

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**UNITED STATES OF AMERICA :
Appellant,**

VS. : APPEAL NUMBER 05-4833

**MARC RICKS :
Appellee.**

**Petition for Panel Rehearing and Rehearing En Banc
Under Fed. R. App. P. 35(b) and 40(a)**

The petitioner, Marc Ricks, by his attorney David L. McColgin, Assistant Federal Defender, Federal Community Defender Office for the Eastern District of Pennsylvania, Federal Court Division, respectfully requests the granting of the instant Petition for Panel Rehearing and Rehearing En Banc Under Fed. R. App. P. 35(b) and 40(a). In support of this petition, counsel represents the following:

I express a belief, based on a reasoned and professional judgment, that the panel's precedential opinion (attached as Addendum) conflicts with the Supreme Court's recent decision in *United States v. Rita*, ___ U.S. ___, 127 S. Ct. 2456 (2007), as well as the Sixth Amendment principles set out in *Cunningham v. California*, ___ U.S. ___, 127 S. Ct. 856 (2007), *United States v. Booker*, 543 U.S. 220 (2005), *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and consideration by the full Court is therefore

necessary. In addition, I express a belief, based on a reasoned and professional judgment, that the panel's opinion involves a question of exceptional importance: May the district courts at sentencing in crack cocaine or other cases, in the course of applying the sentencing factors under 18 U.S.C. § 3553(a), disagree on general policy grounds with the Federal Sentencing Guidelines, or may they vary from the guidelines based only on "individual, case-specific factors"?

Facts and Procedural History

Marc Ricks and his brother Michael Ricks pleaded guilty to drug conspiracy charges without a plea agreement, reserving for litigation at sentencing the quantity of drugs that could be attributed to them. Counsel contested the quantity at an evidentiary hearing, and the judge determined that each brother was responsible for distributing at least 2000 grams of cocaine base, 3000 grams of powder cocaine, and 30 grams of heroin. The resulting Guidelines range for Marc Ricks was 188 to 235 months, and for Michael Ricks it was 324 to 405 months. Both brothers appealed, and their cases were remanded for resentencing in light of *Booker*.

At the resentencing hearings the judge first correctly calculated the Guideline range for each brother, "accepting as accurate" the Guidelines ranges set forth in the original Pre-Sentence Reports based on the crack/powder cocaine drug quantity ratio of 100 to 1. (Con. App. 91 (Marc Ricks); 47-48, 54 (Michael

Ricks)). Then, exercising his discretion under 18 U.S.C. § 3553(a), the judge considered what the Guidelines range would be if the 20-to-1 ratio recommended by the Sentencing Commission were used. Taking into account the disparity between crack and cocaine along with the nature of the case and the history and circumstances of each defendant, the judge sentenced Marc Ricks to 135 months and Michael Ricks to 168 months. Each sentence was within what the Guidelines range would have been using the 20-to-1 ratio. *United States v. Ricks*, slip op. at 3-4.

This Court reversed the sentences, holding that it was error for the district court judge to “disagree with the 100-to-1 ratio as a policy matter.” *Id.* at 16. Instead, this Court held that the district court may “consider the crack/powder differential” only in the context of case-specific facts that would warrant a sentence outside the guideline range. *Id.* As the Court stated, “We conclude that when a district court imposes a below-Guidelines sentence for a crime involving crack, the record must demonstrate that the court focused on individual, case-specific factors.” *Id.* at 18.

In so holding, the Court in part followed its prior decision in *United States v. Gunter*, 462 F.3d 237 (2006), insofar as *Gunter* held that a district court has the discretion to “consider the crack/powder cocaine differential . . . as simply

advisory at step three of the post-*Booker* sentencing process (imposing the actual sentence after considering the relevant § 3553(a) factors).” *Id.* at 249. But *Ricks* restricted the holding of *Gunter* by placing limits on that discretion, barring the district court from disagreeing with the policy underlying the 100-to-1 ratio, and allowing consideration of the ratio only in the context of “individual, case-specific factors.”

Reasons for Granting Rehearing

A. The restriction in *Ricks* that district courts may not disagree on general policy grounds with the Guidelines is contrary to the Supreme Court’s decision in *Rita*.

This Court should reconsider its opinion in *Ricks* because its limitation on the district court’s consideration of the policies underlying the Guidelines is contrary to *Rita*. The Supreme Court in *Rita* made clear that the district court, in exercising its discretion under 18 U.S.C. § 3553(a), may disagree with the Guidelines on general policy grounds and is *not* limited to case-specific facts in determining whether a sentence outside the Guidelines range is warranted.

Rehearing is necessary to reconcile this contradiction.

Rita teaches that after a district court determines the advisory guideline range, it may entertain arguments that “the Guidelines sentence should not apply,”

[1] “perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the ‘heartland’ to which the Commission intends

individual Guidelines to apply,” or

[2] “perhaps because the Guidelines sentence *itself* fails properly to reflect § 3553(a) considerations” or

[3] “because the case warrants a different result regardless.”

127 S. Ct. at 2465 (emphasis added). Further, a party may “contest[] the Guidelines sentence *generally* under § 3553(a) – that is, [the party may] argue[] that the Guidelines reflect an *unsound judgment*, or, for example, that they do not generally treat certain defendant characteristics in the proper way. . . .” *Id.* at 2468 (emphasis added). *Rita* thus establishes that a sentencing court may evaluate the soundness of the policy judgments of the Sentencing Commission as embodied in the Guidelines, and must do so in response to nonfrivolous arguments by either party.

The district court’s freedom to disagree with the Guidelines on policy grounds flows from the Supreme Court’s view of the proper role of the sentencing court. As *Rita* explained, the sentencing court carries out the same function as, and has a co-equal role with, the Sentencing Commission in making the determinations required under 18 U.S.C. § 3553(a). *Rita* states, “In instructing both the *sentencing judge* and the *Commission* what to do, Congress referred to the basic sentencing objectives that the statute sets forth in 18 U.S.C. § 3553(a).” *Id.* at 2463. This provision “tells the *sentencing judge* to consider” seven objectives under §

3553(a), and “Congressional statutes then tell the *Commission* to write Guidelines that will carry out these same § 3553(a) objectives.” *Id.* (emphasis in original).

“The upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one at retail, the other at wholesale.” *Id.*

This co-equal role that the sentencing court and the Commission have in making the § 3553(a) determinations is the basis for the “double reliability” rationale in *Rita*, which in turn is the justification for the non-binding appellate presumption of reasonableness. *Rita* explained that such a presumption on the appellate level “simply recognizes the real-world circumstance that when the judge’s discretionary decision accords with the Commission’s view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable.” *Id.* at 2465.¹ Barring the district court from considering whether policy judgments in the Guidelines are unsound in light of the § 3553(a) factors would vitiate this “double reliability” and undermine the rationale for *Rita*’s

¹ *Rita*’s “double reliability” rationale strongly supports the *below*-guidelines sentences the judge imposed here. In this case, “the judge’s discretionary decision [to impose a sentence consistent with the 20:1 ratio] accords with the Commission’s view of the appropriate application of § 3553(a) [to crack and powder cases],” since it is the Commission itself which has so forcefully advocated for the 20:1 ratio. Thus, under *Rita*, application of an appellate presumption here would have to favor the sentences actually imposed.

holding.

Ricks does just that, and it is therefore contrary to *Rita*. *Ricks* held that it is error for a district court to “disagree[] with the 100-to-1 ratio as a policy matter,” slip op. at 16, and that “when a district court imposes a below-Guidelines sentence for a crime involving crack, the record must demonstrate that the court focused on individual, case-specific factors.” *Id.* at 18. Such a restriction cannot be reconciled with *Rita*’s language allowing district courts to consider whether the “Guidelines reflect an unsound judgment.” 127 S. Ct. at 2465. Nothing in *Rita* restricts the district court’s consideration of the § 3553(a) factors to “individual, case-specific” facts.

The Court should therefore grant rehearing in order to address *Rita* and make clear that the district courts do have the discretion under § 3553(a) to consider whether the policy judgments underlying the Guidelines, such as the crack/powder differential, are unsound.

B. The reversal of the below-guidelines sentences in this case violates the Sixth Amendment because the Guidelines range was based on facts that were neither admitted nor proven to a jury beyond a reasonable doubt.

Under the Sixth Amendment principle laid down in a string of Supreme Court precedents since 2000, appellate courts may not reverse below-guidelines sentences based on a failure to impose guidelines sentences that derive from facts beyond the guilty verdict and any valid admissions. *See Cunningham v. California*, 127 S. Ct. 856, 860 (2007); *United States v. Booker*, 543 U.S. 220, 233 (2005); *Blakely v. Washington*, 542 U.S. 296, 304-05 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Reversal of such a sentence, as in this case, violates that Sixth Amendment principle by effectively holding that the federal sentencing system requires a sentence longer than that authorized by the jury found or admitted facts. As the Supreme Court held most recently in *Cunningham*, “placing sentence-elevating factfinding within the judge’s province[] violates a defendant’s right to trial by jury safeguarded by the Sixth Amendment. . . .” 127 S. Ct. at 860 (holding that California’s determinate sentencing law, providing for enhanced sentence based on a “circumstance in aggravation,” violates Sixth Amendment).

Marc and Michael Ricks never admitted to the quantity of drugs involved in this case, and at their guilty pleas, they each “reserved the issue of the quantity of

drugs that should be attributed to them.” *Ricks*, slip op. at 3. The judge held a hearing at which the quantities were hotly contested, and he then made findings to resolve the factual disputes.

This Court holds in the instant appeal that once the sentencing judge found the facts regarding the quantity of crack cocaine, he was bound to impose an enhanced sentence under the Guidelines for crack cocaine, unless he found “individual, case-specific factors” warranting a lower sentence. *Id.* at 18. In so holding, this Court effectively treats the Guidelines range as a mandatory and binding on the sentencing judge – a range from which the judge can vary based only on a finding of mitigating facts. Under the *Ricks* holding, case-specific facts must be found to justify a variance because the judge may not disagree with the Guidelines on general “policy” grounds. *Id.* at 16. Without the judicial fact-finding regarding the quantity of crack, the Guidelines sentences for the *Ricks* brothers would have been much lower.

The holding in *Ricks* thus effectively restores the Guidelines, at least in crack cases, to their pre-*Booker* mandatory status. The variances allowed by *Ricks* are no functionally no different than the departures for aggravating or mitigating circumstances allowed under the mandatory Guidelines that *Booker* found unconstitutional. Facts found by the judge raise the Guidelines range, and that

range is mandatory unless the judge finds facts warranting a different sentence.

Rehearing should therefore be granted because the opinion this case conflicts with the Supreme Court's Sixth Amendment jurisprudence.

WHEREFORE, for all the foregoing reasons, petitioner respectfully requests that this Court grant the instant Petition for Panel Rehearing and Rehearing En Banc.

Respectfully submitted,

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