No. 06-5618

In the Supreme Court of the United States

MARIO CLAIBORNE,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

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

BRIEF FOR THE NEW YORK COUNCIL OF DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Was the district court's choice of below-Guidelines sentence reasonable?

2. In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?

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STATEMENT OF INTEREST

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 200 lawyers (including many former federal prosecutors) whose principal area of practice is the defense of criminal cases in the federal courts of New York.[1] NYCDL's mission includes protecting and ensuring individual rights guaranteed by the U.S. Constitution by rule of law through education; supporting and advancing the criminal defense function by enhancing the quality of defense representation; taking positions on important defense issues; promoting study and research in the criminal justice system; and promoting the proper administration of criminal justice.

As *amicus curiae*, NYCDL offers the Court the perspective of very experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL has an interest in this case insofar as it will determine whether sentences constituting "a substantial variance" from the advisory-guidelines range must be "justified by extraordinary circumstances." We believe that it is imperative to the protection of our clients' rights, and to the establishment of a more just sentencing system, that the courts of appeals review sentences for unreasonableness in order to assess whether they are "sufficient, but not greater than necessary" to comply with the purposes of sentencing, as required by 18 U.S.C. § 3553(a) (commonly referred to as the "parsimony provision").

To assist this Court, NYCDL has undertaken an analysis of all post-*United States v. Booker*, 543 U.S. 220 (2005), reasonableness review cases captured by its search

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[1] Petitioner has filed a general consent for amicus briefs in this case, and a letter of consent from Respondent has been submitted concurrently with this filing. No counsel for a party authored this brief in whole or in part, and no person other than the amici, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. S. Ct. R. 37.6.

terms (described in the appendix attached hereto ("App.")), from January 1, 2006 through November 16, 2006.[2] The complete results of NYCDL's work should help this Court appreciate the ways in which reasonableness review has been applied by the courts of appeals. The data show that courts of appeals have affirmed the vast majority of upward variances and within-guidelines sentences, while reversing almost all below-guidelines sentences appealed by the government—a pattern flatly inconsistent with the statute's parsimonious mandate.

SUMMARY OF ARGUMENT

Congress requires a district court at sentencing to "impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing set forth in the Sentencing Reform Act. 18 U.S.C. § 3553(a). In determining such a sentence, the district court must "consider" seven factors, only one of which is the guidelines range. At sentencing in this case, the district court addressed each of the four statutory purposes[3] and "consider[ed]" the seven statutory factors that aid a district court in selecting the parsimonious sentence. Even though the district court expressly complied with Section 3553(a), the Eighth Circuit declared Mr. Claiborne's sentence

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[2] The starting date was chosen to avoid the need to filter out the large number of early post-*Booker* decisions that did not involve unreasonableness review, but instead addressed issues such as whether a pre-*Booker* sentence should be vacated and remanded for resentencing in light of *Booker*. The end date is shortly after this Court granted certiorari in this case. *See* App. at 1a n.1. NYCDL's appendix is also available at http://www.nycdl.org.

[3] The purposes of paragraph (2) are "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." 18 U.S.C. § 3553(a)(2).

unreasonable. In the Eighth Circuit—and in the other courts of appeals—that is not uncommon.[4]

NYCDL's database indicates that the courts of appeals are inherently skeptical of sentences that—like Mr. Claiborne's—are below the range suggested by the guidelines, even when these sentences otherwise appear to comply with all the provisions of Section 3553(a). This skepticism is reflected in a series of decisions in which the circuits are regularly reversing nearly every below-guidelines sentence appealed by the government, even when the district court's judgment reflects thoughtful consideration of the facts and law.

This trend of reversals of district court discretionary judgments about the application of the factors set out in Section 3553(a) in part reflects the judicially-created requirement that sentences outside of the guidelines be justified by unusual or unique—or in this case "extraordinary"—circumstances. This requirement, however, is without basis in the text, which assigns no hierarchy to the factors district courts are to "consider," and does not comport with Section 3553(a)'s parsimonious mandate.

The extra-textual requirements that some circuits have imposed for below-guideline sentences fail to acknowledge the research and insights of the United States Sentencing Commission, which has identified a variety of flaws in the guidelines system, based upon its study of 15 years of guidelines sentencing. The Commission's own analytical reports document the guidelines' inability to consistently achieve the purposes of sentencing identified by Congress in

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[4] Although "[a]chieving agreement between the circuit courts and within each circuit on post-*Booker* issues has, unfortunately, been like trying to herd bullfrogs into a wheelbarrow," *United States v. McBride*, 434 F.3d 470, 474 (6th Cir. 2006), the courts have been near unanimous in their distaste for below-guidelines sentences. That is likely not what this Court contemplated in crafting the *Booker* remedy. *See* 543 U.S. at 263 ("We cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure.").

Section 3553(a), and indicate that guidelines sentences are often greater than necessary to comply with these purposes.

In fact, the reasons the district court articulated to justify Mr. Claiborne's 15-month sentence—(1) the guidelines range placed too much significance on drug quantity for a low-level offender; (2) the total absence of criminal history suggested a low likelihood of recidivism; and (3) the guidelines' extremely harsh approach to crack offenses relative to powder cocaine—involve guidelines issues that the Commission has repeatedly identified as problematic.

ARGUMENT

Notwithstanding the plain text of Section 3553(a), the courts of appeals have created two extra-textual requirements for the review of sentences after *Booker*. First, seven courts of appeals have expressly adopted a presumption that within-guidelines sentences are reasonable, which at least implicitly connotes that sentences outside the guidelines are less likely to be reasonable. Second, nearly all of the circuits have held that the more a district court varies from the advisory-guidelines range, the more extraordinary the circumstances, as articulated by the district court in support of its non-guidelines sentence, must be. Neither requirement finds any support in the text or in the Sentencing Commission's own analysis of how the guidelines serve (and often fail to serve) the purposes of sentencing set forth by Congress. These requirements strongly discourage district courts from exercising the sentencing discretion that this Court deemed constitutionally essential in *Booker*.

I. THE COURTS OF APPEALS HAVE REVERSED NEARLY ALL OF THE BELOW-GUIDELINES SENTENCES APPEALED BY THE GOVERNMENT

NYCDL's database shows that, even though Section 3553(a) commands district courts to impose sentences "not greater than necessary" to accomplish Congress's

articulated purposes of sentencing, the vast majority of below-guidelines sentences appealed by the government have been declared unreasonable by courts of appeals. The frequency of these reversals casts doubt on whether the courts of appeals are attentive to the statutory text of Section 3553(a) that *Booker* said should guide reasonableness review.

Overall, in the universe of cases examined in the NYCDL study, the courts of appeals declared unreasonable and vacated *60* of *71* below-guidelines sentences appealed by the government (and 47 of these sentence reversals—out of 51 cases appealed by the government—were in those circuits that expressly presume within-guidelines sentences to be reasonable). *See* App. at 2a-3a. These reversals of district judges' decisions to impose below-guidelines sentences suggest a general resistance to and intolerance of any district court judgment to impose a sentence below the guidelines.

In sharp contrast, the NYCDL study reveals that the circuits are showing considerable deference to district court decisions to increase sentences above guidelines ranges—despite the mandate in Section 3553(a) to impose parsimonious sentences. In the cases analyzed in the NYCDL study, the courts of appeals declared only seven of 154 above-guidelines sentences appealed by defendants unreasonable (and those circuits formally adopting a presumption of reasonableness for within-guidelines sentences affirmed 83 of the 88 above-guidelines sentences appealed by defendants). *See* App. at 2a-3a.

The reasonableness review outcomes in the Eighth Circuit, which reversed Mr. Claiborne's sentence, are emblematic of these non-parsimonious patterns. Although the Eighth Circuit purports to apply reasonableness review in a fashion "akin to … review for abuse of discretion," *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006), the cases captured by NYCDL's database tell a different story when the circuit reviews a district court's exercise of sentencing discretion to select a below-guidelines sentence.

For sentences *below* the advisory-guidelines range, the Eighth Circuit's review is deferential in theory but intolerant in practice. The court has found *unreasonable and vacated 27 of 28 below-guidelines sentences appealed by the government*. *See* App. at 4a, 137a-41a. And, in the only other case in the study in which a panel approved a district judge's below-guidelines sentence (despite the government's appeal), the full court *vacated* the panel decision and is rehearing the case *en banc*. *See United States v. Burns*, 438 F.3d 826 (8th Cir.), *vacated by* 2006 U.S. App. LEXIS 12239 (8th Cir. May 18, 2006).[5] On the other hand, the Eighth Circuit has been highly deferential to sentences *within* and *above* the guidelines range: it has affirmed 116 of 118 within-range sentences and has affirmed 21 of 22 above-guidelines sentences appealed by defendants. App. at 4a, 132a-34a, 141a-59a.

The Eighth Circuit's decisions to vacate below-guidelines sentences appealed by the government often state that the circumstances cited by the district court were not sufficiently "extraordinary" to justify the sentence's downward variance from the presumed reasonable guidelines range. *See, e.g.*, *United States v. Beal*, 463 F.3d 834, 836-38 (8th Cir. 2006); *United States v. Bryant*, 446 F.3d 1317, 1319 (8th Cir. 2006); *United States v. Bueno*, 443 F.3d 1017, 1024 (8th Cir. 2006); *United States v. Gall*, 446 F.3d 884, 889 (8th Cir. 2006); *United States v. Gatewood*, 438 F.3d 894, 896-97 (8th Cir. 2006); *United States v. Givens*, 443 F.3d 642, 645 (8th Cir. 2006).

Notably, the Eighth Circuit's inconsistent approach to reasonableness review impacts its assessment of the extent of variances from the guidelines as well as the direction of

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[5] In addition, in the *only* below-guidelines sentence appealed by the government and affirmed as reasonable, *United States v. Krutsinger*, 449 F.3d 827 (8th Cir. 2006), the Eighth Circuit remarked that "[t]his case presents an unusual scenario. If we were only considering the characteristics of each defendant and the extent of his or her co-operation, *we would likely reverse*." *Id.* at 829 (emphasis added).

these variances. Despite repeatedly asserting that extraordinary variances require extraordinary justifications, the Eighth Circuit has affirmed at least nine sentences that imposed imprisonment terms *more than double* the bottom of the advisory range, including one in which the bottom was *nearly tripled*.[6] In at least eight cases, the Eighth Circuit affirmed sentences that added five or more years of imprisonment to the bottom of the guidelines range.[7] By contrast, the court has declared unreasonable at least 13 downward variances of less than five years.[8] App. at 132a-34a, 137a-41a.

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[6] *United States v. Lyons*, 450 F.3d 834 (8th Cir.) (from 70 to 180 months), *cert. denied*, 127 S. Ct. 358 (2006); *United States v. Mallory*, 2006 WL 2441577 (8th Cir. 2006) (from 27 to 60 months); *United States v. Maurstad*, 454 F.3d 787 (8th Cir. 2006) (from 41 to 120 months); *United States v. Meyer*, 452 F.3d 998 (8th Cir. 2006) (from 180 to 270 months); *United States v. Porter*, 439 F.3d 845 (8th Cir. 2006) (from 57 to 120 months); *United States v. Nelson*, 453 F.3d 1004 (8th Cir. 2006) (from 4 to 24 months); *United States v. Porchia*, 180 Fed. Appx. 596 (8th Cir. 2006) (from 6 to 24 months); *United States v. Larison*, 432 F.3d 921 (8th Cir. 2006) (from 5 to 60 months); *United States v. Hawk Wing*, 433 F.3d 622 (8th Cir. 2006) (from 6 to 18 months). Perhaps because the majority of within-guidelines sentences imposed nationwide are set at the bottom of the guidelines range, the Sentencing Commission's statistical analysis typically compares sentences to the bottom of the applicable range. *See* U.S. Sentencing Commission, Preliminary Quarterly Data Report, 4th Quarter Release, Preliminary Fiscal Year 2006 Data Through September 30, 2006. NYCDL followed this methodology in its analysis.

[7] *Lyons*, 450 F.3d 834 (increase of more than 9 years); *Maurstad*, 454 F.3d 787 (increase of more than 6.5 years); *Meyer*, 452 F.3d 998 (increase of 7.5 years); *Porter*, 439 F.3d 845 (increase of 5 years); *United States v. Hawkman*, 438 F.3d 879 (8th Cir.) (increase of more than 5 years), *cert. denied*, 127 S. Ct. 281 (2006); *United States v. Sitting Bear*, 436 F.3d 929 (8th Cir. 2006) (increase of more than 6 years); *United States v. Marshall*, 436 F.3d 929 (8th Cir. 2006) (increase of more than 6 years); *United States v. Larrabee*, 436 F.3d 890 (8th Cir. 2006) (increase of 14.5 years); *United States v. Hacker*, 450 F.3d 808 (8th Cir. 2006) (increase of more than 7 years).

[8] *United States v. Smith*, 450 F.3d 856 (8th Cir. 2006) (from 262 to 204 months); *United States v. Medearis*, 451 F.3d 918 (8th Cir. 2006) (from 46 to 0 months); *United States v. Ture*, 450 F.3d 352 (8th Cir. 2006) (from 12

The data from the Eighth Circuit are hard to square with the parsimony provision. The presumption of reasonableness for within-guidelines sentences and the requirement that variances from the guidelines be justified by increasingly extraordinary circumstances in practice treats with disfavor only those sentences below the advisory-guidelines range.

A. The Types Of Sentences Found Unreasonable Suggest That Courts Are Not Attentive To The Text Of Section 3553(a)

The text of Section 3553(a) is plain: Congress has instructed that a district court "*shall* impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)"; and that, in reaching that determination, the court *shall* consider six additional factors, only one of which is the advisory-guidelines range. Nothing in the statute allows for one of the factors that a court must "consider" to become the benchmark by which all other decisions are judged. There is no textual basis for demanding that the applicable guidelines range serve as the gravitational center for all sentencing determinations.[9] *See generally* Brief of New

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to 0 months); *United States v. Rogers*, 448 F.3d 1033 (8th Cir. 2006) (from 51 to 12 months); *United States v. Gall*, 446 F.3d 884 (8th Cir. 2006) (from 30 to 0 months); *United States v. Lazenby*, 439 F.3d 928 (8th Cir. 2006) (from 70 to 12 months); *United States v. Myers*, 439 F.3d 415 (8th Cir. 2006) (from 37 to 12 months); *Claiborne*, 439 F.3d 479 (from 37 to 15 months); *United States v. Gatewood*, 438 F.3d 894 (8th Cir. 2006) (from 63 to 36 months); *United States v. Shafer*, 438 F.3d 1225 (8th Cir. 2006) (from 63 to 48 months); *United States v. McMannus*, 436 F.3d 871 (8th Cir. 2006) (from 57 to 24 months); *United States v. Bryant*, 446 F.3d 1317 (8th Cir. 2006) (from 70 to 30 months); *United States v. Givens*, 443 F.3d 642 (8th Cir. 2006) (from 24 to 0 months).

[9] *See, e.g.*, *United States v. Foreman*, 436 F.3d 638, 644 n.1 (6th Cir. 2006) ("It is worth noting that a district court's job is not to impose a 'reasonable' sentence. Rather, a district court's mandate is to impose 'a sentence sufficient, but not greater than necessary, to comply with the purposes' of section 3553(a)(2). Reasonableness is the *appellate* standard of review in judging whether a district court has accomplished its task.").

York Council of Defense Lawyers, as Amicus Curiae Supporting Petitioner, *Rita v. United States*, No. 06-5754 at 9-15 (2006) ("Brief for NYCDL, *Rita*").

Requiring any special showing or some form of "extraordinary circumstances" to justify a sentence below the advisory guidelines conflicts with the statute's multi-dimensional list of sentencing factors, and also directly conflicts with the parsimony provision that Section 3553(a) sets forth as a district court's guiding directive. The text makes plain that a court must impose a lower sentence if the higher sentence is greater than necessary in light of the purposes of sentencing *even if* the higher sentence is suggested by the guidelines. *Nothing* in the statute remotely suggests that faced with a decision whether to impose a higher guidelines sentence or a lower sentence that would serve the purposes of sentencing, the court must impose the guidelines sentence in the absence of some special or extraordinary circumstances. The statute requires compliance with the parsimony directive and simply calls upon district courts to "consider" the guidelines in their efforts to follow that directive.

B. The Courts Of Appeals' Approach To Reasonableness Review Has Failed To Take Into Account The Commission's Findings That The Guidelines Are Not Parsimonious And Often Fail to Achieve Congress's Purposes

In their guideline-centric approach to reasonableness review, the courts of appeals have ignored critical information from the Sentencing Commission about how the guidelines were promulgated, the factors they take into account (and fail to take into account), and evidence showing how poorly the guidelines can sometimes function in practice. *See generally* Brief of NYCDL, *Rita*, at 19-23 (citing United States Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment Of How Well The Federal Criminal Justice System Is Achieving The Goals Of Sentencing Reform 144 (2004) ("USSC Assessment Report")).

In addition to general problems with the guidelines in operation, which are documented by the Sentencing Commission and discussed more fully in Brief of NYCDL, *Rita*, the guidelines have two additional shortcomings that are particularly relevant to Mr. Claiborne's case. First, the Commission itself has determined that its Criminal History Category I overstates the criminal tendencies and likelihood of recidivism for a true first-time offender like Mr. Claiborne. *See* U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computations of the Federal Sentencing Guidelines 15 (2004) (concluding that "sentencing reductions for 'first offenders' are supported by the recidivism data and would recognize their lower re-offending rates"); *see also* Department of Justice, *An Analysis of Non-Violent Drug Offenders With Minimal Criminal Histories* (1994) (noting that under the guidelines system "low-level," first time drug offenders, who are least likely to recidivate after release, often get sentences that "overlap with defendants who had much more significant roles in the drug scheme").

Second, the Commission has after extended study emphatically stated that it "firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress." United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 91 (May 2002) ("Cocaine and Federal Sentencing Policy"). The Commission has repeatedly explained why the crack guidelines recommend sentences, especially for low-level offenders like Mr. Claiborne, which are systematically far greater than necessary to comply with the purposes of sentencing.

Under the guidelines, a crack cocaine offender receives the same base offense level as a powder cocaine offender who possesses 100 times more cocaine. *See* U.S.S.G. § 2D1.1(c) (Drug Quantity Table). This provision dramatically increases sentences for those convicted of crack cocaine offenses and has its most significant impact in

cases involving low-level offenders like Mr. Claiborne. "According to the Department of Justice, defendants convicted of trafficking less than 25 grams of powder cocaine received an average sentence of 13.6 months, just over one year. In contrast, defendants convicted of trafficking an equivalent amount of crack cocaine received an average sentence of *64.8 months, over five years*." Cocaine and Federal Sentencing Policy at 98 (emphasis in original). The guidelines actually have the effect of increasing the "penalty gap" even more dramatically for those offenders—like Mr. Claiborne—with the lowest quantities and least criminal history. *Id.* at iv; *see also id.* at 99 (discussing 8.3 to 1 penalty ratio for crack cocaine and powder cocaine offenders with the lowest drug quantities and the least criminal history (Criminal History Category I)).

C. The Circuits Have Been More Deferential To *Upward* Variances Than Downward Variances, A Pattern Inconsistent With Parsimony And The Commission's Findings

Courts have generally affirmed upward variances for certain factors while disapproving downward variances based on *the very same reasons*. For example, in *United States v. Shaw*, —F.3d—, 2006 WL 3505339, at *4 (10th Cir. 2006), the court affirmed a substantial upward variance imposed to match a co-defendant's higher guidelines sentence, but in *United States v. Khan*, 461 F.3d 477, 500 (4th Cir. 2006), the Fourth Circuit vacated a below-guidelines sentence imposed to avoid disparities between co-defendants. *See also United States v. Thurston*, 456 F.3d 211 (1st Cir. 2006) (vacating below-guidelines sentence imposed by district court in part to avoid unwarranted disparity between co-defendants).[10]

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[10] Congress, in its statutory instruction to judges, lists "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" as only one of the seven distinct sentencing considerations. *See* 18 U.S.C. § 3553(a)(6). Some courts of appeals justify placing primacy significance on the

A similar pattern has emerged in the consideration of a defendant's criminal history. In *Terrell*, for example, the Tenth Circuit rejected the defendant's argument that the criminal history computation overstated the seriousness of his record, and held that the guidelines adequately take such considerations into account. 445 F.3d at 1265. In *Shaw*, however, the Tenth Circuit affirmed an *upward* variance from the guidelines minimum of 57 months to a sentence of 105 months and described the guidelines criminal history calculation as a mere "technical computation [that] did not adequately capture the seriousness of Shaw's record." 2006 WL 3505339, at *2.

The Eighth Circuit too has approved substantial *upward* variances in a large number of cases where the district court found that the guidelines did not adequately capture the severity of the offender's criminal history. *See*, *e.g.*, *Lyons*, 450 F.3d 834 (affirming upward variance from 70 to 180 months based on criminal history and likelihood of recidivism); *Mallory*, 2006 WL 2441577 (same; from 27 to 60 months); *Maurstad*, 454 F.3d 787 (same; from 41 to 120 months); *Porter*, 439 F.3d 845 (same; from 57 to 120 months); *United States v. Chase*, 451 F.3d 474 (8th Cir. 2006) (same; from 57 to 96 months); *Hacker*, 450 F.3d 808 (same; from 92 to 180 months); *Porchia*, 180 Fed. Appx. 596 (same; from 6 to 24 months); *Hawk Wing*, 433 F.3d 622 (same; from 6 to 18 months). By contrast, it has held unreasonable a significant

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guidelines ranges by asserting that the guidelines best take this factor into account. *See*, *e.g.*, *United States v. Terrell*, 445 F.3d 1261, 1265 (10th Cir. 2006) (the presumption of reasonableness of a guidelines sentence, "simply reflect[s] that the Guidelines are generally an accurate application of the factors listed in § 3553(a)"); *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006) ("This court, too, has consistently emphasized, even post-Booker, that 'the purpose of the Guidelines [is] to promote uniformity in sentencing so as to prevent vastly divergent sentences for offenders with similar criminal histories and offenses.'") (citation omitted); *United States v. Johnson*, 445 F.3d 339, 342 (4th Cir. 2006) (same). Nonetheless, these same circuits invoke factor (a)(6) to affirm above-guidelines sentences or reverse below-guidelines sentences. *See*, *e.g.*, *Shaw*, 2006 WL 3505339.

number of below-guidelines sentences in which the district court concluded that the guidelines overstated the offender's criminal history. *See*, *e.g.*, *United States v. McDonald*, 461 F.3d 948 (8th Cir. 2006) (vacating below-guidelines sentence imposed by district court based on low likelihood of recidivism); *Ture*, 450 F.3d 352 (vacating below-guidelines sentence for first-time offender); *Gall*, 446 F.3d 884 (criminal history); *United States v. Feemster*, 435 F.3d 881 (8th Cir. 2006) (age and criminal history); *United States v. Lee*, 454 F.3d 836 (8th Cir. 2006) (criminal history); *United States v. Bradford*, 447 F.3d 1026 (8th Cir. 2006) (age and criminal history); *United States v. Brinton*, 436 F.3d 871 (8th Cir. 2006) (criminal history).

When courts of appeals vacate below-guidelines sentences and approve of within- and above-guidelines sentences, they discourage district courts from complying with the parsimony provision Congress set forth in Section 3553(a) and from giving due consideration to all of the statutory factors (rather than only the guidelines range), as this Court has held the statute requires. *See Booker*, 543 U.S. at 259-60 ("The Act … requires judges to take account of the Guidelines *together with other sentencing goals* … . [It] requires judges to consider the Guidelines … [range], the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, … [and] the need to provide restitution to victims.") (citation omitted and emphasis added); *see also id.* at 260 (noting that the Act also "*requires* judges to impose sentences that reflect" the purposes of sentencing enumerated in Section 3553(a)(2)(A)-(D)) (emphasis added).

II. THE COURT OF APPEALS ERRED WHEN IT REVERSED MR. CLAIBORNE'S SENTENCE

At Mr. Claiborne's sentencing, the district court took account of the various Section 3553(a) factors and considered the advisory-guidelines range. The court articulated its reasons for imposing the sentence, and those reasons are amply supported by the record. Among other things, the court considered the nature and magnitude of the offense;

its personal assessment of Mr. Claiborne, including what was necessary to create the best chance for successful rehabilitation; his drug treatment, job, and family history; and the court's experience with similarly-situated defendants. *See* JA 71-72.

Based on the totality of the sentencing record, the court found that a 15-month sentence would constitute adequate punishment, would be commensurate with the sentences of other similarly-situated defendants in the same court, and would facilitate rehabilitation. The district judge also concluded, conversely, that a guidelines sentence would be "tantamount to throwing [Mr. Claiborne] away"—that is, greater than necessary to comply with the purposes of sentencing. JA 72. The district court's sentencing judgment is an impressive example of the kind of "refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing," which this Court has said is entitled to substantial deference. *Koon v. United States*, 518 U.S. 81, 98 (1996); *see also* S. Rep. No. 98-225, at 52 (1983) (before imposing a sentence, "the judge" must consider "the nature and circumstances of the offense"); *id.* at 53 ("the judge" must undertake "a comprehensive examination of the characteristics of the particular offense and the particular offender").

In particular, the district court found that the applicable guidelines range overstated Mr. Claiborne's criminal tendencies. Mr. Claiborne was a true first offender with no prior convictions. As noted above, the Sentencing Commission's reports and analysis *actually support*—rather than contradict—the district court's decision to take that factor into account. *See* Measuring Recidivism at 15 (concluding that "sentencing reductions for 'first offenders' are supported by the recidivism data and would recognize their lower re-offending rates").[11]

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[11] The advisory nature of the guidelines—and the controlling authority of Section 3553(a)'s parsimony provision—makes this case different from

The district court also took into account the small drug quantity and that Mr. Claiborne was a low-level offender. The judge found that the quantity of drugs did not justify the penalty suggested by the guidelines; and, comparing Mr. Claiborne with other offenders the judge had sentenced for offenses involving much larger quantities of drugs, the judge found the guidelines' suggested sentence greater than necessary. This analysis was entirely consistent not only with its discretionary authority, but also with the Commission's findings that the guidelines' reliance on quantity over other more relevant factors fails in some cases to reflect the relative harmfulness of the crime, USSC Assessment Report at vii; that the most significant flaw in the quantity-based approach and the resultant sentences suggested by the guidelines grids is that quantity is "a particular poor proxy for the culpability of low-level offenders," *id.* at 50; and that the crack/powder disparity is not justified by any legitimate sentencing goals and that "the current penalty structure's almost exclusive reliance on quantity-based penalties to account for the entirety of the harms … fails to provide adequate sentencing

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Koon in that respect. In *Koon*, this Court found that the offender's low likelihood of recidivism "was not an appropriate basis for departure." 518 U.S. at 111. The district court had granted a departure because, "within Criminal History Category I, the Guidelines do not adequately distinguish defendants who, for a variety of reasons, are particularly unlikely to commit crimes in the future. Here, the need to protect the public from the defendants' future criminal conduct is absent 'to a degree' not contemplated by the Guidelines." *Id.* (quoting district court opinion). That is precisely the rationale employed by the district court in Mr. Claiborne's case. In *Koon*, however, this Court rejected the district court's rationale because it "failed to account for the Commission's specific treatment of this issue." *Id.* But now, the Commission's treatment of criminal history is not dispositive. "The guidelines—being advisory—are no longer decisive as to factors any more than as to results." *United States v. Smith*, 445 F.3d 1, 3 (1st Cir. 2006); *Booker*, 543 U.S. at 305 n.3 (Scalia, J., dissenting in part) ("[The Commission's] policy decisions are no longer mandatory, [and] the sentencing judge is free to disagree with them.").

proportionality," Cocaine and Federal Sentencing Policy at 101.

The district court sentenced Mr. Claiborne to 15 months' imprisonment after engaging in precisely the kind of nuanced and reasoned approach to sentencing that the statute requires. Every aspect of the sentencing process was reasoned, and by any common understanding "not unreasonable." Nevertheless, the Eighth Circuit rejected the district court's assessment and analysis and declared the below-guideline sentence unreasonable. That was wrong. The Eighth Circuit's requirement of "extraordinary circumstances" to justify this sentence finds no basis in the text of the statute and conflicts with the Commission's own reports. In addition, district courts are indisputably far better qualified and uniquely equipped to make the kinds of individualized determinations required to fashion an appropriate sentence. *Koon*, 518 U.S. at 98-99 ("District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more [sentencing] cases than appellate courts do."). They also have "special competence [] about the ordinariness or unusualness of a particular case." *Id.* at 98-99 (quotation omitted).

CONCLUSION

For these reasons, the court of appeals decision vacating Mr. Claiborne's sentence should be reversed.

Respectfully submitted,

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