No. 08-1185

IN THE
Supreme Court of the United States

GENA MARIE DUNPHY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
CARLOS A. WILLIAMS, *President*
HENRY J. BEMPORAD, *Co-chair, Amicus Committee*
DAVID LEWIS
JUDITH MIZNER

SEAN HECKER *Counsel of Record*
ERIC D. MEYER
COURTNEY M. DANKWORTH
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

INTEREST OF THE AMICUS CURIAE

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation of indigent defendants in federal criminal prosecutions provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender offices. One of the NAFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented. The instant case presents an issue of great importance to criminal defendants, including many indigent defendants represented by counsel in Federal Defender offices across the country: Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to 18 U.S.C. § 3582 because of a retroactive amendment to the Sentencing Guidelines. In the interest of its clients, the NAFD asks this Court to grant certiorari on the issue presented in this case.[1]

---

[1] The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court, in accordance with Sup. Ct. R. 37.2(a). No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the NAFD or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court has repeatedly held that district courts must treat the Federal Sentencing Guidelines as advisory and impose sentences on defendants based on consideration of all of the factors set forth in 18 U.S.C. § 3553(a). Thousands of federal inmates are eligible for reduced terms of imprisonment under 18 U.S.C. § 3582(c)(2) as a result of the recent retroactive amendment to the Guidelines that reduced, but did not eliminate, the unwarranted disparity in the Sentencing Guidelines' treatment of crack and powder cocaine offenses. But within some judicial circuits, including the Fourth Circuit, these defendants are being resentenced pursuant to mandatory, amended guidelines ranges. Binding application of the Guidelines improperly limits the potential sentence reductions available to defendants in such jurisdictions. Courts in jurisdictions where the Guidelines are treated as advisory in Section 3582 proceedings have employed discretion in appropriate cases to impose sentences outside the amended Guidelines range. This disparity in treatment is unjust: The thousands of defendants in identical circumstances in other jurisdictions should have the same opportunity to receive sentences that reflect full consideration of all relevant § 3553(a) factors.

Not only is mandatory application of the Sentencing Guidelines in Section 3582 resentencings unjust and inconsistent with this Court's recent holdings, but the question of the interaction between retroactive amendments to the Guidelines and this Court's decision in *United States v. Booker*, 543 U.S.

220 (2005), is likely to recur and affect thousands more defendants in the future. The United States Sentencing Commission has made 27 retroactive amendments to the Guidelines, in some instances based on evidence of unwarranted disparities in sentences that took years to come to light. Future retroactive amendments will present the same question of the proper weight to accord the Guidelines on resentencing. The Court should take this opportunity to resolve the issue.

ARGUMENT

I. This Question Affects Thousands of Defendants Who Currently Await Resentencing And Are Subject To Disparate Sentencing Regimes In Different Federal Districts And Is Likely To Recur.

Thousands of federal inmates remain eligible for significantly reduced terms of imprisonment in resentencing proceedings conducted pursuant to 18 U.S.C. § 3582(c)(2) based on recent retroactive changes to the Federal Sentencing Guidelines that reduced, but did not eliminate, the unwarranted disparity in the Guidelines' treatment of crack cocaine and powder cocaine. Since Amendment 706 to the Guidelines reduced the crack-to-powder cocaine ratio below 100:1,[2] and Amendment 713

---

[2] The amendment reduced by two levels the offense level corresponding to particular crack quantities. This created widely-varying ratios between crack and powder cocaine, ranging from 25:1 to 80:1, depending on the offense level. *See* James Egan & Molly Roth, *Good Math to Fight the Bad Math: Applying the Commission's Lowest Accepted*

made that change retroactive, thousands of defendants convicted of offenses relating to the distribution of crack cocaine have had their sentences reduced by an average of 24 months pursuant to the amended guidelines ranges. U.S. SENTENCING COMM'N, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT, March 2009, tbl.8 [hereinafter MARCH 2009 REPORT]. But many eligible defendants have yet to seek modified sentences under § 3582(c)(2), including many who stand to gain the most from resentencings. Moreover, many district courts, including the one that resentenced the petitioner below, have been precluded from considering all of the 18 U.S.C. § 3553(a) factors that this Court has repeatedly held district courts must consider in imposing sentence, and have instead been required to treat the amended guidelines ranges as binding.

A. Thousands Of Defendants Remain Eligible For Meaningful Reductions In Their Sentences.

The U.S. Sentencing Commission's data indicates that thousands of defendants remain eligible for resentencing under 18 U.S.C. § 3582(c)(2) as a result of the retroactive revisions to the crack Guidelines. Many others have sentences currently on appeal.

Ratios to All Offense Levels, CHAMPION (Apr. 2008), at 1 & n.3; Brian T. Yeh & Charles Doyle, *Sentencing Levels for Crack and Powder Cocaine:* Kimbrough v. United States *and the Impact of* United States v. Booker, CONG. RES. SERV. (Jan. 2009), at 14 & n.111.

In October 2007, the Sentencing Commission estimated that 19,500 defendants would be eligible for sentence reductions. Memorandum Analyzing the Impact of the Crack Cocaine Amendment If Made Retroactive from Glenn Schmitt, Lou Reedt, and Kenneth Cohen to Ricardo Hinojosa, Chair, U.S. Sentencing Comm'n 4-5 (Oct. 3, 2007), *available at* http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf [hereinafter Impact Memorandum]. That estimate, however, did not include defendants sentenced prior to fiscal year 1992, or after the third quarter of fiscal year 2007. From March 3, 2008, when Amendment 706 became retroactive, through March 5, 2009, over 19,000 defendants applied for resentencing, and over 13,000 defendants have had their motions granted. MARCH 2009 REPORT, at tbl.1. More than 3,000 of the defendants whose motions have been denied, however, were not previously identified by the Sentencing Commission as eligible to seek a sentencing reduction, and thus were not included in the Commission's estimate of 19,500 defendants. *Id.* at tbl.5, n.1. Furthermore, nearly 500 of the applicants for sentence reductions were originally sentenced between fiscal years 1989 and 1991 or in fiscal year 2008, and so were also not accounted for in the Sentencing Commission's 2007 estimate. *Id.* at tbl.3. Put simply, the Commission originally estimated that 19,500 defendants would be eligible, and a similar number (19,000) have already applied. But several thousand of those who have applied were not among the 19,500 believed to be eligible, and several thousand of those believed to be eligible have yet to file for relief.

The experiences of lawyers in Federal Defender offices confirm what is apparent from the Sentencing Commission's data: In judicial districts across the country, there remain significant numbers of eligible defendants who are currently incarcerated and have yet to seek modified sentences under Section 3582, or whose cases are currently on appeal. Without this Court's intervention, many of these defendants will be subjected to binding application of the Sentencing Guidelines if they seek modifications under Section 3582(c)(2).

The potential sentence reductions available in these proceedings have real, meaningful impacts on the lives of defendants. The March 2009 Report determined that defendants have received an average reduction of 24 months' incarceration upon resentencing. MARCH 2009 REPORT, at tbl.8. But the determination in some circuits that district courts are bound by the revised Guidelines range in Section 3582 proceedings effectively prevents district courts from giving full consideration to all applicable 3553(a) factors, as well as the overarching command to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing.

Moreover, many of the defendants who have yet to seek relief or whose cases are currently on appeal are the individuals who stand to benefit the most from a holding that the Guidelines are advisory in Section 3582 proceedings. That is so because many defendants close to the end of their sentences have already stipulated to two-level reductions or had their sentences modified under § 3582(c)(2). As

a matter of efficiency and in the interest of clients close to the end of their sentences, attorneys in Federal Defender offices across the country have sought sentence reductions for defendants close to the end of their sentences first; it is those defendants with longer pending sentences who comprise the bulk of remaining eligible defendants.

B. Defendants Within Some Circuits Are Erroneously Subjected To Mandatory Application Of The Guidelines.

The federal courts are divided over whether the amended crack guideline ranges are binding in Section 3582 proceedings. In addition to the Fourth Circuit, five other federal courts of appeals have enforced the Sentencing Commission's policy statement, U.S.S.G. § 1B1.10 cmt. n.3, and held that the amended guideline ranges are binding when applied retroactively under § 3582(c)(2). *See United States v. Fanfan*, No. 08-2062, 2009 WL 531281 (1st Cir. Mar. 4, 2009); *United States v. Cunningham*, 554 F.3d 703 (7th Cir. 2009), *petition for cert. pending*, No. 08-1149 (filed Mar. 16, 2009); *United States v. Melvin*, No. 08-13497, 2009 WL 236053 (11th Cir. Feb. 3, 2009), *petition for cert. pending*, No. 08-8664 (filed Feb. 10, 2009); *United States v. Starks*, 551 F.3d 839 (8th Cir. 2009); *United States v. Rhodes*, 549 F.3d 833 (10th Cir. 2008), *petition for cert. pending*, No. 08-8318 (filed Jan. 21, 2009). In the interest of obtaining a ruling as quickly as possible, the NAFD as *amicus curiae* supports this Court granting certiorari in any of the cases in which petitions presenting this question are pending.

These decisions conflict with the decision of the Ninth Circuit in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007), and with the decisions of two federal district courts in circuits that have yet to rule on the issue. *See United States v. Blakely*, No. 3:02-CR-209-K, 2009 WL 174265 (N.D. Tex. Jan. 23, 2009); *United States v. Ragland*, 568 F. Supp. 2d 19 (D.D.C. 2008); *cf. United States v. Thompson*, No. 2-03-cr-24, 2008 WL 4456850, at *3 (M.D. Fla. Oct. 1, 2008) (noting practice to enforce § 1B1.10 limitations but finding "a unique factor . . . which justifies a further reduction based upon *Kimbrough*," and imposing sentence more than five years below the amended Guidelines range). Relying on this Court's holding in *United States v. Booker*, 543 U.S. 220 (2005), these courts have held that the Sentencing Guidelines are advisory and that district courts can impose sentences below the amended guideline ranges in Section 3582 proceedings. Because of this conflict, defendants in certain districts can receive new sentences below their applicable Guidelines range in Section 3582 proceedings based on a district court's consideration of all the § 3553(a) factors, while below-Guidelines sentences are unavailable to defendants in identical proceedings in other districts.

Where they are permitted the discretion to do so, district courts have determined that below-Guidelines sentences were appropriate for certain defendants based on consideration of the § 3553(a) factors. *See, e.g.*, *Blakely*, 2009 WL 174265, at *13 (imposing sentence of time served, 23 months below the revised Guidelines minimum); Order, *United States v. Fox*, No. 3:96-cr-00080 (JKS), at 6-8 (D.

Alaska Nov. 20, 2008) (imposing sentence of time served, more than eleven years below the revised Guidelines range); *United States v. Reid*, 584 F. Supp. 2d 187 (D.D.C. 2008) (imposing sentence of time served, more than two months below the revised Guidelines range). In *Blakely*, *Fox*, and *Reid*, the district courts took similar approaches in arriving at below-Guidelines sentences: they calculated the amended Guidelines range, considered whether a reduction was warranted and determined what sentence would best serve the purposes of sentencing set forth in § 3553(a)(2). Relying on *Hicks*, the district court in *Fox* noted that had the defendant dealt powder cocaine rather than crack cocaine, his minimum Guidelines sentence would have been 16 years less than his minimum Guidelines sentence under the *amended* Guidelines. Based on its analysis of the § 3553(a) factors, the defendant's behavior in prison, and the continuing unwarranted disparity between the Guidelines' treatment of crack and powder cocaine offenses, the district court reduced the sentence to time served. Order, *Fox*, No. 3:96-cr-00080 (JKS), at 7. Courts in these districts can fully consider, among other factors, the defendant's behavior over the course of the potentially many years that the individual has already served in prison, developments in the defendant's health and family circumstances, and evidence of remorse and rehabilitation. These courts may, of course, also reduce a sentence below the low end of the revised Guidelines range based on a determination that the crack-to-powder ratio continues to be unwarranted. *See United States v. Kimbrough*, 128 S. Ct. 558, 569 (2007).

A defendant in the Fourth Circuit (or the other circuits that have held that the amended Guidelines are binding) is not afforded the same possible sentencing outcomes. A district court in one of those circuits is prohibited from imposing a non-Guidelines sentence, even if that court concluded that a below-Guidelines sentence would best serve the purposes of sentencing in a particular case.

The conflicting application of § 3582(c)(2) across districts is affecting thousands of defendants who are eligible for sentence reductions. According to the Sentencing Commission, over 12,000 defendants were initially eligible for resentencing in the six circuits that have ruled that the amended Guidelines are binding—including over 5,000 in the Fourth Circuit alone—and many remain eligible today. *See* Impact Memorandum, at 15, tbl.3. These defendants are currently subject to a different sentencing regime than that applied by district courts in the Ninth Circuit, the Northern District of Texas, and the District of Columbia, where over 1,200 defendants were eligible for resentencing based on a district court's full consideration of all the 3553(a) factors. *See id.*

This Court's immediate consideration of the relationship between the retroactive crack cocaine sentencing Guidelines and this Court's decision in *Booker* is necessary to eliminate these unwarranted sentencing disparities across federal districts.

C. This Issue Will Recur.

The history and frequency of retroactive amendments to the Sentencing Guidelines demonstrates that the question of the proper weight to accord the Sentencing Guidelines on resentencing proceedings will undoubtedly recur. Since 1989, the Sentencing Commission has revised the Guidelines retroactively 27 times, with the most recent amendment effective as of May 1, 2008. *See* U.S.S.G. § 1B1.10(c), app. C, vol. III, Amend. 715. Several of the amendments, like the reduction in the crack-to-powder cocaine ratio, were triggered by new data on sentencing disparities that were unavailable when the Guidelines were initially drafted. Moreover, even the Sentencing Commission has recognized that the revised crack-to-powder cocaine ratios are only a partial solution to the unwarranted disparities in sentencing defendants convicted of crimes involving different forms of the same drug. *See* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, May 2007, at 10 [hereinafter MAY 2007 REPORT] (calling the amendment a "partial remedy"); *cf. Kimbrough*, 128 S. Ct. at 569 (noting that "[t]his modest amendment yields sentences for crack offenses between two and five times longer than sentences for equal amounts of powder" (citation and footnote omitted)). This recent history strongly suggests that the issue of how *Booker* interacts with retroactive amendments will recur.

A few recent retroactive amendments to the Guidelines evidence the frequency, nature and causes of these revisions. For example, in 1993, the

Commission revised the method for calculating the weight of LSD when determining the appropriate offense level under the Guidelines. U.S.S.G. § 1B1.10(c), App. C, vol. I, Amend. 488. According to the Sentencing Commission, the amendment was intended to eliminate "unwarranted disparity among offenses involving the same quantity of actual LSD but different carrier weights," thereby reducing "sentences that are disproportionate to those for other, more dangerous controlled substances." *Id.* vol. I, Amend. 488, Reason for Amend. This amendment was made retroactive. *Id.* vol. I, Amend. 502. Also in 1993, the Commission adopted a retroactive amendment to the drug equivalency tables to reflect the "reassessment of the potency" of the drug PCE. *See id.* vol. 1, Amend. 499, Reason for Amend.; Amend. 502 (applying the change retroactively). In 1995, the Commission similarly altered the method for calculating the weight of marijuana plants for purposes of determining the offense level under the Guidelines, *id.* vol. I, Amend. 516, and applied this change retroactively, *id.* vol. I, Amend. 536. The revision was a result of studies that demonstrated errors in the Commission's understanding of how much actual marijuana a plant yields. *Id.* Reasons for Amend. Finally, in 2003, the Commission altered the way the drug oxycodone was measured when determining the appropriate offense level under the Guidelines. *Id.* vol. II, Amend. 657. The Commission recognized "proportionality issues" in the way quantities of oxycodone were previously determined as a result of greater understanding of the various medicines in which the drug could be found. *See id.* Reason for

Amend. The oxycodone amendment was also applied retroactively. *See id.* Amend. 662.

The frequency of these retroactive amendments, often prompted by an analysis of statistical data that accumulates over time, means that defendants currently serving terms of imprisonment for various offenses stand a real chance of being made eligible for a reduced sentence under Section 3582 based on sentencing disparities that the Sentencing Commission has yet to identify. The question of the weight a district court must give to the Guidelines and the discretion available to impose non-Guidelines sentences in these circumstances will therefore undoubtedly recur.

II. Defendants In Crack Resentencings Are Particularly Deserving Of Full Consideration Of The § 3553(a) Factors By District Courts.

A. The Reduced Crack/Cocaine Ratios Remain Excessively Disparate.

As noted above, in amending the Sentencing Guidelines to reduce the crack-to-powder cocaine ratio, the U.S. Sentencing Commission itself recognized that the amendment was an incomplete solution to the unjustified disparity reflected in the drug quantity ratio. MAY 2007 REPORT, at 10. Indeed, over a decade earlier, in 1995, the Sentencing Commission proposed amendments to the Guidelines which would have implemented a 1:1 ratio. *See* 60 Fed. Reg. 25075-25077 (1995); *Kimbrough*, 128 S. Ct. at 569. In 1997, the Commission proposed a 5:1 ratio, U.S. SENTENCING

COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (Apr. 1997), *available at* http://www.ussc.gov/r_congress/newcrack.pdf, and in 2002, it proposed lowering the ratio to *no more than* 20:1, U.S. SENTENCING COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY iv (May 2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf.[3]

Based in part on a recognition that the prior 100:1 ratio did not reflect the Commission's reasoned, empirically-grounded judgment about the relative severity of crack and powder cocaine offenses, this Court held in *Kimbrough* that district courts have discretion to deviate, on policy grounds, from the crack Guidelines. *Kimbrough*, 128 S. Ct. at 575 (crack Guidelines "do not exemplify the Commission's exercise of its characteristic institutional role").

The Guidelines' revised crack-to-powder cocaine ratios, ranging from 25:1 to 80:1, remain subject to challenge because they are still without empirical grounding. *See Kimbrough*, 128 S. Ct. at 569 (revised ratios only partial remedy for problems of disparate treatment of crack and powder cocaine). Many district courts have concluded that a ratio below 25:1 is sufficient to meet the sentencing

---

[3] In its May 2007 Report, the Sentencing Commission also examined state sentencing guidelines for crack and powder cocaine offenses. It found that Iowa, the only state in 2002 with a ratio as high as 100:1, had recently amended its state sentencing guidelines to reflect a 10:1 ratio. MAY 2007 REPORT, at 99.

objectives set forth by Congress in 18 U.S.C. § 3553(a). *See, e.g., United States v. Edwards*, No. 04-CR-1090-5, 2009 WL 424464, at *3 (N.D. Ill. Feb. 17, 2009) (substituting 10:1 ratio); *United States v. Fisher*, 451 F. Supp. 2d 553 (S.D.N.Y. 2005) (same); *Simon v. United States*, 361 F. Supp. 2d 35, 48-49 (E.D.N.Y. 2005) (sentence reflecting ratio of either 10:1 or 20:1). District courts should be permitted to deviate from the Guidelines' ratios in resentencing crack defendants pursuant to § 3582(c)(2). Even with the reduced disparity reflected in the amended Guidelines, a district court may "conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." *Kimbrough*, 128 S. Ct. at 575 (quoting 18 U.S.C. § 3553(a)).

This Court recently reaffirmed these principles, and further emphasized that deviation from the crack Guidelines need not be based on factors specific to the defendant. *See United States v. Spears*, 129 S. Ct. 840, 843 (2009) ("[W]ith respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the Guidelines is not suspect."). Given the Sentencing Commission's own previous proposals to lower the crack-to-powder cocaine ratios below those currently in place, a district court may well still disagree categorically with the amended crack Guidelines when resentencing crack defendants. District courts must have the authority to exercise that discretion.

B. Many Of These Defendants Are Low-Level, Non-Violent Offenders.

The majority of federal crack cocaine offenders have been convicted of performing low-level trafficking functions, and did not engage in aggravating conduct. MAY 2007 REPORT, at 11. Sentencing Commission data reflects that fully two-thirds of crack defendants sentenced in 2000 were street-level dealers, and that this category remained a majority of defendants in 2005. *Id.* at 21. In 2005, violence or threats of violence were involved in only 10% of crack cocaine offenses, and bodily injury occurred in only 5% of offenses. *Id.* at 37. More than half of crack cocaine defendants in 2006 fell into one of the three lowest Criminal History categories—Category I, II, or III—under the Guidelines. *Id.* at 44.

Petitioner Dunphy is an example of low-level crack defendants receiving disproportionately long sentences. Dunphy transported a small amount of crack cocaine to a meeting point only to support her own drug habit. She cooperated with police following her arrest. Dunphy had no prior criminal history. Her original sentence of more than 11 years was the lowest possible within the then-mandatory guidelines range. Similarly, in another of the cases for which a petition for certiorari is currently pending in this Court, *Cunningham v. United States*, No. 08-1149, the petitioner Cunningham had the lowest criminal history category, and was sentenced to the minimum of the applicable guidelines ranges both before and after the § 3582(c)(2) amendment. *See* Petition for certiorari,

at 3-4 (filed Mar. 16, 2009). Petitioner Rhodes, No. 08-8318 (filed Jan. 21, 2009), was likewise sentenced to the minimum of the applicable guidelines ranges both at sentencing and resentencing; indeed, at the original sentencing, the district court apparently considered departing below the applicable guidelines range based on Rhodes's extraordinary acceptance of responsibility. *See Rhodes*, 549 F.3d at 835 n.1.

III. U.S.S.G. § 1B1.10 Should Be Considered Advisory In § 3582(c)(2) Resentencings Under The Sixth Amendment And The Remedial Holding In *United States v. Booker*.

Section 3582(c)(2) provides that "the court may reduce the term of imprisonment, after considering the factors set forth in Section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." Section 3553(a), in turn, advises district courts to consider the applicable Guidelines range for the conduct, as well as characteristics of the individual defendant and the criminal conduct, Congress's goals in sentencing, and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." These considerations are identical to those confronted when a district court imposes an original sentence. *See* 18 U.S.C. § 3553(b)(1).

A Section 3582 proceeding, therefore, requires the district court to weigh the same factors and perform the same essential tasks as it would at a full sentencing. To cabin the district court's discretion

when considering these factors only in the context of Section 3582 resentencings is both illogical and inconsistent with this Court's holding in *Booker*, which rejected "a mandatory system in some cases and a nonmandatory system in others." *Booker*, 543 U.S. at 266. The Sentencing Commission's revised policy statements, set forth in U.S.S.G. § 1B1.10 and adopted one day after this Court's decision in *Kimbrough*, purport to limit a sentencing court's discretion to impose a sentence below the minimum of the amended Guidelines range. These policy statements plainly reflect an attempt to enforce a mandatory system in the context of crack resentencings (as well as resentencings of other defendants under Section 3582(c)(2)), in violation of the Sixth Amendment.

In resentencing crack cocaine defendants, district courts may carry over factual findings from prior sentencing proceedings, including findings about a defendant's criminal history and the nature of his or her conduct. Each § 3553(a) factor need not be considered anew. But there may be additional facts a district court should consider, including a defendant's behavior during the years he or she has been in custody since the original sentencing, any developments in the defendant's family and personal circumstances and any evidence of rehabilitation. In weighing all of the Section 3553(a) factors, however, the revised Guidelines range must be treated as advisory by the district court in order to fashion a sentence only as severe as necessary to address the statutory purposes of sentencing.

Further, in resentencing defendants whose original sentences occurred before *Booker*, district courts should have the discretion to accord greater weight to the § 3553(a) factors in Section 3582 resentencings than may have been accorded in the initial sentencing proceeding, due to the then-mandatory nature of the Guidelines. For example, in *United States v. Melvin*, the district court determined that the Guidelines range for defendant Melvin's crack cocaine offense, even under the amended crack Guidelines, failed to achieve the purposes set forth by Congress in § 3553(a), and instead sentenced Melvin to a shorter term of imprisonment. Brief of Appellee at 13, *United States v. Melvin*, No. 08-13497 (11th Cir. July 28, 2008). This Court's holding in *Booker* grants district courts discretion in crafting sentences appropriate for specific defendants and conduct, and this holding must be applied to all Section 3582 resentencing proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
Carlos A. Williams,
President
Henry J. Bemporad,
Co-chair,
Amicus Committee
David Lewis
Judith Mizner

Sean Hecker
Counsel of Record
Eric D. Meyer
Courtney M. Dankworth
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000

April 21, 2009