



United States Attorney
Northern District of Ohio

Four Seagate Suite 308 Toledo, Ohio 43604-2624 (419) 259-6376 Fax (419) 259-6360

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Leonard Green, Clerk of Court United States Court of Appeals for the Sixth Circuit 100 East Fifth Street, Room 532 Potter Stewart U.S. Courthouse Cincinnati, OH 45202-3988

RE: Case No. 05-3708, 05-3709

<u>United States of America v. James M. Funk</u>

District Court No. 3:02CR708

Dear Mr. Green:

The government requests the Clerk of Courts to forward this letter to the hearing panel as expeditiously as possible.

On January 7, 2008, the Supreme Court vacated this Court's decision vacating appellant James M. Funk's 150-month sentence and remanded the case for further consideration in light of Gall v. United States, 128 S. Ct. 586 (2007). See Funk v. United States, 128 S. Ct. 861 (2008). On February 12, 2008, the government filed a supplemental brief arguing that, in light of the congressional directive in 28 U.S.C. § 994(h), district courts are "without discretion" to disagree with the career offender guideline. Supp. Br. of Appellant at 12, 16-18 (citing Kimbrough v. United States, 128 S. Ct. 558, 571 (2007)). We have since become aware that the argument the government made in its supplemental brief does not correctly state the position of the United States. Accordingly, the government withdraws the argument at pages 12 and 16-18 of the supplemental brief. government apologizes to the Court for the misstatement in its supplemental brief and requests that the Court accept this letter clarifying our position.

In <u>Kimbrough</u>, the Supreme Court concurred with the submission of the United States that district courts may vary from the advisory Sentencing Guidelines range based on policy considerations, "including disagreements with the Guidelines."

Kimbrough, 128 S. Ct. at 570 (quoting U.S. Br. 16 and citing Rita v. United States, 127 S. Ct. 2456, 2465 (2007) (district court may consider arguments that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations")). See U.S. Br. in Kimbrough at 29 ("As long as Congress expresses its will wholly through the Guidelines system, the policies in the Guidelines will best be understood as advisory under Booker and subject to the general principles of sentencing in Section 3553(a)."). Kimbrough left open whether "closer review may be in order" on appeal "when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect the § 3553(a) considerations' even in a minerun case," 128 S. Ct. at 575, but it rejected the position that a sentencing court's disagreement with the Sentencing Guidelines on policy grounds is per se barred.

The language in Kimbrough on which the government relied in * its supplemental brief (at 16) does not indicate that sentencing courts lack all discretion to disagree with the career offender quideline on policy grounds. In explaining its conclusion that Congress had not required the Commission (and the courts) to apply the 100:1 crack/powder ratio to sentences other than those required by the mandatory minimums in the drug statute, the Court noted that 21 U.S.C. § 841(b) "sa[id] nothing" about sentences other than at the mandatory minimums, and contrasted that statute with the career offender provision of the &Sentencing Reform Act, which "specifically required the Sentencing Commission to set Guidelines sentences for serious recidivist offenders 'at or near' the statutory maximum." 128 S. Ct. at 571 (quoting 28 U.S.C. § 994(h)). The Court used the career offender provision to illustrate that Congress knows how to "direct sentencing practices in express terms" when it wants to do so. The Court did not say, however, that Congress had directed sentencing courts to impose sentences for such offenders "at or near" the maximum; rather, the Court emphasized that the Kimbrough's reference to the direction was to the Commission. career offender guideline reflected the conclusion that Congress intended the Guidelines to reflect the policy stated in Section 994(h), not that the quideline implementing that policy binds In light of the holding of Kimbrough and the federal courts. earlier reasoning of the Court in Rita, a sentencing court is not precluded from imposing a non-Guidelines sentence based on a policy disagreement with the career offender guideline, although the sentencing court's explanation of such a variance may be subject to closer appellate review.

We continue to believe that the sentence the district court imposed in this case was procedurally unreasonable. As the

government argued in its opening brief in this appeal, the court failed to explain why the fact that the offense did not involve firearms justified a substantial downward variance for a defendant whose extensive criminal record would have placed him in criminal history category VI even if he had not qualified as a career offender. Brief of Appellant at 20-23 (filed Feb. 28, 2006); see Gall, 128 S. Ct. at 597 (appellate court must "ensure that the district court committed no significant procedural error, such as * * * failing to adequately explain the chosen sentence - including an explanation for any deviation from the Guidelines range"). The sentencing court imposed a sentence at the top of the range that would have applied without the career offender enhancement. The court thus gave no weight to the career offender enhancement and gave no specific explanation why it entirely eliminated any additional sentence enhancement beyond the otherwise-applicable range, despite the Guidelines' provision of a higher range as a direct response to congressional policy. Accordingly, the sentence should be vacated and the case remanded for resentencing.

Very truly yours,

WILLIAM J. EDWARDS ACTING UNITED STATES ATTORNEY

Joseph K. Wilson

Assistant United States Attorney

CC
Spiros Cocoves, Esq.
610 Adams Street, 2nd Floor
Toledo, Ohio 43604
Attorney for Appellee Funk