in original.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 944, 846) or section 1010 or 103 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

3. Section 841 of Title 21 of the United States Code (2000 & Supp. IV 2004) provides:

Prohibited acts

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18,

or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-

phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at

least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual,

or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding

section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such persons shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) PENALTIES FOR DISTRIBUTION.—

(A) IN GENERAL.—Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) DEFINITION.—For purposes of this paragraph, the term "without that individual's knowl-

edge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally—

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under Title 18, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under Title 18, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies, be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18 or imprisoned not more than one year, or both.

4. Public L. No. 104-38, 109 Stat. 334, provides:

SECTION 1. DISAPPROVAL OF AMENDMENTS RELATING TO LOWERING OF CRACK SENTENCES AND SENTENCES FOR MONEY LAUNDERING AND TRANSACTIONS IN PROPERTY DERIVED FROM UNLAWFUL ACTIVITY.

In accordance with section 994(p) of title 28, United States Code, amendments numbered 5 and 18 of the "Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary", submitted by the United States Sentencing Commission to Congress on May 1, 1995, are hereby disapproved and shall not take effect.

SECTION 2. REDUCTION OF SENTENCING DISPARITY.

(a) RECOMMENDATIONS.—

(1) IN GENERAL.—The United States Sentencing Commission shall submit to Congress recommendations (and an explanation therefor), regarding changes to the statutes and sentencing guidelines governing sentences for unlawful manufacturing, importing, exporting, and trafficking of cocaine, and like offenses, including unlawful possession, possession with intent to commit any of the forgoing offenses, and attempt and conspiracy to commit any of the forgoing offenses. The recommendations shall reflect the following considerations—

(A) the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine;

(B) high-level wholesale cocaine traffickers, organizers, and leaders, of criminal activities should generally receive longer sentences than low-level retail cocaine traffickers and those who played a minor or minimal role in such criminal activity;

(C) if the Government establishes that a defendant who traffics in powder cocaine has knowledge that such cocaine will be converted into crack cocaine prior to its distribution to individual users, the defendant should be treated at sentencing as though the defendant had trafficked in crack cocaine; and

(D) an enhanced sentence should generally be imposed on a defendant who, in the course of an offense described in this subsection—

(i) murders or causes serious bodily injury to an individual;

(ii) uses a dangerous weapon;

(iii) uses or possesses a firearm;

(iv) involves a juvenile or a woman who the defendant knows or should know to be pregnant;

(v) engages in a continuing criminal enterprise or commits other criminal offenses in order to facilitate his drug trafficking activities;

(vi) knows, or should know, that he is involving an unusually vulnerable person;

(vii) restrains a victim;

(viii) traffics in cocaine within 500 feet of a school;

(ix) obstructs justice;

(x) has a significant prior criminal record; or

(xi) is an organizer or leader of drug trafficking activities involving five or more persons.

(2) RATIO.—The recommendations described in the preceding subsection shall propose revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes and

guidelines in a manner consistent with the ratios set for other drugs and consistent with the objectives set forth in section 3553(a) of title 28 United States Code.

(b) STUDY.—No later than May 1, 1996, the Department of Justice shall submit to the Judiciary Committees of the Senate and House of Representatives a report on the charging and plea practices of Federal prosecutors with respect to the offense of money laundering. Such study shall include an account of the steps taken or to be taken by the Justice Department to ensure consistency and appropriateness in the use of the money laundering statute. The Sentencing Commission shall submit to the Judiciary Committees comments on the study prepared by the Department of Justice.

5. Section 2D1.1 of the United States Sentencing Commission Guidelines provides in relevant part:

§ 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after

one or more prior convictions for a similar offense; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer

aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.

(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.

(4) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by **2** levels.

(5) If the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.

(6) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by 2 levels.

(7) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.

(8) (Apply the greater):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.

(B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C); or (II) the environment, increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

(C) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

(9) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder) or § 2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

(1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to

that individual, an adjustment under § 3A1.1(b)(1) shall apply.

(c) DRUG QUALITY TABLE

	Controlled Substances and Quantity*	Base Offense Level
(1)	● 30 KG or more of Heroin; ● 150 KG or more of Cocaine; ● 1.5 KG or more of Cocaine Base; ● 30 KG or more of PCP, or 3 KG or more of PCP (actual); ● 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice"; ● 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual); ● 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); ● 12 KG or more of Fentanyl; ● 3 KG or more of a Fentanyl Analogue; ● 30,000 KG or more of Marihuana; ● 6,000 KG or more of Hashish; ● 600 KG or more of Hashish Oil; ● 30,000,000 units or more of Schedule I or II Depressants; ● 1,875,000 units or more of Flunitrazepam.	**Level 38**
(2)	● At least 10 KG but less than 30 KG of Heroin; ● At least 50 KG but less than 150 KG of Cocaine; ● At least 500 G but less than 1.5 KG of Cocaine Base; ● At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual); ● At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice"; ● At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);	**Level 36**

- At least 100 G but less than 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 4 KG but less than 12 KG of Fentanyl;
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil;
- At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
- At least 625,000 but less than 1,875,000 units of Flunitrazepam.

(3)
- At least 3 KG but less than 10 KG of Heroin; **Level 34**
- At least 15 KG but less than 50 KG of Cocaine;
- At least 150 G but less than 500 G of Cocaine Base;
- At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
- At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice";
- At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);
- At least 30 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 1.2 KG but less than 4 KG of Fentanyl;
- At least 300 G but less than 1 KG of a Fentanyl Analogue;
- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
- At least 187,500 but less than 625,000 units of Flunitrazepam.

(4) **Level 32**

- At least 1 KG but less than 3 KG of Heroin;
- At least 5 KG but less than 15 KG of Cocaine;
- At least 50 G but less than 150 G of Cocaine Base;
- At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
- At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
- At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);
- At least 10 G but less than 30 G of LSD;
- At least 400 G but less than 1.2 KG of Fentanyl;
- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
- At least 62,500 but less than 187,500 units of Flunitrazepam.

(5) **Level 30**

- At least 700 G but less than 1 KG of Heroin;
- At least 3.5 KG but less than 5 KG of Cocaine;
- At least 35 G but less than 50 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
- At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";
- At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
- At least 7 G but less than 10 G of LSD;
- At least 280 G but less than 400 G of Fentanyl;
- At least 70 G but less than 100 G of a Fentanyl Analogue;

- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
- At least 43,750 but less than 62,500 units of Flunitrazepam.

(6) **Level 28**

- At least 400 G but less than 700 G of Heroin;
- At least 2 KG but less than 3.5 KG of Cocaine;
- At least 20 G but less than 35 G of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
- At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";
- At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 160 G but less than 280 G of Fentanyl;
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 25,000 but less than 43,750 units of Flunitrazepam.

(7) **Level 26**

- At least 100 G but less than 400 G of Heroin;
- At least 500 G but less than 2 KG of Cocaine;
- At least 5 G but less than 20 G of Cocaine Base;
- At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);

- At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
- At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
- At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 40 G but less than 160 G of Fentanyl;
- At least 10 G but less than 40 G of a Fentanyl Analogue;
- At least 100 KG but less than 400 KG of Marihuana;
- At least 20 KG but less than 80 KG of Hashish;
- At least 2 KG but less than 8 KG of Hashish Oil;
- At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
- At least 6,250 but less than 25,000 units of Flunitrazepam.

(8)
- At least 80 G but less than 100 G of Heroin; **Level 24**
- At least 400 G but less than 500 G of Cocaine;
- At least 4 G but less than 5 G of Cocaine Base;
- At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
- At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";
- At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
- At least 800 MG but less than 1 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 32 G but less than 40 G of Fentanyl;
- At least 8 G but less than 10 G of a Fentanyl Analogue;
- At least 80 KG but less than 100 KG of Marihuana;
- At least 16 KG but less than 20 KG of Hashish;
- At least 1.6 KG but less than 2 KG of Hashish Oil;
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;

- At least 5,000 but less than 6,250 units of Flunitrazepam.

(9) **Level 22**

- At least 60 G but less than 80 G of Heroin;
- At least 300 G but less than 400 G of Cocaine;
- At least 3 G but less than 4 G of Cocaine Base;
- At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
- At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice";
- At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);
- At least 600 MG but less than 800 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 24 G but less than 32 G of Fentanyl;
- At least 6 G but less than 8 G of a Fentanyl Analogue;
- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
- At least 3,750 but less than 5,000 units of Flunitrazepam.

(10) **Level 20**

- At least 40 G but less than 60 G of Heroin;
- At least 200 G but less than 300 G of Cocaine;
- At least 2 G but less than 3 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
- At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";
- At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
- At least 400 MG but less than 600 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

- At least 16 G but less than 24 G of Fentanyl;
- At least 4 G but less than 6 G of a Fentanyl Analogue;
- At least 40 KG but less than 60 KG of Marihuana;
- At least 8 KG but less than 12 KG of Hashish;
- At least 800 G but less than 1.2 KG of Hashish Oil;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
- 40,000 or more units of Schedule III substances;
- At least 2,500 but less than 3,750 units of Flunitrazepam.

(11)
- At least 20 G but less than 40 G of Heroin; **Level 18**
- At least 100 G but less than 200 G of Cocaine;
- At least 1 G but less than 2 G of Cocaine Base;
- At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
- At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";
- At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
- At least 200 MG but less than 400 MG of LSD;
- At least 8 G but less than 16 G of Fentanyl;
- At least 2 G but less than 4 G of a Fentanyl Analogue;
- At least 20 KG but less than 40 KG of Marihuana;
- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III substances;
- At least 1,250 but less than 2,500 units of Flunitrazepam.

(12)
- At least 10 G but less than 20 G of Heroin; **Level 16**
- At least 50 G but less than 100 G of Cocaine;
- At least 500 MG but less than 1 G of Cocaine Base;

- At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
- At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice";
- At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);
- At least 100 MG but less than 200 MG of LSD;
- At least 4 G but less than 8 G of Fentanyl;
- At least 1 G but less than 2 G of a Fentanyl Analogue;
- At least 10 KG but less than 20 KG of Marihuana;
- At least 2 KG but less than 5 KG of Hashish;
- At least 200 G but less than 500 G of Hashish Oil;
- At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
- At least 10,000 but less than 20,000 units of Schedule III substances;
- At least 625 but less than 1,250 units of Flunitrazepam.

(13) **Level 14**

- At least 5 G but less than 10 G of Heroin;
- At least 25 G but less than 50 G of Cocaine;
- At least 250 MG but less than 500 MG of Cocaine Base;
- At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
- At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";
- At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual);
- At least 50 MG but less than 100 MG of LSD;
- At least 2 G but less than 4 G of Fentanyl;
- At least 500 MG but less than 1 G of a Fentanyl Analogue;
- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 5,000 but less than 10,000 units of Schedule I or II Depressants;

- At least 5,000 but less than 10,000 units of Schedule III substances;
- At least 312 but less than 625 units of Flunitrazepam.

(14) **Level 12**
- Less than 5 G of Heroin;
- Less than 25 G of Cocaine;
- Less than 250 MG of Cocaine Base;
- Less than 5 G of PCP, or less than 500 MG of PCP (actual);
- Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";
- Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);
- Less than 50 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- Less than 2 G of Fentanyl;
- Less than 500 MG of a Fentanyl Analogue;
- At least 2.5 KG but less than 5 KG of Marihuana;
- At least 500 G but less than 1 KG of Hashish;
- At least 50 G but less than 100 G of Hashish Oil;
- At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
- At least 2,500 but less than 5,000 units of Schedule III substances;
- At least 156 but less than 312 units of Flunitrazepam;
- 40,000 or more units of Schedule IV substances (except Flunitrazepam).

(15) **Level 10**
- At least 1 KG but less than 2.5 KG of Marihuana;
- At least 200 G but less than 500 G of Hashish;
- At least 20 G but less than 50 G of Hashish Oil;
- At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
- At least 1,000 but less than 2,500 units of Schedule III substances;
- At least 62 but less than 156 units of Flunitrazepam;
- At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).

(16) **Level 8**
- At least 250 G but less than 1 KG of Marihuana;
- At least 50 G but less than 200 G of Hashish;
- At least 5 G but less than 20 G of Hashish Oil;

- At least 250 but less than 1,000 units of Schedule I or II Depressants;
- At least 250 but less than 1,000 units of Schedule III substances;
- Less than 62 units of Flunitrazepam;
- At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);
- 40,000 or more units of Schedule V substances.

(17) - Less than 250 G of Marihuana; **Level 6**
- Less than 50 G of Hashish;
- Less than 5 G of Hashish Oil;
- Less than 250 units of Schedule I or II Depressants;
- Less than 250 units of Schedule III substances;
- Less than 4,000 units of Schedule IV substances (except Flunitrazepam);
- Less than 40,000 units of Schedule V substances.

[notes to drug quantity table omitted]

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COMMENTARY

APPLICATION NOTES

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10. The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, i.e., heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marihuana. In the case of a controlled substance that is not specifically

referenced in the Drug Quantity Table, determine the base offense level as follows:

(A) Use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana.

(B) Find the equivalent quantity of marihuana in the Drug Quantity Table.

(C) Use the offense level that corresponds to the equivalent quantity of marihuana as the base offense level for the controlled substance involved in the offense.

(See also Application Note 5.) For example, in the Drug Equivalency Tables set forth in this Note, 1 gm of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 kg of marihuana. In a case involving 100 gm of oxymorphone, the equivalent quantity of marihuana would be 500 kg, which corresponds to a base offense level of 28 in the Drug Quantity Table.

The Drug Equivalency Tables also provide a means for combining differing controlled substances to obtain a single offense level. In each case, convert each of the drugs to its marihuana equivalent, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level.

For certain types of controlled substances, the marihuana equivalencies in the Drug Equivalency Tables are "capped" at specified amounts (e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed 999 grams of marihuana). Where there are

controlled substances from more than one schedule (e.g., a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the marihuana equivalency for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the marihuana equivalencies to determine the combined marihuana equivalency (subject to the cap, if any, applicable to the combined amounts).

Note: Because of the statutory equivalences, the ratios in the Drug Equivalency Tables do not necessarily reflect dosages based on pharmacological equivalents.

Examples:

a. *The defendant is convicted of selling 70 grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). The PCP converts to 70 kilograms of marihuana; the LSD converts to 25 kilograms of marihuana. The total is therefore equivalent to 95 kilograms of marihuana, for which the Drug Quantity Table provides an offense level of 24.*

b. *The defendant is convicted of selling 500 grams of marihuana (Level 8) and five kilograms of diazepam (Level 8). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 10 in the Drug Quantity Table.*

c. *The defendant is convicted of selling 80 grams of cocaine (Level 16) and five kilograms of marihuana (Level 14). The cocaine is equivalent to 16 kilograms of marihuana. The total is therefore equiva-*

lent to 21 kilograms of marihuana, which has an offense level of 18 in the Drug Quantity Table.

d. *The defendant is convicted of selling 56,000 units of a Schedule III substance, 100,000 units of a Schedule IV substance, and 200,000 units of a Schedule V substance. The marihuana equivalency for the Schedule III substance is 56 kilograms of marihuana (below the cap of 59.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of 4.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been 6.25 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of 999 grams of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been 1.25 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of 59.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been 61.99 (56 + 4.99 + .999) kilograms.*

DRUG EQUIVALENCY TABLES

Schedule I or II Opiates*

1 gm of Heroin =	1 kg of marihuana
1 gm of Alpha-Methylfentanyl =	10 kg of marihuana
1 gm of Dextromoramide =	670 gm of marihuana

1 gm of Dipipanone =	250 gm of marihuana
1 gm of 3-Methylfentanyl =	10 kg of marihuana
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm of marihuana
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP =	700 gm of marihuana
1 gm of Alphaprodine =	100 gm of marihuana
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg of marihuana
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg of marihuana
1 gm of Levorphanol =	2.5 kg of marihuana
1 gm of Meperidine/Pethidine =	50 gm of marihuana
1 gm of Methadone =	500 gm of marihuana
1 gm of 6-Monoacetylmorphine =	1 kg of marihuana
1 gm of Morphine =	500 gm of marihuana
1 gm of Oxycodone (actual) =	6700 gm of marihuana
1 gm of Oxymorphone =	5 kg of marihuana
1 gm of Racemorphan =	800 gm of marihuana
1 gm of Codeine =	80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm of marihuana
1 gm of Ethylmorphine =	165 gm of marihuana
1 gm of Hydrocodone/Dihydrocodeinone =	500 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm of marihuana
1 gm of Opium =	50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg of marihuana

**Provided,* that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*

1 gm of Cocaine =	200 gm of marihuana
1 gm of N-Ethylamphetamine =	80 gm of marihuana
1 gm of Fenethylline =	40 gm of marihuana
1 gm of Amphetamine =	2 kg of marihuana
1 gm of Amphetamine (Actual) =	20 kg of marihuana
1 gm of Methamphetamine =	2 kg of marihuana
1 gm of Methamphetamine (Actual) =	20 kg of marihuana
1 gm of "Ice" =	20 kg of marihuana
1 gm of Khat =	.01 gm of marihuana
1 gm of 4-Methylaminorex ("Euphoria")=	100 gm of marihuana
1 gm of Methylphenidate (Ritalin)=	100 gm of marihuana
1 gm of Phenmetrazine =	80 gm of marihuana
1 gm Phenylacetone/P_2P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P_2P (in any other case) =	75 gm of marihuana
1 gm of Cocaine Base ("Crack") =	20 kg of marihuana
1 gm of Aminorex =	100 gm of marihuana
1 gm of Methcathinone =	380 gm of marihuana
1 gm of N-N-Dimethylamphetamine =	40 gm of marihuana

**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)*

1 gm of Bufotenine =	70 gm of marihuana
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 kg of marihuana
1 gm of Diethyltryptamine/DET =	80 gm of marihuana
1 gm of Dimethyltryptamine/DMT =	100 gm of marihuana
1 gm of Mescaline =	10 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin(Dry) =	1 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm of marihuana
1 gm of Peyote (Dry) =	0.5 gm of marihuana
1 gm of Peyote (Wet) =	0.05 gm of marihuana
1 gm of Phencyclidine/PCP =	1 kg of marihuana
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg of marihuana
1 gm of Psilocin =	500 gm of marihuana
1 gm of Psilocybin =	500 gm of marihuana
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg of marihuana
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg of marihuana
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg of marihuana
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg of marihuana
1 gm of 3,4-Methylenedioxy-amphetamine/MDA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-methamphetamine/MDMA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-N-	

ethylamphetamine/MDEA=	500 gm of marihuana
1 gm of Paramethoxymethamphetamine/ PMA =	500 gm of marihuana
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm of marihuana
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg of marihuana

*_Provided_, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

Schedule I Marihuana

1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 gm of marihuana
1 gm of Hashish Oil =	50 gm of marihuana
1 gm of Cannabis Resin or Hashish =	5 gm of marihuana
1 gm of Tetrahydrocannabinol, Organic =	167 gm of marihuana
1 gm of Tetrahydrocannabinol, Synthetic =	167 gm of marihuana

Flunitrazepam**

1 unit of Flunitrazepam =	16 gm of marihuana

**_Provided_, that the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

Schedule I or II Depressants (except gamma-hydroxybutyric acid)

1 unit of a Schedule I or II Depressant (except gamma-hydroxybutyric acid) =	1 gm of marihuana

Gamma-hydroxybutyric Acid

1 ml of gamma-hydroxybutyric acid =	8.8 gm of marihuana

Schedule III Substances***

1 unit of a Schedule III Substance =	1 gm of marihuana

***_Provided_, that the combined equivalent weight of all Schedule III substances, Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

Schedule IV Substances (except flunitrazepam)****

1 unit of a Schedule IV Substance (except Flunitrazepam) =	0.0625 gm of marihuana

****_Provided_, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 4.99 kilograms of marihuana.

Schedule V Substances*****

1 unit of a Schedule V Substance =	0.00625 gm of marihuana

*****_Provided_, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.

List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)******

1 gm of Ephedrine =	10 kg of marihuana
1 gm of Phenylpropanolamine =	10 kg of marihuana
1 gm of Pseudoephedrine =	10 kg of marihuana

******Provided*, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

To facilitate conversions to drug equivalencies, the following table is provided:

MEASUREMENT CONVERSION TABLE

1 oz = 28.35 gm
1 lb = 453.6 gm
1 lb = 0.4536 kg
1 gal = 3.785 liters
1 qt = 0.946 liters
l gm = 1 ml (liquid)
1 liter - 1,000 ml
1 kg - 1,000 gm
1gm = 1,000 mg
1 grain = 64.8 mg.

* * * * *

Background: Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant's criminal his-

tory, and whether death or serious bodily injury resulted from the offense.

The base offense levels in § 2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking. Levels 32 and 26 in the Drug Quantity Table are the distinctions provided by the Anti-Drug Abuse Act; however, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, who also advocate the necessity of these distinctions. Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.

The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; e.g., level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months.

For marihuana plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater. The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana. In controlled substance offenses, an attempt is assigned the same offense level as the object of the attempt. Consequently, the Commission adopted the policy that each plant is to be treated as the equivalent of an attempt to produce 100 grams of marihuana, except where the actual weight of the usable marihuana is greater.

Specific Offense Characteristic (b)(2) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.

Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).

Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP.

Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in Chapman v. United States, 111 S.Ct. 1919 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the

weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. None the-less, this approach does not override the applicability of "mixture or substance" for the purpose of applying any mandatory minimum sentence (see Chapman; § 5G1.1(b)).

Subsection (b)(8)(A) implements the instruction to the Commission in section 303 of Public Law 103-237.

Subsections (b)(8)(B) and (C) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106-310.