

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA)

Appellant)

v.)

JAMES M. FUNK)

Appellee)

No. 05-3708

REPLY OF PETITIONER REGARDING PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

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ARGUMENT

The Government admits that the Majority erred. Yet it urges the Court to embrace both the Majority's holding and its novel "closer review" standard, which applies stricter scrutiny to any outside-the-range sentence where, in the view of the appellate panel, the defendant does not qualify for a Guidelines departure. That standard of review comes too close to a presumption of unreasonableness for outside-the-range sentences to be constitutional. It conflicts with Supreme Court precedent, splits from the post-*Kimbrough* jurisprudence of sister Circuits, and produces an erroneous holding. The Government contends that the Court should uphold the sentence nonetheless by adopting the Majority's view that any guideline based on a congressional directive must be presumed to comport with § 3553(a), a view that is contrary to *Rita* and *Kimbrough*, as the Government concedes. The Court should withdraw the opinion and affirm the sentence as reasonable.

A. The "closer review" standard urged by the Government would create a circuit split

Notwithstanding its admission of error, the Government asks the Court to embrace the Majority's novel, stringent, and widely applicable standard of review for substantive reasonableness. That standard directs as follows: If the appellate panel considers a case typical (*viz.*, mine-run, or within the heartland), then the

panel must give an outside-the-range sentence “closer review.” The only support proposed for this standard is the *Kimbrough* “closer review” dictum.

That dictum fails to support a new rule of stringent appellate review, especially one keyed to a case’s typicality. The *Kimbrough* court itself underscored that its “closer review” remark was mere dictum. *Kimbrough v. United States*, 128 S. Ct. 558, 575 (2008) (stating the Court has “no occasion” to apply closer review to the mine-run case before it). The *Kimbrough* Court did not intend for circuit courts to use this dictum to resurrect stringent standards of review and generate yet another round of circuit splits and Supreme Court litigation. *See Kimbrough*, 128 S. Ct. at 576-77 (Scalia, J., concurring) (concurring only because the “closer review” dictum did *not* constitute an abandonment of the Court’s “clear statements” that “free” the district court to “make its own reasonable application of the § 3553(a) factors, and to reject (after due consideration) the advice of the Guidelines”). This Court has recognized that it should refrain from relying on dicta without carefully considering its import and independently grappling with the underlying issues. *United States v. Hardin*, 539 F.3d 404, 413 (6th Cir. 2008) (citing Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249 (2006)); *United States v. Yoon*, 398 F.3d 802, 806 (6th Cir. 2005); *see also* Leval, *supra* at 1252 (“If ... the

lower courts, instead of making their own effort to decide the issues, have merely regurgitated the Supreme Court's dicta, the Supreme Court receives no benefit from lower court consideration. The judicial system is impaired.”). After a careful review of the “closer review” dictum's context and import, the Second Circuit concluded that the dictum fails to justify a higher standard of review for any subset of outside-the-range cases: “In sum, these references [in *Kimbrough*] 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.” *United States v. Jones*, 531 F.3d 163, 173 (2d Cir. 2008).

Accordingly, sister Circuits, unlike the *Funk* Majority, have declined to transform the *Kimbrough* dictum into a stringent standard of review. *Jones*, 531 F.3d at 172-73 & n.7; *United States v. Smart*, 518 F.3d 800, 806-09 (10th Cir. 2008); *United States v. Williams*, 517 F.3d 801, 810-13 (5th Cir. 2008); *United States v. Garcia*, 2008 WL 2601331, *3 (11th Cir. July 2, 2008); *United States v. Carty*, 520 F.3d 984, 993 n.8 (9th Cir. 2008) (en banc). For example, in *Smart*, the Tenth Circuit, while affirming an outside-the-range sentence in a mine-run case, discussed “closer review” but granted full deference to the judge's sentencing decision, emphasizing two points particularly at odds with the *Funk* Majority rule:

(1) “district courts are now allowed to contextually evaluate each § 3553(a) factor, including those factors the relevant guideline(s) already purport to take into account, even if the facts of the case are less than extraordinary,” and (2) “We may not conclude that simply by diverging from the Guidelines, a district court has disregarded policy considerations which led the Commission to create a particular Guideline.” 518 F.3d at 808-09. *See also Williams*, 517 F.3d at 810-813 (mentioning “closer review” dictum, but giving “considerable deference” to an outside-the-range sentence in a mine-run case where the court varied solely on factors already addressed by the Guidelines); *Jones*, 531 F.3d at 172-73 (noting that *Kimbrough* “appeared to limit this possibility to cases involving Guidelines based on the Commission’s traditional empirical and experiential study,” but holding that it “cannot be construed as a signal . . . to establish a higher standard of review”); *Garcia*, 2008 WL 2601331, *3 (refusing to give “closer review” to an outside-the-range sentence in a mine-run case since “the district court did not explicitly disagree with the Guidelines” or base the sentence on “its own personal view of punishment” but “focus[ed] on . . . factors under § 3553(a)”).

Splitting from these circuits, the *Funk* Majority has transformed the “closer review” dictum into a stringent standard that allows for the routine reversal of outside-the-range sentences. The Majority’s new standard would have “closer

review” apply whenever a case is “typical” or “mine-run” or “within the heartland.” *United States v. Funk*, 534 F.3d 522, 528 (6th Cir. 2008) (stating that operative question is “Is this an atypical case, outside the Guidelines’ ‘heartland’ of cases that entitles the district court’s decision to ‘greatest respect’; or is it. . . a ‘mine-run case,’ warranting some ‘closer review’?”). But sister Circuits have recognized the Supreme Court intended no such widely applicable standard of stricter review. Indeed, the Majority’s standard clashes with *Kimbrough* itself. As explained in *Funk*’s rehearing petition, the Majority’s standard rests on the patently faulty premise that *Kimbrough* involved an atypical, rather than typical, defendant and fact pattern. *Kimbrough*, 128 S. Ct. at 575; *Smart*, 518 F.3d at 808 n.5.

B. The Government has effectively conceded that Funk’s sentence is substantively reasonable

The Majority admitted that *Funk*’s sentence is procedurally reasonable. *Id.*, 534 F.3d at 527. It nonetheless held the sentence “substantively unreasonable.” *Id.* at 530. To explain its holding, the Majority asserted that the sentencing judge, by disagreeing with the guideline range produced by the career-offender guideline for *Funk*, disagreed with the policy determination of the Sentencing Commission

and Congress,¹ and that such disagreement was “improper.” *Id.* at 530. This notion – that it is “improper” for a sentencing judge to disagree with the career-offender guideline on a policy basis – was the Majority’s justification for finding the sentence “so serious[ly]” flawed as to be “substantively unreasonable.” *Id.* at 526, 530.

The Government has conceded that this justification is itself invalid. (Resp. 9.) It has proposed that this justification be “deleted.” (*Id.*) Deleting this justification from the Majority’s opinion knocks the legs out from under its holding. So revised, the Majority opinion definitively lacks any basis for finding the sentence substantively unreasonable. *See Funk*, 534 F.3d at 530.

Consequently, the Government has resorted to merely faulting the sentencing judge for allegedly “fail[ing] to explain” the sentence enough to allow for “meaningful appellate review.” (Resp. 9.) But that complaint (which is nonetheless inaccurate) is a complaint running to the procedural, not substantive, reasonableness of the sentence. Thus, the Government has effectively conceded that the sentence, because it does not rest on an improper basis, is substantively

¹Notably, the sentencing judge never said he disagreed with the policy embodied by the career-offender guideline; he in fact acknowledged the value of penalizing for recidivism. (*See* D.E. 298, Sent. Tr. at 9-10, 16-17, Apx. 127-28, 134-35.) He simply disagreed with the guideline’s particular application to Funk and his myriad circumstances.

reasonable – contrary to the ultimate holding of the Majority. That holding must be corrected.

Funk’s sentence is reasonable, both procedurally and substantively. This is obviously so because: (1) the sentencing judge identified several flaws in the career-offender guideline as applied to Funk; (2) these flaws have been recognized by experts and the Commission itself; and (3) the judge tied those flaws to § 3353(a) characteristics and circumstances present in Funk’s case.² As Chief Judge Boggs explained, “the district judge obviously knew the characteristics of the defendant before him, considered the advice of the guidelines, and decided to reject it, invoking the language of § 3553(a) as to the factors that he considered.” *Funk*, 534 F.3d at 531. When a judge, as here, considers the “gravity of the offense,” he is not “simply disagree[ing]” with the guidelines, but “advanc[ing] his consideration of the § 3553(a) factors.” *United States v. Klups*, 514 F.3d 532, 538 & n.3 (6th Cir. 2008).

²In its response, the Government states that Funk had “three prior convictions for violent crimes,” (Resp. 8 n.4), but just two of those were felonies and one was nearly fifteen years stale. (PSR ¶¶ 28, 43, Appx. 138, 140.) In any event, as Funk has explained, the Commission’s own study shows offenders, like Funk, *presently* convicted for nonviolent drug offenses have the lowest, or second lowest, rate of recidivism across the criminal-history categories (except for category I). (Pet. 1.)

C. The Government proposes an invalid presumption that the career offender guideline should apply at sentencing and an invalid presumption of reasonableness on appeal

Although the Government concedes that sentencing judges can disagree with the career-offender guidelines for policy reasons and seeks deletion of the Majority's language prohibiting disagreement when a guideline is based on a congressional directive, it nonetheless asserts that "Congress's judgment must be assumed to be compatible with the application of Section 3553(a) factors in a 'mine-run' case." (Resp. 10.) This, however, is the same invalid rationale of *Funk I* for deeming "impermissible" disagreement with Congress's policy statements as implemented by the Commission, 534 F.3d at 526, which the Majority nonetheless re-adopted in *Funk II* by equating "Congress's directive" with "the Commission's exercise of its characteristic institutional role," *id.* at 528, and which the Government concedes is erroneous. Resp. 8-9.

By pressing this theory, the Government evidently proposes that sentencing judges and appellate panels must presume that a guideline based on a Congressional directive complies with § 3553(a). The Government's theory is patently invalid. The sentencing judge may not apply "a legal presumption that the Guidelines sentence should apply," *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007), the judge "may not presume . . . that the Guidelines range is

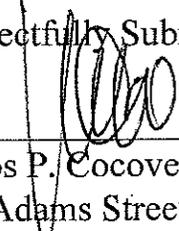
reasonable,” *Gall v. United States*, 128 S. Ct. 586, 596-97 (2008), and the court of appeals may not adopt a presumption of unreasonableness. *Rita*, 127 S. Ct. at 2467. Through *Rita*, the Supreme Court has allowed, but not required, a presumption of reasonableness only by an appellate panel reviewing a within-the-range sentence. *Rita*, 127 S. Ct. at 2462-65. And through *Kimbrough*, the Court has established that sentencing judges can disagree with guidelines keyed to Congressional directives, like the crack guideline, on a policy basis, 128 S. Ct. at 570, as the Government concedes. (Resp. 8-9.) Accordingly, courts have held it permissible to disagree on a policy basis not only with the career-offender guideline (*see* Pet. 15 (collecting cases)), but also with other guidelines keyed to congressional decrees, such as the computer enhancement under § 2G1.3, which is based on Pub. L. No. 108-21, title V, § 512 (Apr. 30, 2003), *United States v. Vanvliet*, ___ F.3d ___, 2008 WL 4225996 (1st Cir. 2008), and the child pornography guidelines. *See United States v. Shipley*, 560 F. Supp. 2d 739 (S.D. Iowa 2008); *United States v. Rausch*, ___ F. Supp. 2d ___, 2008 WL 3411819 (D. Colo. Aug. 13, 2008); *United States v. Hanson*, 561 F.Supp.2d 1004 (E. D. Wis. 2008); *United States v. Ontiveros*, 2008 WL 2937539 (E.D. Wis. July 24, 2008); *United States v. Taylor*, 2008 WL 2332314 (S.D.N.Y. June 2, 2008); *United States v. McClelland*, 2008 WL 1808364 (D. Kan. April 21, 2008); *United States v.*

Baird, 2008 WL 151258 (D. Neb. Jan. 11, 2008). A guideline derives from a congressional decree no special aura of reasonableness. Whether the guideline emanates from a congressional directive or not, it is not an abuse of discretion to disagree with it based on § 3553(a) policy considerations even in a mine-run case. *Kimbrough*, 128 S. Ct. at 574-75; *Rita*, 127 S. Ct. at 2465, 2468.

CONCLUSION

The Government concedes that the Majority's core justification for its holding is invalid, effectively conceding that the case was wrongly decided. Further, the Majority's novel standard of review is profoundly problematic, and presents a circuit split. The Court should grant rehearing en banc to correct these errors.

Respectfully Submitted,

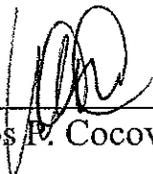


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Certificate of Service

I certify that a copy of the foregoing petition for rehearing has been served by U.S. mail to I certify that a copy of the foregoing motion for leave to file reply has been served by U.S. mail to Nina Goodman, U.S. Department of Justice, 950 Pennsylvania Ave., NW, Room 1264, Washington, D.C. and to Joseph R. Wilson, Assistant United States Attorney, Four Seagate, Suite 308, Toledo, Ohio 43604, on October 16, 2008.



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