NO. 05-3708

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
WESTERN DIVISION

DISTRICT COURT NO. 3:02-CR-00708-JGC

APPELLEE'S SUPPLEMENTAL BRIEF

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STATEMENT OF THE CASE

I. Nature of the Case

The Government no longer contends that any of the District Court's reasons for James Funk's sentence were improper, and it concedes Funk's sentence may be substantively reasonable. The Government argues only that the District Court failed to explain the sentence adequately. At sentencing, however, the Government failed to object to the adequacy of the explanation. Thus, under plain-error review, the Government must show the District Court *obviously* failed to give an adequate explanation and that the putative inadequacy harmed the Government's "substantial rights." Fed. R. Crim. P. 52(b). Because the Government can show neither, the sentence should be affirmed.

This case also gives the en banc Court the chance to address two additional questions implicated by the Government's argument: (1) whether the career-offender Guideline commands special deference from sentencing courts; and (2) whether *Kimbrough*'s "closer review" dictum has any application here. Funk shows the answer to both questions is "no."

II. Course of the Proceedings Below

Funk is satisfied with the Government's statement of the procedural history, except for one aspect. *See* Fed. R. App. P. 28(b). The Government asserts Funk's

offense involved not just marijuana but also cocaine. (Supp. Brief at 5, 17.) That is not clearly so. True, at Funk's trial, two witnesses claimed that on isolated occasions Funk handled relatively small amounts of cocaine. (R.295, Johns, Trial Tr. at 144-48, Apx. 91-95; R.295, Valdez, Trial Tr. at 211-13, Apx. 102-04; *see* Presentence Report at 7-8.) But that testimony was dubious since it lacked corroboration and was given in exchange for leniency. (*Id*.) The jury did not decide whether Funk's offense involved cocaine because that determination was left to the District Court at sentencing. (R.297, Trial Tr. at 27-29, Apx. 116-18.) At sentencing, the District Court stated Funk's offense involved marijuana only. (R.317, Resent. Tr. at 6-7, Apx. 124-25.) The Government agreed. (*Id.*) The record thereby indicates the offense did not involve cocaine.[1] (*Id.*) In any event, the Panel acknowledged that the Government waived any argument as to an error regarding cocaine. *United States v. Funk*, 477 F.3d 421, 427 (6th Cir. 2007).

[1]The Government now points out that the District Judge adopted the factual recitations of the Presentence Report. That fact makes no difference because the PSR's factual recitation did not purport to state factual conclusions as to cocaine, but rather merely quoted the prosecutor's recap of the trial testimony and his conclusion that any quantities of cocaine had no effect on the offense level. (PSR at 6-8.) Moreover, because "the specific trumps the general," the District Court's general adoption of the Presentence Report does not trump its specific (and agreed-to) conclusion that cocaine was not involved. *Jackson, Tenn. Hosp. Co. v. W. Tenn. Healthcare, Inc.*, 414 F.3d 608, 613 (6th Cir. 2005).

STATEMENT OF FACTS

A. The District Court gave several reasons for the sentence.

A Sentencing Commission study shows that offenders sentenced at age 41 to 50 are much less likely to recidivate than those younger than 35.[2] That study also shows that nonviolent drug offenders have the lowest, or second lowest, rate of recidivism across the criminal-history categories (except for category I).[3] Another Commission study shows that the public tends to disrespect the law when it punishes a third offense as severely as does the career-offender Guideline.[4] For all these reasons, the career-offender Guideline can reasonably be questioned when it advises a harsh "three strikes" sentence for a 41-year-old defendant convicted of a nonviolent drug offense.

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[2]U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 12 & Ex. 9, http://www.ussc.gov/publicat/Recidivism_General.pdf.

[3]*Id.* at 13 & Ex. 11. *See generally* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004) (*"Fifteen Year Report"*), http://www.ussc.gov/15_year/15year.htm.; *United States v. Pruitt*, 502 F.3d 1154, 1168 (10th Cir. 2007) (McConnell, J., concurring) (observing that the Fifteen Year Report "might appear to be an admission by the Commission that th[e career-offender] guideline, at least as applied to low-level drug sellers like Ms. Pruitt, violates the overarching command of § 3553(a) ...").

[4]*See* Peter H. Rossi & Richard A. Berk, U.S. Sentencing Commission, Public Opinion on Sentencing Federal Crimes, Executive Summary (1997), http://www.ussc.gov/nss/jp_exsum.htm.

On a *Booker* remand, the District Court sentenced 41-year-old James Funk for a nonviolent drug offense. The Sentencing Guidelines classified Funk as a career offender, advising a sentence of 262 – 327 months, or about 22 to 27 years. (R.317, Resent. Tr. at 6, Apx. 124.) Absent the career-offender Guideline, Funk's advisory range was 120 – 150 months. (*Id.* at 5, Apx. 123.) Funk argued for a sentence within this lesser range, at 120 months (which was double the statutory mandatory minimum). (*Id.* at 17, Apx. 135.) The Government objected, arguing that a sentence within the career-offender Guideline range "would not be unreasonable." (*Id.* at 10, Apx. 128.)

During the hearing, the judge gave at least six reasons for imposing a sentence shorter than the career-offender Guideline advised.

- Due to his age, Funk would not be as likely as other "career offenders" to reoffend. (*Id.* at 8-9, Apx. 126-27.)
- The nonviolent nature of Funk's offense suggested Funk posed less of a danger to the public than most drug traffickers. (*Id.* at 6-7, Apx. 124-25.)
- A 150-month sentence was harsh, taking "maybe a third of the years" Funk had left to him. (*Id.* at 8, Apx. 126.) An even harsher sentence of 262 months or more might "promote disrespect" for the law since it could easily be viewed as excessive by the public. (*Id.* at 10, Apx. 128.)
- A 150-month sentence was harsh enough to deter the public from trafficking marijuana. (*Id.* at 9, Apx. 127.)

- A sentence of 262 months or more would be too long compared to the sentences imposed on Funk's co-conspirators. (*Id.* at 13, Apx. 131.)

- The non-career-offender sentencing range of 120 – 150 months incorporated a substantial enhancement for Funk's recidivism. (*Id.* at 16-17, Apx. 134-35.)

On the other hand, the judge acknowledged that Funk's recidivism justified some extra punishment, and that his current offense was "'extremely serious.'" (*Id.* at 6, 9-10, 16-17, Apx. 124, 127-28, 134-35.)

In balance, the judge concluded that a 262-month, career-offender sentence was "not appropriate" for Funk, who was 41 years old, convicted of a nonviolent drug offense, and had a strong chance of reforming. (*Id.* at 21, Apx. 139.) Making explicit and discrete findings as to each § 3553(a) factor, the judge imposed a sentence of 150 months, at the very top of the non-career-offender Guidelline range.[5] (*Id.* at 7-10, 21, Apx. 125-28, 139.)

B. The Government declined to ask for a better explanation of the sentencing reasons.

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[5]Well before *Booker* there was "extensive use" of below-Guideline sentences in career-offender cases, and these were "typically" in the range produced absent the career-offender enhancement. *See* Michael S. Gelacak, Ilene H. Nagel and Barry L. Johnson, *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 Minn. L. Rev. 299, 356-57 (December 1996). A year after *Booker*, the Commission reported that below-Guideline sentences in career-offender cases had more than doubled, and that three-quarters of these were in cases in which the instant offense was, as here, a drug offense. *Final Report on the Impact of United States v. Booker on Federal Sentencing* 137-39 (March 2006), http://www.ussc.gov/booker_report/Booker_Report.pdf.

After giving his reasons and announcing the 150-month sentence, the judge said: "I hope I've expressed adequately my reasons for [selecting the sentence]. Anything that I've missed in terms of that? Realizing that you don't agree with them, but I just want to make sure I've connected the dots." (R.317, Resent. Tr. at 21, Apx. 139.) The prosecutor responded: "Just note our objection for those reasons previously stated" (*id.*), referring to her argument that a sentence outside the career-offender Guideline would fail to reflect the § 3553(a) considerations and consequently would be "unreasonable." (*Id.* at 11-15, Apx. 128-33.)

Moments later, the judge formally asked the *Bostic*[6] question of the prosecutor: "Are there any previously unstated objections to any aspect of these proceedings, Ms. Dustin?" (*Id.* at 24, Apx. 142.) The prosecutor, Ms. Dustin, responded: "No. I just wanted to put on the record that the career offender Guideline that we believe that he should have been sentenced under would be 262 to 327 months." (*Id.*) The Government did not object by asking for reasons that were more "particulariz[ed]" or "individualized," or clear enough reasons "to permit meaningful appellate review." (Supp. Brief at 14-15, 17 (internal quotation

[6]*United States v. Bostic*, 371 F.3d 865, 872-73 (6th Cir. 2004) (directing sentencing judges to ask, after announcing a proposed sentence, whether the parties have any previously unstated objections).

marks omitted).) The Government said nothing about the sentence being unreasonable procedurally.

C. On *Booker* remand, the Government attacked the substantive reasonableness of the sentence on a now-abandoned basis.

As the Government has explained in its Supplemental Brief, the Government appealed Funk's post-*Booker* sentence. This Court then vacated it in *Funk I*, which the Supreme Court reversed. On remand, this Court again vacated the sentence in *Funk II*, and now the en banc Court has vacated *Funk II* for rehearing. *United States v. Funk*, 477 F.3d 421, 424 (6th Cir. 2007) ("*Funk I*"), *vacated sub nom. Funk v. United States*, 128 S. Ct. 861 (2008), *affirmed, United States v. Funk*, 534 F.3d 522 (6th Cir. 2008) ("*Funk II*").

In *Funk II*, the Government argued that the sentence was substantively unreasonable because "where, as here, Congress has plainly stated a policy, that certain recidivists defined as career offenders are to be sentenced at or near the statutory maximum, the Commission, and the courts, are *without discretion* to alter it." (*Funk II* Supp. Brief at 16 (emphasis added).) The *Funk II* Panel, while reconfirming Funk's sentence was reasonable procedurally, held that it was unreasonable substantively. *Funk II*, 534 F.3d at 526-27, 530. It based its holding on the Government-sponsored idea that it is "improper" for a sentencing judge to

disagree with the career-offender Guideline on "policy" grounds. *Id.* That idea, however, has now been abandoned by the Government. (Supp. Brief at 13.)

D. Now the Government seeks only a better explanation of the sentencing reasons.

The Government has lowered its sights. It now seeks nothing but a better explanation from the District Court for Funk's sentence. It states its sole issue as: "Whether the district court failed to provide an adequate explanation for the below-Guidelines sentence it imposed." (Supp. Brief at 2.) And it concludes its brief by stating: "It is possible that the district court could justify a 150 month sentence but it has not done so on this record" because (in the Government's view) the District Court did nothing "more than regurgitate 18 U.S.C. § 3553(a)" and largely relied on "a boilerplate recitation of generic Section 3553(a) factors." (Supp. Brief at 17, 18.) The Government maintains this appeal to seek better articulated or more individualized reasons for the sentence.

SUMMARY OF THE ARGUMENT

First, the Government cannot prevail under plain-error review because it lacks a "substantial right" to a better explanation of a sentence that it has conceded may be substantively reasonable.

Second, the District Court gave an adequate explanation of the sentence imposed because it gave several reasons that both are pertinent to Funk's case and

find support in Sentencing Commission studies, Supreme Court precedent and common sense. Accordingly, the Court should dismiss the appeal.

To avoid this conclusion, the Government has invited the Court to issue special rules that would govern sentencing in career-offender cases. The Court should refuse that invitation because the Government's arguments are misguided.

The Government first errs in claiming the career-offender Guideline must command a special presumption of reasonableness. That presumption is forbidden by the Supreme Court. Moreover, the career-offender Guideline is neither binding like a statute nor imbued with the normal advisory value of a properly crafted Guideline. It deserves no special deference.

The Government also errs in claiming *Kimbrough*'s "closer review" dictum applies. That dictum clearly fails to support a stricter standard of review, especially in the instant case, because the career-offender Guideline does not exemplify the Commission's work as an independent expert agency, because the District Court was neither unreasonable nor alone in its disagreement with the Guideline, and because the Government now merely seeks a better explanation of the sentencing reasons.

ARGUMENT

I. The District Court gave an adequate explanation for the sentence imposed outside the Guideline range.

A. Under *Vonner*, review must be for plain error, and for that reason alone the Court should dismiss the appeal.

In *Vonner*, the en banc Court made it perfectly clear that, if a party wants a better explanation of a sentence, counsel must first seek it when the judge announces the sentence and asks the *Bostic* question. *United States v. Vonner*, 516 F.3d 382, 385-86, 390-92 (6th Cir. 2008) (en banc). "The import of the *Bostic* question is that it gives counsel a chance to ask the sentencing judge for clarifications about the proposed sentence it just announced." *Id.* at 390. Specifically, the *Bostic* rule applies to the objection that the court "failed to adequately explain[] its reasons for imposing the sentence" it just announced. *Id.* Failure to object to the adequacy of the judge's explanation triggers appellate review for plain error. *Id.*; *see, e.g., United States v. Houston*, 529 F.3d 743, 750 (6th Cir. 2008) (applying plain-error review in such circumstances).

As its Statement of the Issue establishes, the Government's sole argument on appeal is that the District Court "failed to provide an adequate explanation for the below-Guidelines sentence it imposed." (Supp. Brief at 2.) But the Government did not preserve that failure-to-explain issue for appeal. Although the Government

had argued that a within-the-range sentence was reasonable, it did not object to the adequacy of the District Court's explanation, even when prompted by the *Bostic* question. It did not argue – as it now argues on appeal – that the court's explanation was too cursory, too vague, or too "boilerplate." (Supp. Brief at 17-18.) Under *Vonner*, review is for plain error.

To prevail on plain-error review, the Government must show not only that the putative error is "obvious" but that the error affected its "substantial rights." *Vonner*, 516 F.3d at 386; *see* Fed. R. Crim. P. 52(b). The Government's right to further explanation of a sentence that it has conceded may be substantively reasonable cannot be characterized as "substantial." That is so because even the Government's relatively stronger interest in correcting an overly-short sentence is hard to characterize as a "substantial interest" for plain-error purposes. *See United States v. Garcia-Pillado*, 898 F.2d 36, 39 (5th Cir. 1990) (holding that government cannot prevail under plain-error review on a sentencing appeal seeking harsher sentence), *clarified on other grounds by United States v. Calverly*, 37 F.3d 160, 163 n.20 (5th Cir. 1994) (en banc); *United States v. Barajas-Nunez*, 91 F.3d 826, 835-36 (6th Cir. 1996) (Siler, J., dissenting) (explaining why the government should not be allowed to prevail under plain-error review in a sentencing appeal). This Court should hold – abrogating *Barajas-Nunez* if necessary – that the

Government cannot prevail on plain-error review when it merely seeks better explanation of a sentence that it has conceded may be long enough.

The Court should dismiss the appeal because the Government cannot show harm to a substantial interest, obviating the need to decide if the District Court's statement of reasons was "obvious[ly]" inadequate. *Vonner*, 516 F.3d at 388.

B. The District Court adequately explained the sentence by giving several sound, pertinent reasons for imposing it.

The Government claims Funk's sentence is procedurally unreasonable because, in its view, the District Judge's statement of reasons was largely a "regurgitat[ion]" of "boilerplate" § 3553(a) factors. (Supp. Brief at 17.)

When sentencing outside the Guideline range, the sentencing court must, in order to issue a procedurally reasonable sentence, give "sufficient justifications" for the relative leniency or harshness of the sentence. *Gall v. United States*, 128 S. Ct. 586, 594 (2008). The justification suffices when it provides "sound, case-specific" reasons for the sentence selected. *United States v. Martin*, 520 F.3d 87, 91 (1st. Cir. 2008). It need not rely upon "extraordinary circumstances." *Id.*

Examples give this standard flesh. In *United States v. Grossman*, 513 F.3d 592 (6th Cir. 2008), this Court found procedurally reasonable a sentence far below the child-pornography Guideline range where the sentencing judge expressed disagreement with the harshness of the Guidelines enhancements and said leniency

was appropriate since the defendant recognized his actions were "legally and morally wrong," showed promise for rehabilitation, and was a first offender and an "educated man." *Id.* at 594-98. In *United States v. Klups*, 514 F.3d 532 (6th Cir. 2008), this Court found procedurally reasonable a sentence far above the sexual-abuse-of-a-minor Guideline range where the sentencing judge, in a statement flawed by "unfortunate ambiguity," justified the sentence with some sound, pertinent reasons, primarily the wrongness of some conduct the Guideline did not address. *Id.* at 537-38. *Accord United States v. Presley*, 547 F.3d 625, 629-30 (6th Cir. 2008) (upholding large variance on explanation of similar caliber).[7]

In the career-offender context, other circuits have issued comparable decisions. In *United States v. Williams*, 435 F.3d 1350 (11th Cir. 2006), the Eleventh Circuit upheld the sentence of a career offender sentenced within the non-career-offender Guideline range. The sentencing judge opined that the career-offender Guideline range was "way out of proportion to the seriousness of the offense and to [defendant's] prior criminal conduct" and gave "specific, valid reasons" for the sentence imposed, including the need to "promote respect for the

[7]The Government cites *United States v. Stephens*, 549 F.3d 459 (6th Cir. 2008), as contrary authority. But the *Stephens* court remanded not due to a failure to adequately explain the sentence, but because the district court (perhaps due to the view formerly championed by the Government) evidently failed to recognize it had the authority to vary from the career-offender Guideline. *Id.* at 466-67.

law" by avoiding excessive harshness. *Id.* at 1352-53, 1355. In *United States v. Martin*, 520 F.3d 87 (1st Cir. 2008), the First Circuit likewise upheld the sentence of a career offender sentenced within the non-career-offender Guideline range. The sentencing judge relied on common-sense reasons to select the relatively lenient sentence, namely, the defendant's "close family ties," his "personal qualities" showing rehabilitation potential, and his codefendant's shorter sentences – factors which the court acknowledged were "not unique." *Id.* at 90, 95. The sentence was reasonable since the judge justified it with a "plausible sentencing rationale" that pertained to the "not unique" factors of the case. *Id.* at 91, 96.

Here, the District Court's statement of reasons was at least as sound and pertinent as those upheld in the foregoing cases. For example, the District Court relied on several reasons that were both pertinent to Funk and soundly supported by the Sentencing Commission's own studies: (1) that Funk's age suggested a lesser risk of recidivism, (2) that Funk posed less of a danger because his offense was a nonviolent drug offense, and (3) that the public could easily view a harsher sentence as too harsh. *See* pp. 3-4 & nn. 1-3, *supra*. The District Court also sought to lessen the disparity between Funk's and his similarly-situated codefendants' sentences; this rationale finds firm support *Gall*. *Gall*, 128 S. Ct. at 600 ("stating that sentencing courts may "consider[] the need to avoid unwarranted similarities

among [codefendants] who [are] not similarly situated" despite falling in the same Guideline range); *United States v. Smart*, 518 F.3d 800, 804 (10th Cir. 2008) ("the district court may compare codefendants when deciding a sentence"); *United States v. Presley*, 547 F.3d 625, 631 (6th Cir. 2008) (same). Plus, the District Court explicitly and specifically addressed each of the § 3553(a) factors. Because the District Court's sentencing explanation provided sound, pertinent reasons, it was procedurally reasonable. It certainly was not so "derelict" as to constitute error or "obvious" error. *Vonner*, 516 F.3d at 388. Like the Panel, the Court should reconfirm Funk's sentence is procedurally reasonable. The Court should dismiss the Government's appeal.

II. The Court should reject the Government's invitation to issue special rules for cases involving the career-offender Guideline.

In an effort to make procedural-reasonableness review more rigorous, the Government argues for special rules that would govern cases involving the career-offender Guideline. Such rules are improper.

A. The career-offender Guideline commands no special deference.

The Government proposes that courts must presume the career-offender Guideline range reasonable since the Guideline was prompted by a Congressional directive: "Congress's judgment must be assumed compatible with the application of the Section 3553(a) factors in a 'mine-run' case." (Supp. Brief at 16.) This

proposed presumption – which, because described in the passive voice, appears to apply to both sentencing and appellate courts – is indefensible on two counts.

First, the Supreme Court has forbid such a presumption. Sentencing judges may not apply "a legal presumption that the Guidelines sentence should apply," *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007), they "may not presume . . . that the Guidelines range is reasonable," *Gall*, 128 S. Ct. at 596-97, and the appellate court may not adopt a presumption of unreasonableness. *Rita*, 127 S. Ct. at 2467. Through *Rita*, the Supreme Court has allowed, but not required, a presumption of reasonableness only by an appellate panel reviewing a within-Guideline sentence. *Rita*, 127 S. Ct. at 2462-65. To require a sentencing judge to give an especially compelling justification for varying from a presumably reasonable career-offender Guideline range would create, in the career-offender context, two forbidden presumptions: (1) a presumption in the sentencing court that the Guideline range is reasonable, and (2) a presumption on appeal that an outside-the-range sentence is unreasonable. In a terse remand, the Supreme Court recently emphasized "[t]he Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable." *Nelson v. United States*, __ U.S. __, 2009 U.S. LEXIS 872, *4 (Jan. 26, 2009) (emphasis in original).

Second, the Government misconceives why, after *Booker*, any given advisory Guideline commands judicial respect. "*Kimbrough* and *Gall* both emphasize that, after *Booker*, the Guidelines' claim on judicial respect derives from the fact that the Sentencing Commission 'has the capacity courts lack' to frame Guidelines on the basis of 'empirical data and national experience, guided by a professional staff with appropriate expertise.'" *United States v. Jones*, 531 F.3d 163, 173 n.7 (2d Cir. 2008) (quoting *Kimbrough v. United States*, 128 S. Ct. 558, 575 (2008)). Simply put, an advisory Guideline commands respect only insofar as it is produced by expertise. If dictated by Congress, a Guideline is the product of political will – although that Guideline might turn out to comport with expert analysis, it would not necessarily do so. And a Guideline that is dictated, rather than merely prompted, by Congress might even be unconstitutional because Congress cannot commandeer the Commission without tarnishing the integrity of the judiciary. *Mistretta v. United States*, 488 U.S. 361, 407 (1989).[8] In short, for an advisory Guideline, a political pedigree is no asset. A Guideline's advisory value comes strictly from the independent expertise that went into crafting it.

[8]The *Mistretta* Court suggested it upheld the constitutionality of the "peculiar institution" that was the newly-created Sentencing Commission only because Congress would refrain from using the independent Commission to "cloak" its political "work in the neutral colors of judicial action." *Id.* at 384, 407.

Tracing the career-offender Guideline's lineage shows the Guideline was neither a directive to the courts by Congress, nor the product of expertise, and, as such, is neither binding like a statute nor imbued with the advisory value of a properly crafted Guideline. Congress originally considered directly enacting career-offender provisions as a statute. *United States v. Sanchez*, 517 F.3d 651, 663-64 (2d Cir. 2008). Instead it chose to delegate the matter to the Sentencing Commission, *id.*, an "independent" and "expert" agency. *Mistretta*, 488 U.S. at 379, 385. Specifically, through 28 U.S.C. § 994(h), Congress directed the Commission to "'rational[ly] implement'" a career-offender Guideline that the Commission could revise "'over time,'" *id.* at 664 (quoting Senate Report), using its "professional staff with appropriate expertise." *Kimbrough*, 128 S. Ct. at 575; *cf.* 28 U.S.C. § 991(b)(1) (charging Commission with crafting Guidelines that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process"). Its directive anticipated the Commission fulfilling its "characteristic institutional role" as an independent expert agency. *Kimbrough*, 128 S. Ct. at 578. Because Congress's directive addresses the Commission rather than the courts, it does not bind the courts. *Sanchez*, 517 F.3d at 663-65; *United States v. Liddel*, 543 F.3d 877, 884 (7th Cir. 2008); *see United*

States v. Martin, 520 F.3d 87, 96 (1st Cir. 2008). Thus, at best, the career-offender Guideline could carry the weight of an ordinary Guideline.

History shows, however, that with respect to the career-offender Guideline the Commission has failed to act as an independent expert agency. To begin, the Commission failed to base the career-offender Guideline (unlike other Guidelines) on past practice, as the Commission itself acknowledged in its past-practice study.[9] And, over time, the Commission's own studies and data showed that the Guideline was too harsh in many ways, including those that Funk has described above. *See* p. 3-4 & nn. 1-3, *supra*. Yet the Commission failed to revise the Guideline to reflect those studies or data from the courts, Amy Baron-Evans, *Deconstructing the Career Offender Guidelines*, 32-40 (June 2008), http://www.fd.org/odstb_SentDECON.htm., even though such revision is what Congress mandated. *Sanchez*, 517 F.3d at 664.[10] Because of these failings, and

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[9]*See* U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* at 44 (1987) ("much larger increases are provided for certain repeat offenders" under § 4B1.1 than under pre-Guideline practice), available at http://www.fd.org/pdf_lib/Supplementary%20Report.pdf.

[10]For example, the Commission has failed to reduce the severity or reach of the career-offender Guideline, despite its own empirical research showing it fails to advance any purpose of sentencing in the vast majority of cases in which it applies and has a disproportionate impact on African-Americans. *See Fifteen Year Report*, at 133-34. And the Commission has failed to narrow the definition of "crime of violence" despite substantial feedback from the courts, and its own recognition, that its definition includes crimes that are not in fact violent. *See* 58 Fed. Reg.

contrary to Congress's design, the career-offender Guideline fails to "exemplify the Commission's exercise of its characteristic institutional role." *Kimbrough*, 128 S. Ct. at 575. It is not the product of independent expert analysis.

In sum, if the career-offender Guideline were the product of expertise, then its advice would command merely ordinary respect, not the type of special presumption of reasonableness the Government proposes. *Id.* Because, however, the Guideline is not in fact the product of expertise, the Guideline fails to command even the ordinary level of respect.

B. *Kimbrough*'s closer-review dictum has no application here

Citing dictum from *Kimbrough*, the Government proposes the Court should subject Funk's sentence to "closer review" for procedural reasonableness.

While reversing an appellate court that used *Kimbrough* dicta to curtail sentencing-court discretion, the Supreme Court recently emphasized the extent of *Kimbrough*'s holding. *Spears v. United States*, __ U.S. __, 2009 U.S. LEXIS 864, *5 (Jan. 21, 2009). As *Spears* explains, *Kimbrough* recognized the "district courts' authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case." *Spears*, 2009 U.S. LEXIS 864 at *5

67522, 67533 (Dec. 21, 1993).

(emphasis in original). A disagreement based on "policy" alone, *id.*, is one based "on general objectives of sentencing" alone, without "any factfinding anchor." *Cunningham v. California*, 549 U.S. 270, 279-91 (2007). Because a policy disagreement pertains to general objectives of sentencing, that type of disagreement generally pertains to all (or to a certain class of) cases arising under the Guideline. Thus, *Spears* confirmed that, when a sentencing court properly disagrees with a Guideline on a "policy" ground, it can "reject and vary" from the Guideline "categorically." *Spears*, 2009 U.S. LEXIS 864 at *5, *7 (approving sentencing court's reliance on 20:1 ratio in lieu of Guideline's 100:1 ratio). *Accord United States v. Cavera*, 550 F.3d 180, 195 (2d Cir. 2008) (en banc) (approving "categorical" disagreement).

The judge's policy-disagreement authority originated not in *Kimbrough* but in *Rita*, where the Court said that the judge "may hear arguments . . . that the Guidelines sentence should not apply . . . because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations." *See Rita*, 127 S. Ct. at 2465; *see also id*. at 2468 (a "party [may] contest[] the Guidelines sentence generally under § 3553(a) [by arguing] that the Guidelines reflect an unsound judgment."). Accordingly, the judge has the authority to categorically disagree not just with the crack Guideline but with any given Guideline. *Cavera*, 550 F.3d at 191; *United*

States v. Barsumyan, 517 F.3d 1154, 1158 (9th Cir. 2008) (indicating Guidelines are generally subject to attack on grounds that they "reflect over-broad or mistaken policy priorities"); *see United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc) ("one of the central points of *Booker*, highlighted by *Kimbrough* is that a district court judge may disagree with the application of the Guidelines to a particular defendant because the Guidelines range is too high or too low to accomplish the purposes set forth in § 3553(a)"); *Duncan v. United States*, 552 F.3d 442, 444 (6th Cir. 2009) (quoting *Kimbrough* and explaining in non-crack context that "'as a general matter, courts may vary from Guidelines ranges based solely on policy considerations, including disagreements with the Guidelines.'")

Besides confirming the sentencing judge's authority to categorically disagree with a Guideline, the *Kimbrough* Court stated: "while the Guidelines are no longer binding, closer review [on appeal] may be in order when the sentencing judge varies from the Guideline range solely on the judge's view that the Guidelines range fails to properly reflect § 3553(a) considerations even in a mine-run case." *Kimbrough*, 128 S. Ct. at 575. The *Kimbrough* Court itself established this "closer review" remark was dictum by itself explaining that such review

certainly could not apply where, as there, the relevant Guideline fails to "exemplify the Commission's exercise of its characteristic institutional role." *Id.*[11]

Here, contrary to the Government's proposal, the "closer review" dictum cannot apply for three reasons. Perhaps the simplest reason is that, as Courts of Appeals have recognized, the career-offender Guideline deserves no different treatment than the crack-cocaine Guideline. *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *Martin*, 520 F.3d at 96; *Liddel*, 543 F.3d at 884-85; *Sanchez*, 517 F.3d at 663-65; *see Williams*, 435 F.3d at 1355 (giving ordinary review to sentence below career-offender range).[12] Indeed, if "closer review" applies anywhere, it could apply only where the Guideline "exemplif[ies] the Commission's exercise of its characteristic institutional role" and the judge disagreed with it "solely" on his or her uninformed or personal "view." *Kimbrough*, 128 S. Ct. at 575. As just explained in Section II.A, the career-offender Guideline is, like the crack Guideline in *Kimbrough*, merely keyed to

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[11]The *Kimbrough* Court's mention of "closer review" was simply a reference to a statement Justice Breyer had made during oral argument in *Gall*.

[12]The Eleventh Circuit has issued *United States v. Vasquez*, __ F.3d __, 2009 WL 331014 (Feb. 12, 2009), in which it decided *Kimbrough*'s logic does not clearly apply to the career-offender Guideline. That decision misreads *Kimbrough*, fails to address *Rita*, *Spears* and *Nelson*, fails to address contrary persuasive authority in other circuits, fails to address its own precedent in *Williams*, 435 F.3d 1350, and directly conflicts with the Government's concession in the instant case. Rehearing is being sought in *Vasquez*.

legislation, not developed through independent, expert analysis.[13] Consequently, the career-offender Guideline "does not exemplify the Commission's exercise of its characteristic institutional role," and, just as in *Kimbrough*, there is no occasion to explore the idea of "closer review." *Kimbrough*, 128 S. Ct. at 575.

Second, if "closer review" applies anywhere, it could apply only where the sentencing judge has categorically varied from the Guideline "solely on the judge's view" on sentencing policy. *Kimbrough*, 128 S. Ct. at 575. This means that the judge must be alone in his or her policy disagreement — the "judge's view" must be the "sole[]" basis for dissent, *id.*, wholly lacking meaningful basis in Sentencing Commission reports, in other reputable studies, or even in the common sense of fellow judges. *Cf. United States v. Davis*, 537 F.3d 611, 618 (6th Cir. 2008) (rejecting judge's reason for the variance because it simply failed to support any variance); *Cavera*, 550 F.3d at 196 & n.15 (proposing a variance cannot be based on "junk science" but can be based on a "[]controversial" theory). Here, to the contrary, the District Court's reasons had a meaningful basis in Commission reports, in Supreme Court precedent, and in common sense.

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[13]Although the Government is correct that Congress didn't mandate the crack Guideline in explicit terms, that Guideline undeniably was keyed to Congress's statutory mandatory minimums for crack offenses.

Finally, the "closer review" suggested by *Kimbrough* refers to appellate review of a substantive, not procedural, nature since *Kimbrough* discussed review of a substantive nature – *viz.*, the review of the propriety of the "judge's view" of policy. *Kimbrough*, 128 S. Ct. at 575. Since the Government now seeks only procedural review, the "closer review" dictum most decidedly has no application here.

In sum, like several other Circuits, this Court should decline to transform the "closer review" dictum into a stricter standard of review. *United States v. Jones*, 531 F.3d 163, 172-73 & n.7 (2d Cir. 2008); *Smart*, 518 F.3d at 806-09; *United States v. Williams*, 517 F.3d 801, 810-13 (5th Cir. 2008); *United States v. Garcia*, 284 Fed. Appx. 719, 721-22 (11th Cir. 2008); *United States v. Carty*, 520 F.3d 984, 993 n.8 (9th Cir. 2008) (en banc). *Kimbrough*'s "references to 'closer review' and 'significant justification' cannot be construed as a signal to view non-Guidelines sentences with inherent suspicion or to establish a higher standard of review than abuse of discretion for some non-Guidelines sentences." *Jones*, 531 F.3d at 173.

CONCLUSION

Because James Funk's sentence is reasonable, the Court should affirm it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing *Supplemental Brief* been sent by first-class mail, postage prepaid on: David E. Hollar, U.S. Department of Justice, Criminal Division, Appellate Section, 950 Pennsylvania Ave. NW, Suite 1264, Washington, D.C. 20530, and Joseph R. Wilson, United States Attorney, Four SeaGate, Suite 308, Toledo, Ohio 43604 on February __, 2009.

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