

No. 05-3708

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JAMES M. FUNK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

**CORRECTED RESPONSE OF THE UNITED STATES TO
DEFENDANT'S PETITION FOR REHEARING EN BANC**

WILLIAM J. EDWARDS
*United States Attorney
Northern District of Ohio*

JOSEPH R. WILSON
*Assistant U.S. Attorney
Northern District of Ohio*

NINA GOODMAN
*Attorney
Criminal Division
U.S. Dep't of Justice
950 Pennsylvania Ave., NW
Room 1264
Washington, D.C. 20530
(202) 514-3962*

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Funk v. United States, 128 S. Ct. 861 (2008) 3

Gall v. United States, 128 S. Ct. 586 (2007) 1, 3, 6, 9

Kimbrough v. United States, 128 S. Ct. 558
(2007) passim

Rita v. United States, 127 S. Ct. 2456 (2007) 9, 10

United States v. Boardman, 528 F.3d 86
(1st Cir. 2008) 8

United States v. Booker, 543 U.S. 220 (2005) 2

United States v. Davis, 537 F.3d 611
(6th Cir. 2008) 6

United States v. Funk, 534 F.3d 522
(6th Cir. 2008) passim

United States v. Funk, 477 F.3d 421
(6th Cir. 2007) 3

United States v. Funk, 124 Fed. Appx. 987
(6th Cir. 2005) 2, 3

United States v. Klups, 514 F.3d 532
(6th Cir. 2008) 5

United States v. Liddell, 2008 WL 4149750
(7th Cir. 2008) 8

United States v. Sanchez, 517 F.3d 651
(2d Cir. 2008) 8

Wright v. Morris, 111 F.3d 414 (6th Cir. 1997) 5

FEDERAL STATUTES

18 U.S.C. 3553(a) 6

21 U.S.C. 841(b) 7

REFERENCES

U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing (2004). 8

U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines (2004).. 8

Defendant seeks rehearing en banc principally on the contentions that (1) the panel improperly created a two-tier standard of review of sentencing determinations based on whether or not the sentence was within the advisory Guidelines range in a mine-run case; (2) the panel misused the terms "mine-run" and "heartland" in crafting its approach; and (3) the panel improperly applied "closer review" to the district court's disagreement with the career offender range as applied to the facts of this mine-run case. Those contentions do not warrant rehearing en banc. The Supreme Court's decisions in Gall v. United States, 128 S. Ct. 586 (2007), and Kimbrough v. United States, 128 S. Ct. 558 (2007), support a general practice of applying closer appellate review when a court varies from the advisory range in a typical case. The panel correctly applied that principle in reviewing a significant variance from the career offender range in this typical case. The panel did err in suggesting that variances from the career offender range based on a district court's policy disagreements are "improper." But the Court's judgment is correct because the district court failed to give an adequate explanation for the significant variance from the range in this case.

STATEMENT

1. From 1998 to 2001, defendant James Funk was part of a conspiracy to transport drugs from Florida and Texas to Ohio. An indictment returned in 2002 charged Funk and others with conspiring to possess with intent to distribute cocaine and marijuana,

alleging that the defendants conspired to obtain over 15 kilograms of cocaine and over 2,000 pounds of marijuana. R.10, Indictment; Apx. 42-45. A jury convicted Funk on the conspiracy charge. R.309, Amended Judgment; Apx. 61.

The presentence report (PSR) determined that Funk's criminal history - which included convictions for an aggravated assault in which Funk attacked police officers with a baseball bat and a metal pole, burglary of a residence, resisting arrest, domestic violence, theft, and marijuana trafficking - placed him in criminal history VI. PSR ¶¶ 28-52; Apx. 154-157. Funk also qualified as a career offender under Sentencing Guidelines § 4B1.1.^{1/} Under that provision, his Guidelines range was 262 to 327 months of imprisonment. PSR ¶¶ 25, 52, 78; Apx. 153, 157, 161.

The district court sentenced Funk to 262 months in prison. This Court affirmed Funk's conviction, but remanded for resentencing under United States v. Booker, 543 U.S. 220 (2005). 124 Fed. Appx. 987, 991 (6th Cir. 2005).

2. On remand, the district court varied downward from the advisory Guidelines range, sentencing Funk to 150 months of imprisonment. Apx. 62. The court acknowledged that "marijuana trafficking is an extremely serious offense," but stated that the

¹ Section 4B1.1 provides that a defendant is a career offender if he is at least eighteen years old at the time he commits a felony that is either a crime of violence or a controlled substance offense, and has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

conspiracy did not involve "cocaine or heroin or crack cocaine or methamphetamine or ecstasy" or "the use of firearms" - factors that "would have made possibly the conviction and guidelines more severe." R.317, Resentencing Transcript 6-7; Apx. 124-125. The court stated that it was "inclined to apply the guideline range as if the career enhancement was not there," *id.* at 10; Apx. 128, finding that a sentence within the non-career-offender range would "promote respect for the law," "provide a just punishment," "be an adequate deterrence to others," and - given Funk's age - would "finally cause [Funk], on returning to society," to become a "law-abiding citizen." *Id.* at 8-9; Apx. 126-127. The court concluded that a sentence within the career offender range, "even taking into account the extensiveness, frequency, and seriousness of [Funk's] prior criminal conduct," would be unduly severe. *Id.* at 9-10; Apx. 127-128, see *id.* at 10; Apx. 128 ("the public is ahead of the courts and Congress in understanding that sentences can be excessively severe and unfair"). In its statement of reasons attached to the judgment, the court found that "the career enhancement was excessive and unreasonable," and reiterated that Funk's "extremely serious offense" did not involve firearms or drugs other than marijuana, and that the 150-month sentence would satisfy the purposes of sentencing. Apx. 170.

This Court again vacated Funk's sentence, 477 F.3d 421 (6th Cir. 2007), and the Supreme Court remanded for reconsideration in light of Gall. 128 S. Ct. 861 (2008).

3. On remand, the Court again held that Funk's sentence was unreasonable. 534 F.3d 522, 530 (6th Cir. 2008). Citing the Supreme Court's statement in Kimbrough, 128 S. Ct. at 575, that "closer review" may be appropriate when a district court varies based solely on its disagreement with the Guidelines' application in a typical case, the majority found that "[b]ased on the district court's reasoning, * * * this appears to be the type of 'mine-run case'" which would be subject to "closer review." 534 F.3d at 527-528. Under that "more skeptical" standard, the majority held, the justifications stated by the district court did not support the substantial variance from the Guidelines range. Id. at 529-530.^{2/}

ARGUMENT

1. Contrary to Funk's contention (Pet. 6-11), the panel correctly concluded that the district court's imposition of a below-Guidelines sentence based on its disagreement with the career offender guideline was subject to "closer" appellate review. In Kimbrough, the Supreme Court identified "discrete institutional strengths" of the Sentencing Commission and sentencing courts and observed that in light of the sentencing judge's "'greater familiarity with * * * the individual case and the individual defendant before him,'" 128 S. Ct. at 574 (quoting Rita v. United

² Chief Judge Boggs dissented. 534 F.3d at 530-531 (Boggs, C.J., dissenting). In his view, the district court's explanation of the below-Guidelines sentence, although "somewhat cursory," was properly read as based on "the facts of this case," rather than on a general disagreement with the career offender guideline. Id. at 531.

States, 127 S. Ct. 2456, 2469 (2007)), "a district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case 'outside the "heartland" to which the Commission intends individual Guidelines to apply.'" Id. at 574-575 (quoting Rita, 127 S. Ct. at 2465). "On the other hand," the Court stated, "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." 128 S. Ct. at 575 (quoting Rita, 127 S. Ct. at 2465).^{3/}

The district court in this case imposed a below-Guidelines sentence based on its conclusion that the career offender enhancement was "excessive and unreasonable," Apx. 170, and the panel properly subjected that determination to "closer review." 534 F.3d at 528-530; see United States v. Klups, 514 F.3d 532, 538 n.3 (6th Cir. 2008) (even if district court "simply disagreed with the guidelines," Court would affirm variance under "closer" review).

³ As Funk notes (Pet. 9 n.7), the Kimbrough Court's observation concerning the application of "closer review" is dicta. See 128 S. Ct. at 575 (finding "no occasion" for further explication of standard because Sentencing Commission based cocaine guideline on extrapolation from statutory mandatory minimum sentences and had itself concluded that crack guideline produces sentences that are greater than necessary to achieve purposes of sentencing). This Court has made clear, however, that "the Supreme Court's dicta is of persuasive precedential value." Wright v. Morris, 111 F.3d 414, 419 (6th Cir. 1997) (internal quotation omitted).

Defendant contends, however, that applying "closer review" to some sentences, as the Supreme Court suggested in Kimbrough, would be contrary to the abuse of discretion standard of review adopted in Gall. There is no inconsistency between the panel's application of closer review and Gall's holding that appellate courts must review all sentences - whether inside or outside the Guidelines - "under a deferential abuse-of-discretion standard." 128 S. Ct. at 591. The panel made clear that abuse of discretion review applies to all sentences, see 534 F.3d at 525-526 (citing Gall). Id. at 529. The panel nowhere suggested that it was applying a presumption of unreasonableness for sentences outside the Guidelines range, as Funk contends (Pet. 9). And, contrary to Funk (Pet. 8-9 & n.7), the panel made clear, consistent with the Supreme Court's statement in Kimbrough, that closer review applies only where "the sentencing judge disagrees with the Commission's determinations" in a "mine run case[]." 534 F.3d at 528-529.

Funk objects (Pet. 10-11) to the panel's use of "heartland" to describe typical cases, but the Supreme Court used that same term in Kimbrough. See 128 S. Ct. at 575 (quoting Rita, 127 S. Ct. at 2465). The panel did not suggest that variances under 18 U.S.C. 3553(a) must satisfy the requirements for departures under the Guidelines. See United States v. Davis, 537 F.3d 611, 617 (6th Cir. 2008) (noting sentencing court's broader "authority to exercise independent judgment in granting a variance after applying the § 3553(a) factors").

The panel did not simply make its own determination about whether any factors took this case outside the "heartland," as Funk asserts (Pet. 9). Instead, it properly focused on the reasons the district court gave for the variance, finding that "[b]ased on the district court's reasoning, this appears to be [a] 'mine-run case.'" 534 F.3d at 527; see id. at 528 (nothing in district court's statement of reasons in sentencing order "indicates that this case is atypical"). Funk's claim (Pet. 12) that the panel misread the district court's statements raises no issue of exceptional importance that warrants review by the en banc Court.

2. Funk also contends (Pet. 12-15) that closer review is not appropriate in this case because the career offender guideline, like the cocaine guidelines at issue in Kimbrough, "originated in a Congressional directive." But Kimbrough did not hold that the Sentencing Commission's policy judgments are suspect whenever they are consistent with a direction from Congress; rather, the Supreme Court concluded that there was no congressional direction for the Commission to follow in formulating Guidelines for cocaine offenses. The Court rejected the government's argument that the Guidelines reflected a congressional policy determination that sentences for crack and powder offenses must comport with the 100:1 quantity ratio in 21 U.S.C. 841(b), 128 S. Ct. at 571-573, holding that the statute "mandates only maximum and minimum sentences" and "says nothing about the appropriate sentences within these brackets." Id. at 571. The Court contrasted the drug 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)).^{4/}

Congress’s direction to the Commission in Section 994(h) does not, however, preclude sentencing courts from varying based on policy disagreements with the career offender guideline. See United States v. Liddell, 2008 WL 4149750, at *5 (7th Cir. Sept. 10, 2008); United States v. Boardman, 528 F.3d 86, 87 (1st Cir. 2008); United States v. Sanchez, 517 F.3d 651, 663-665 (2d Cir. 2008). The Court in Kimbrough did not say that Congress had directed sentencing courts to impose sentences for serious recidivist offenders “at or near” the maximum (which Congress had

⁴ The Court also noted that the Sentencing Commission had itself “determined that the crack/powder sentencing disparity is generally unwarranted.” 128 S. Ct. at 568-569. While the Commission has raised questions about specific applications of the career offender enhancement, it has not deemed the enhancement generally unwarranted. See U.S. Sent. Comm’n, Fifteen Years of Guidelines Sentencing [Fifteen Year Report] 133-134 (2004) (questioning application of career offender enhancement to “offenders qualifying only because of prior drug offenses”); see generally U.S. Sent. Comm’n, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 10-16 (2004) (discussing relative recidivism rates for categories of offenses and offenders). But in any event, the Commission’s concern that the career offender enhancement might overstate the risk of recidivism for defendants who qualify as career offenders based solely on prior drug offenses has no application to Funk, whose criminal history includes three prior convictions for violent crimes. PSR ¶¶ 28-51; Apx. 154-157; see Fifteen Year Report at 134 (52% of career offenders with prior violent felonies recidivate within two years; incapacitation of “repeat violent offenders” may “protect the public from additional crimes by the offender”).

not done); rather, the Court emphasized that the direction was to the Commission. 128 S. Ct. at 571. Thus, as with other guidelines, courts may vary from the range recommended by the career offender guideline based on policy considerations, including "disagreements" with the guideline. 128 S. Ct. at 570 (quoting U.S. Br. 16 and citing Rita, 127 S. Ct. at 2465 (district court may consider arguments that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations"))).

Although the panel acknowledged that the Supreme Court had "refuted" its prior holding that a district court's disagreement with the career offender guideline is an "impermissible" sentencing consideration, 534 F.3d at 526-527, it also stated that Section 994(h) is a "clear direction by Congress * * * that offenders such as Funk be sentenced as [career offenders]," id. at 530, and that disagreement with the policy of the career offender guideline is an "improper" basis for a variance, ibid. For the reasons set forth above, those statements are inconsistent with Kimbrough and Rita, and should be deleted from the panel's opinion.

But the Court's judgment is correct. The flaw in the district court's decision is that it failed to explain the basis for the court's disagreement with the policy reflected in the guideline as applied to this case. In an advisory guidelines system with reasonableness review, a court's explanation for its sentence is vital to permit meaningful appellate review. See Gall, 128 S. Ct. at 597 (district court must "adequately explain the chosen sentence

to allow for meaningful appellate review and to promote the perception of fair sentencing"); see also Rita, 127 S. Ct. at 2468 ("The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority."). Funk's claim (Pet. 13) that disagreements with the application of the career offender guideline in a typical case do not warrant closer review because that guideline is not the product of "empirical evidence" lacks merit. The guideline reflects Congress's judgment about the need for severe punishment of career offenders, and Congress's judgment must be assumed to be compatible with the application of the Section 3553(a) factors in a "mine-run" case. Accordingly, a sentencing court that reaches a judgment contrary to the general view reflected in the career offender guideline can appropriately be expected, under abuse of discretion review, to provide a reasonable explanation. Here, the court's statement of reasons did not provide a satisfactory explanation.

CONCLUSION

The petition for rehearing en banc should be denied.

Respectfully submitted.

WILLIAM J. EDWARDS
United States Attorney
Northern District of Ohio

/s/Nina Goodman
NINA GOODMAN
Attorney, U.S. Department of Justice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on October 9, 2008, I electronically filed the foregoing Corrected Response of the United States to Defendant's Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that counsel for appellant, Spiro P. Cocoves, is a registered CM/ECF user and that service will be accomplished by the CM/ECF system.

/s/Nina Goodman

NINA GOODMAN
Attorney, Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Room 1264
Washington, D.C. 20530
Phone: (202) 514-3962
Fax: (202) 305-2121
nina.goodman@usdoj.gov