No. 06-6330

In The Supreme Court of the United States

DERRICK KIMBROUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

I. BEYOND SETTING THE MANDATORY MINIMUM AND MAXIMUM PENALTIES SPECIFIED BY 21 U.S.C. § 841(b)(1), CONGRESS HAS NOT BOUND SENTENCING COURTS OR THE SENTENCING COMMISSION TO APPLY THE 100:1 POWDER/CRACK COCAINE RATIO.

Mr. Kimbrough argues that, under this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), a sentencing court has discretion under the Sentencing Reform Act (SRA) to disagree on policy grounds with sentencing guidelines, including the 100:1 powder/crack cocaine ratio, based on reliable and relevant information such as the U.S. Sentencing Commission's reports setting forth the many problems with the ratio. In response, the government concedes that sentencing courts generally have discretion to disagree with the Guidelines when the disagreement is based on policy grounded in the goals of the SRA and not on case-specific facts. *See* U.S. Br. 29, 43-44. It also concedes that a sentencing court may consider the reports issued by the Sentencing Commission in determining an appropriate sentence for a particular defendant charged with a crack cocaine offense. U.S. Br. 45.

Notwithstanding these concessions, the government urges this Court to affirm the Fourth Circuit's ruling that disagreement with the 100:1 ratio is *per se* unreasonable. In support of its argument, the government advances the novel proposition that there are actually two types of sentencing guidelines. On the

one hand, the government claims that there are "guidelines that simply implement the SRA" through instructions to the Sentencing Commission, which a district court may reject for policy reasons. U.S. Br. 29, 30. On the other hand, according to the government, there are "guidelines that incorporate congressional policy in a manner that binds district courts even after *Booker*." U.S. Br. 30.

The government contends that the 100:1 guideline ratio falls into the latter category. This is so, the government claims, because a 100:1 ratio is set forth in 21 U.S.C. § 841(b)(1) and constitutes a "direct sentencing requirement[] imposed on courts" – albeit an implicit one – to apply the ratio in determining where within the statutory range to impose a sentence. The government further claims that, because the 100:1 ratio is binding on the courts, the Sentencing Commission was required to incorporate it into the drug quantity table of U.S.S.G. § 2D1.1 at all potential quantity levels in order to provide a sentencing scheme that purportedly "avoids unwarranted disparities." U.S. Br. 29-30, 32, 33-34.

The government's argument fails on numerous grounds. Section 841(b)(1) on its face does no more than set mandatory minimum and maximum penalties for trafficking in controlled substances, including crack and powder cocaine. The government's proposition that the statute must be read to imply a sentencing scheme beyond its plain language not only violates basic principles of statutory construction, but has already been rejected by this Court. Moreover, it would effectively reinstate the mandatory nature of the drug guideline in crack cocaine cases, creating a large, unworkable

exception to the Court's remedial opinion in *Booker*. Accordingly, the government's argument must be rejected and the Fourth Circuit's decision reversed.

A. Congress May Limit Sentencing Courts' Discretion Only Through Plain Statutory Language.

The government argues that § 841(b)(1) sets forth the 100:1 ratio as a "direct sentencing requirement," U.S. Br. 29, but it concedes that this claimed requirement is not explicit in the statute, U.S. Br. 32, 33, and it does not identify any other statute requiring incorporation of the 100:1 ratio into U.S.S.G. § 2D1.1's drug table. Moreover, the government fails to point to any canon of statutory construction that would read the language it desires into the Anti-Drug Abuse Act of 1986, *see* Pub. L. No. 99-570, 100 Stat. 3207 (ADAA), which established the ratio. Despite these failings, the government theorizes that the ADAA silently infused the 100:1 ratio into the Guidelines as a binding policy. U.S. Br. 30-34. To support the existence of this implicit, silent directive, the government relies on an event occurring nine years after passage of the ADAA: Congress's 1995 rejection of the Sentencing Commission's proposal to adopt a 1:1 guideline ratio between crack and powder cocaine. U.S. Br. 35-37 & n.10; *see* Pub. L. No. 104-38, 109 Stat. 334 (1995). According to the government, Congress's rejection made clear its intent in the ADAA that sentencing courts and the Commission were "required . . . to take drug quantities into account, and to

do so in a manner that respects the 100:1 ratio." U.S. Br. 35.

The rejection of the guideline amendment proposing the 1:1 ratio is not evidence that the 100:1 ratio was required, silently, by § 841(b)(1). The rejection was not even a directive to the Commission that it must use the 100:1 ratio. The plain language of the 1995 act makes clear that Congress did no more than instruct the Commission to formulate a new proposal that would reflect several considerations, including that the ratio for powder and crack cocaine be "consistent with the ratios set for other drugs and consistent with the objectives set forth in section 3553(a)." Pub. L. No. 104-38, § (2)(a)(2). Another consideration was 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"). *Id.* § 2(a)(1)(A) (emphasis added). An expression that sentences for crack cocaine offenses "should generally exceed" those for powder cocaine offenses is far from a command that the 100:1 ratio must remain, particularly when Congress also charged the Commission to bring the powder/crack cocaine ratio in line with ratios for other drugs.[1]

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[1] The ratios between crack cocaine and the other drugs listed in § 841(b)(1) range from 1:1 (methamphetamine (actual) to crack) to 2:1 (PCP (actual) to crack), to 10:1 (methamphetamine mixture to crack), to 20:1 (PCP mixture to crack and heroin to crack), and to 1:5 (LSD to crack). It was Congress's concern about the anomalously high 100:1 powder/crack cocaine ratio that led the Sentencing Commis-

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Contrary to the government's suggestion, Congress's actual directive that crack cocaine sentences "generally exceed" powder cocaine sentences was followed in this case: Mr. Kimbrough received the mandatory minimum sentence of ten years for his drug convictions, rather than the roughly three-year sentence that he likely would have received had the 148 grams of cocaine he possessed consisted entirely of powder cocaine. *See* U.S.S.G. § 2D1.1(c)(11) (drug quantity table); U.S.S.G. Ch. 5, Pt. A (sentencing table).

Lacking support in the plain language of the 1995 act, the government turns to its legislative history in an attempt to support its claim that the Guidelines' drug table must follow § 841(b)(1).[2] U.S. Br. 36-37. The

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sion to propose a change to the guideline. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, § 280006, 108 Stat. 1796, 1985, 2097 (directing Commission to "address 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").

[2] When the language of a statute is plain – as is that of § 841(b)(1) and the 1995 act – resort to legislative history in search of a contrary meaning is improper. *See Whitfield v. United States*, 543 U.S. 209, 215 (2005); *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 130-36 (2002); *UnitedStates v. Gonzales*, 520 U.S. 1, 6 (1997); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Crandon v. United States*, 494 U.S. 152, 160 (1990); *United States v. Ron*

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government claims that floor statements of two members of Congress show that "any significant change in sentencing for crack-cocaine offenses would require legislative action." *Id.*; *see id.* at 8-9. The government then asks this Court to infer from those statements that the 100:1 ratio was placed into the Guidelines by statute. No such inference can be drawn. The quoted members merely expressed disagreement with the proposed 1:1 ratio and recognized that many crack offenders were subject to statutory mandatory minimums. *See, e.g.*, 141 Cong. Rec. 27,203 (1995) (statement of Sen. Abraham) (expressing concern that "some powder defendants at the top of crack distribution networks seem to be getting lower sentences than retail [crack] distributors" and that "while there is good reason for significant differential treatment of powder and crack, we should have a look more generally at whether the present differential represents the best policy"). And far from requiring incorporation of the 100:1 ratio, one of the quoted members suggested that the Commission was free to reject it, at least in favor of higher sentences. *See id.* (opining that "the Commission resolved these concerns the wrong way: by lowering sentences for crack rather than by raising sentences for powder" and that "I would like to see these issues addressed from the other end: by raising the sentences for powder distribution").

Pair Enterprises, Inc., 489 U.S. 235, 240-41 (1989). The government's resort to legislative history, not even of the ADAA itself but of a different law passed nine years later by a different Congress, serves only to emphasize the weakness of its argument.

In any event, "[f]loor statements of two [legislators] cannot amend the clear and unambiguous language" of an act of Congress. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002). "[T]he statements of individual Members of Congress [are not] a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 390 (2000) (Scalia, J., concurring). Instead, "[t]he *only* reliable indication of *that* intent – the only thing we know for sure can be attributed to *all* of them – is the words of the bill that they voted to make law," *id. at* 390-91 (emphasis in original), as the Court has recognized for many years, *see Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845) (stating that "[t]he law as it is passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself").

In § 841(b)(1), Congress as a whole did no more than set out minimum and maximum penalties for controlled substance offenses, including powder and crack cocaine. Congress did not direct the district courts to impose sentences, or the Sentencing Commission to promulgate guidelines, that apply the 100:1 powder/crack cocaine ratio at sub-tiers within the statutory penalty ranges.

B. This Court Has Already Rejected The Requirement That The Drug Table Must March In Lockstep With 21 U.S.C. § 841(b)(1).

To bolster its claim that Congress has implicitly required sentencing courts and the Sentencing Commission to apply the 100:1 ratio in setting all

sentences in crack cocaine cases, the government asserts the existence of an "implicit . . . structural determination" in the ADAA, U.S. Br. 32, that would make it "logically incoherent to read [it] not to require the Commission and sentencing courts to apply a graduated penalty structure that takes drug quantity into account (and does so in a manner that respects the 100:1 ratio)." U.S. Br. 33-34; *see id.* at 35. The Court, however, has already rejected the government's argument that the drug table contained in U.S.S.G. § 2D1.1 must march in lockstep with § 841(b)(1).

In *Neal v. United States*, 516 U.S. 284 (1996), the Court considered whether the method for determining the weight of LSD on a carrier medium under the drug guideline must be the same as the method used by § 841(b)(1). The case arose from the Commission's amendment in 1993 of § 2D1.1 to create a presumptive weight based on dosage for LSD after it studied the LSD trade and concluded that the method used for calculating statutory mandatory minimum LSD weights did not "fulfill the statutory directive [to the Commission] to promote proportionate sentencing." 516 U.S. at 292; *see Chapman v. United States*, 500 U.S. 453 (1991) (holding that calculation of LSD weight for purposes of determining applicable mandatory minimum sentence must include entire weight of carrier medium). The Commission concluded that the continued use of the mandatory-minimum method in the Guidelines "'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.'" *Neal*, 516 U.S. at 293 (quoting U.S.S.G. § 2D1.1, comment. (backg'd)) (emphasis added). In unanimously affirming the use of two different weight-calculation methods, the Court recognized that "the Guidelines calculation is independent of the statutory calculation" and that "[e]ntrusted within its sphere to make policy judgments, the Commission may abandon its old methods in favor of what it has deemed a more desirable 'approach' to calculating LSD quantities." *Id.* at 294-95.

The Court's statements in *Neal* refute the government's contention that because § 841(b)(1) employs the 100:1 powder/crack cocaine ratio, the Guidelines' drug table must do so as well. As the *Neal* Court found, § 841(b)(1) and the Guidelines do *not* have to operate in the same way, notwithstanding the possibility that inconsistencies may result between sentences under the Guidelines and sentences under the statute. *See* 516 U.S. at 295 (tolerating inconsistency between the statute and the drug guideline even though "there may be little in logic to defend the statute's treatment of LSD [because] it results in significant disparity of punishment meted out to LSD offenders relative to other narcotics traffickers"). *Neal* makes clear, contrary to the government's position, that the Commission has discretion to take an approach to determining drug quantity other than that found in § 841(b)(1), so long as a sentencing court, when determining a sentence in a particular drug case, applies the mandatory minimum and maximum limits plainly stated in § 841(b)(1). That is exactly what the sentencing court did in Mr. Kimbrough's case.

The government also asserts that failing to apply the 100:1 ratio to all crack cocaine sentences "would lead to drastic and obviously unwarranted sentencing disparities, or 'cliffs,' based on insignificant differences in drug quantities." U.S. Br. 33. A similar argument failed in *Neal*, which acknowledged the reality that "cliffs" are already part of the *current* sentencing structure. *See* 516 U.S. at 291-92 (noting that "cliffs" result from "incongruities between the Guidelines and the mandatory [drug] sentencing statute"). Such "cliffs" exist not only in the differing treatment of crack and powder cocaine and of LSD mixtures and dosages, but also in the treatment of cocaine base itself. *See* U.S.S.G. § 2D1.1(c), Notes to Drug Quantity Table, Note (D) (providing that "'[c]ocaine base,' for the purposes of this guideline, means 'crack,'" such that cocaine base that is not crack is treated as powder for purposes of the drug table).[3]

C. Disagreement With The 100:1 Ratio Does Not Automatically Create Unwarranted Disparities And May In Fact Avoid Them.

The government argues that the use of any method of setting crack cocaine sentences other than the 100:1

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[3] Such "cliffs" also occur with respect to marijuana plants. *Compare* U.S.S.G. § 2D1.1(c), Notes to Drug Quantity Table, Note (E) (treating marijuana plant as equal to 100 grams of marijuana unless actual weight is higher) *with, e.g.*, 21 U.S.C. § 841(b)(1)(A)(vii) (establishing ten-year mandatory minimum sentence for "1,000 marijuana plants regardless of weight").

ratio – such as taking § 841(b)(1) as it is written to set only statutory ranges like any other statute setting penalties for criminal offenses – would lead to unwarranted sentence disparities in drug cases, in contradiction of 18 U.S.C. § 3553(a)(6). U.S. Br. 39-42. According to the government, an interpretation of § 841(b)(1) "under which Congress has done nothing more than establish statutory minimums for certain drug offenses . . . would leave courts free not only to impose *lower* sentences for crimes involving crack cocaine . . . but also to impose *higher* sentences for crimes involving *powder* cocaine." U.S. Br. 39 (emphasis in original). The government asserts that this reading of § 841(b)(1) "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)." *Id.* The government does not explain why reasonable comparisons of drug offense severity would result in unwarranted sentencing disparity. Indeed, its argument reveals an unjustified disregard for the ability of sentencing courts to implement the statutory directives of § 3553(a) when considering the reliable and relevant information presented to them.

The government's argument wholly ignores the reasonable limitation on unbridled discretion that Mr. Kimbrough has suggested: in imposing sentences, district courts are permitted to use a wide range of information so long as the information is reliable and relevant to the § 3553(a) considerations. *See* Pet. Br. 17-24. Federal district courts routinely make determinations about the reliability and relevance of

information, even in the context of complex issues, *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590-91 (1993), and this Court relies on their "'learning, good sense, fairness and courage'" in doing so, *see Brown v. Illinois*, 422 U.S. 590, 604 n.10 (1975) (quoting *Nardone v. United States*, 308 U.S. 338, 342 (1939)). Particularly when coupled with the abuse-of-discretion standard of review set out in *Booker* and *Rita v. United States*, 127 S. Ct. 2456 (2007), the "reliable and relevant information" test provides a coherent limiting principle that will prevent unaccountably disparate sentences.

For example, if the government were to present a court with reliable information that supported a determination that a guideline sentence in a powder cocaine case would be too low as compared to crack cocaine cases in light of the purposes of sentencing set forth in § 3553(a)(2), the court would be free to consider that information. Here, the sentencing court was presented with reliable information that the crack cocaine guideline sentence was too high. There was no reason that the information could not be considered in determining the sentence under § 3553(a)(2).

Finally, the government does not attempt to support its contention that prohibiting sentencing courts from disagreeing on a reasoned basis with the 100:1 ratio would avoid unwarranted disparities. Indeed, the opposite is true, as the 100:1 ratio does not reflect even a "rough approximation of sentences that might achieve [the] objectives" of the Sentencing Reform Act, *Rita*, 127 S. Ct. at 2464-65, as the Sentencing Commission has concluded in general and the sentencing court concluded

in particular in this case. Yet, the government contends that courts must impose sentences in accordance with the 100:1 ratio not only at the two mandatory minimum levels directed by Congress in 21 U.S.C. § 841(b)(1)(A) and (B), but at all levels interpolated by the Commission in U.S.S.G. § 2D1.1. The result of the government's argument is that a crack cocaine sentence imposed within the applicable guideline range would be presumed reasonable on appeal based on the fiction that both the Commission and the sentencing court independently concluded that the sentence met the requirements of § 3553(a). *See Rita*, 127 S. Ct. at 2463, 2465, 2467-68. Such a result is contrary both to the goals of the Sentencing Reform Act and the expertise and experience of the Commission and sentencing courts.

D. The Government's Rule Would Reinstate A Mandatory Guideline For Crack Cocaine.

Even if the government is right that the 100:1 ratio is mandatory, its argument fails on constitutional grounds, as it would return sentencing in crack cocaine cases to the mandatory guidelines struck down by this Court in *Booker*. The government disputes that a rule prohibiting the district court from reducing a defendant's sentence based on its disagreement with the crack cocaine guideline would reinstate the mandatory nature of the crack cocaine guideline and would violate the Sixth Amendment. U.S. Br. 43-46. It claims that no constitutional issue arises because the sentencing court could still vary from the crack guideline range based on case-specific facts such as the "individualized

circumstance" that the defendant "did not carry a weapon or otherwise threaten violence," or a policy disagreement with a guideline implicated in the case *other than* U.S.S.G. § 2D1.1, such as the adjustment for role in the offense (*see* U.S.S.G. §§ 3B1.1, 3B1.2) or the policy statement deeming military service not ordinarily relevant (*see* U.S.S.G. § 5H1.11). U.S. Br. 44-45.

Contrary to the government's argument, such a guideline would be mandatory and subject to the Sixth Amendment rule in *Booker*. Under the government's proposed rule, the sentencing court could find facts that were not found by a jury or admitted by the defendant to calculate the guideline range, but would be prohibited from sentencing below the guideline range based on a policy disagreement with the 100:1 ratio reflected in § 2D1.1, and would be required to impose a sentence using that ratio except on the basis of individual case-specific factors. This would effectively replicate the guideline-and-departure system held unconstitutional in *Booker*. *See* 543 U.S. at 234 ("The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself."). It would violate the Sixth Amendment because it would not permit a court to sentence outside the guideline range dictated by U.S.S.G. § 2D1.1 based on "general objectives of sentencing" alone without a "factfinding anchor." *Cunningham v. California*, 127 S. Ct. 856, 863 (2007); *see also id*. at 862-70.[4]

[4] The government appears to claim that its rule would not violate the Sixth Amendment because, although a sentencing court could not vary downward based on a policy disagree-

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This Court should not adopt a reading of § 841(b)(1) that would raise such constitutional concerns.[5] *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). Because under the government's proposed rule, judicial factfinding as to drug quantity in crack cocaine cases would be binding, the Court must either reject the rule or hold that the

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ment with the 100:1 ratio, it could still vary *upward* based on a policy disagreement with it. *See* U.S. Br. 46 (stating that "[a]s 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") (emphasis supplied and in original). However, this Court in *Booker* explicitly rejected the "one-way ratchet" the government promotes as inconsistent with congressional intent. *See* 543 U.S. at 257-58, 266.

[5] These constitutional concerns are not merely hypothetical, for sentencing courts routinely resolve factual disputes as to quantity in crack cocaine cases. Indeed, in *Booker* itself, thisCourt noted that while Freddy Booker was convicted at trial based on evidence of the 92.5 grams of crack cocaine found in his duffel bag, the district court found at his sentencing that he was responsible for an additional 566 grams of crack. 543 U.S. at 227; *see also, e.g.*, *United States v. Ricks*, 494 F.3d 394 (3d Cir. 2007) (where defendants pled guilty and reserved challenge to drug quantity, district court found after evidentiary hearing that each defendant was responsible for at least 2,000 grams of crack cocaine, 3,000 grams of powder cocaine, and 30 grams of heroin); *United States v. Pho*, 433 F.3d 53, 57 (1st Cir. 2006) (where defendant was arrested with 16.73 grams of crack and pled guilty to possessing only 5 or more grams, district court's finding that defendant was responsible for 40.43 grams increased base offense level from 26 to 30).

guideline tiers for quantity and type of drug must be charged in an indictment and proved to a jury beyond a reasonable doubt in every case. As the Court held in *Booker*, rejection of the government's proposed rule would better accord with congressional intent. *See* 543 U.S. at 759-64.

II. THE DISTRICT COURT PROPERLY ACTED WITHIN ITS DISCRETION IN SENTENCING MR. KIMBROUGH.

Even if the Court accepts the government's statutory and constitutional arguments, it should uphold the sentence imposed by the district court. In making its claim that a rule prohibiting disagreement with the 100:1 ratio does not make the ratio mandatory in violation of the Sixth Amendment, the government concedes that district courts may rely upon the various reports issued by the Sentencing Commission regarding crack cocaine in fashioning an appropriate sentence under 18 U.S.C. § 3553(a). U.S. Br. 45. It states that "[w]hile 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." U.S. Br. 45. The government also concedes that individual facts of a particular case would allow a sentence below that called for by the 100:1 ratio. U.S. Br. 45. Applying this position to Mr. Kimbrough's case, the sentence imposed by the district court was certainly not

an abuse of its discretion, and no remand for resentencing is needed.

The district court did not "categorically" disagree with the 100:1 ratio. Although it referenced the Sentencing Commission reports criticizing the ratio, the court was careful to make clear that it was finding only that it was inappropriate *in this case* to impose the sentence resulting from application of the ratio. *See, e.g.*, J.A. 72 (stating that "a sentence of 19 to 22 years *in this case* . . . imposes more punishment, *given the record here*, than is necessary to accomplish what needs to be done") (emphasis added); *id.* at 74 ("The Court also considers significantly the fact that the crack cocaine involved *in this case* does in fact exaggerate the advisory sentencing guideline involved *in this case*.") (emphasis added); *id.* ("So the Court believes should it follow the advisory guidelines, the penalty imposed would clearly be inappropriate and greater than necessary to accomplish what the statute says you should in fact accomplish *in this case*.") (emphasis added); *id.* (in pronouncing the sentence of 180 months, stating "[t]hat's 15 years, which is clearly long enough *under the circumstances*") (emphasis added).

The court based its sentencing decision on the "nature and circumstances" of Mr. Kimbrough's offense, *see* 18 U.S.C. § 3553(a)(1), not on a wholly generic disagreement with the 100:1 ratio. The court determined that "this defendant and another defendant were caught sitting in a car with some crack cocaine and powder by two police officers – that's the sum and substance of it – with a firearm. The Court understands how the offense was committed. The Court heard the facts in this

particular case." J.A. 72-73. These facts, when combined with the court's findings regarding Mr. Kimbrough's military service, his steady work history, and his lack of a felony record, J.A. 73-74, led the court to conclude that a sentence within the range produced by the 100:1 ratio was "greater than necessary" and that a 120-month sentence for the drug offenses, particularly when combined with the consecutive 60-month sentence for the firearms offense, was "long enough." J.A. 74.

Thus, there were individual facts in Mr. Kimbrough's case that allowed for a sentence below that called for by the 100:1 ratio, and the district court did precisely what it was supposed to do within the framework provided by Congress in the Sentencing Reform Act. *See* 18 U.S.C. § 3553(a) (court shall impose a sentence sufficient but not greater than necessary to comply with enumerated purposes of sentencing). In short, the district court's imposition of a sentence based on the Sentencing Commission's reports in combination with the facts of the offense and Mr. Kimbrough's background was an appropriate exercise of the court's discretion. No remand for resentencing is necessary.

CONCLUSION

For the above-stated reasons and those given in Mr. Kimbrough's opening brief, the Court should reverse the decision of the Fourth Circuit with instructions to affirm the judgment of the district court.

Respectfully submitted,

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