

REQUIRED STATEMENT FOR REHEARING EN BANC

In its published decision, the Majority made an error that “directly conflicts” with Supreme Court precedent, and that “precedent-setting” error is of “exceptional public importance.” 6 Cir. R. 35(c).

The error is so stark because, even though the Supreme Court has insisted on a single, uniform abuse-of-discretion standard for reviewing the substantive reasonableness of all sentences, the Majority announced a two-tier standard which would allow appellate courts to make the Sentencing Guidelines virtually mandatory and thus unconstitutional. *Compare Gall v. United States*, 128 S. Ct. 586, 598 (2008) (“The uniqueness of the individual case . . . does not change the deferential abuse-of-discretion standard of review that applies to all sentencing decisions”) with *United States v. Funk*, No. 05-3708, slip op. at (6th Cir. July 22, 2008) (“the amount of deference that is due in any particular case varies, depending on whether the case is outside the Guidelines’ heartland and therefore entitled to the greatest respect, or alternatively, is a mine-run case warranting closer review”) (internal quotations and citations removed). The error is so important because, if left uncorrected, it will corrupt the appellate review of scores of sentences.

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INTRODUCTION and STATEMENT OF FACTS

A. In imposing an outside-the-range sentence, the District Judge identified well-known flaws in the Guidelines as applied to Funk.

A Sentencing Commission study shows that offenders sentenced at age 41 to 50 are much less likely to recidivate than those younger than 35.¹ 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).² 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.³ 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 convicted of a nonviolent drug offense.

¹U.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.

²*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) ...”).

³See 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 Judge sentenced 41-year-old James Funk for a nonviolent drug offense. The Sentencing Guidelines classified Funk as a career offender and advised a sentence of 262 – 327 months, or about 22 to 27 years. The judge decided that a sentence of 150 months, or 12.5 years, satisfied the purposes of 18 U.S.C. § 3553(a). As required, the judge told the parties “in open court” his reasons for that sentence. 18 U.S.C. § 3553(c). The judge said he thought that Funk, due to his age, would not be as likely as other “career offenders” to reoffend. *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*, No. 05-3708, slip op. (6th Cir. July 22, 2008) (“*Funk II*”). Similarly, he said that the nonviolent nature of Funk’s drug offense led him to think Funk posed less of a danger to the public. *Id.* He remarked that a 12.5 year sentence was harsh, taking “maybe a third of the years” Funk had left to him. *Id.* (quoting sentencing judge). In light of this harshness, he added that imposing a sentence of 22 years or more might “promote disrespect” for the law since it was excessive in the public’s view. *Id.* at 424-25. On the other hand, the judge acknowledged that Funk’s offense was “extremely serious” and that his criminal history justified some extra punishment. *See id.*; D.E. 298, Sent. Tr. at 9-10, 16-17, Apx. 127-28, 134-35.

In balance, the judge concluded that a 22-year, career-offender guideline sentence was “‘excessive and unreasonable’” for Funk, who was 41 years old, convicted of a nonviolent drug offense, and had a strong chance of reforming. *Id.* at 425. Making explicit and discrete findings as to each § 3553(a) factor, the judge imposed a sentence of 12.5 years. *Id.* at 425-26.⁴

B. *Funk I*: This Court erred by using a sliding-scale standard.

This Court vacated Funk’s sentence, using a standard of review that gave closer review to a sentence the farther it was outside the Guideline range. *Id.*

While Funk’s certiorari petition was pending, the Supreme Court decided *Gall v. United States*, 128 S. Ct. 586 (2008) and *Kimbrough v. United States*, 128 S. Ct. 558 (2008). The Supreme Court then vacated and remanded Funk’s case, directing reconsideration “in light of *Gall*.” *Funk v. United States*, 128 S. Ct. 861 (2008). *Gall* had explained that “[t]he uniqueness of the individual case . . . does

⁴Notably, this sentence fell at the very top of Funk’s guideline range absent the career-offender enhancement. Well before *Booker* there was “extensive use” of below-guideline sentences in career-offender cases, and these were “typically” in the range 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.

not change the deferential abuse-of-discretion standard of review that applies to all sentencing decisions.” *Gall*, 128 S. Ct. at 598. *Gall* said that, with respect to a procedurally reasonable sentence, the appellate court has to answer “only one question”: “whether the District Judge abused his discretion in determining that the § 3553(a) factors supported” the sentence imposed. *Id.* at 600.

C. *Funk II*: The Majority unveils a two-tier standard of review that turns on a “heartland” concept.

On remand, Chief Judge Boggs answered that “one question,” opining in his dissent that Funk’s 12.5-year sentence reasonably satisfied § 3553(a). *Funk II*, slip op. at 9 (Boggs, C.J., dissenting). He applied a uniform “deferential abuse-of-discretion standard.” *Gall*, 128 S. Ct. at 591.

In contrast, the Majority announced a new sliding-scale standard of review. *Funk II*, slip op. at 4-6. Under this standard, the strictness of review is keyed to a case’s relation to the “heartland”: “the amount of deference that is due in any particular case varies, depending on whether the case is outside the Guidelines’ ‘heartland’ and therefore entitled to the ‘greatest respect,’ or alternatively, is a ‘mine-run case’ warranting ‘closer review.’” *Id.* at 4 (quoting *Kimbrough*, 128 S. Ct. at 575). Its new standard would apply to all outside-the-range sentences, regardless of the grounds given. *Id.* at 4-6.

The Majority made three relevant points about its new standard's "heartland" concept. First, its "heartland" refers to the "heartland" that has played an instrumental role in assessing departures within the Guidelines, as set forth in USSG § 5K2.0. *Id.* at 6 (linking "heartland" to § 5K2.0). Second, its "heartland" is interchangeable with the modifier "mine-run" as used in post-*Booker* sentencing lexicon. *Id.* at 3, 5, 6. Third, whether a case falls in the heartland or not is a question of law. *Id.* at 6.

These points about the "heartland" make clear how appellate courts are to use the two-tier standard on outside-the-range sentences. The court first decides *de novo* whether the case falls in the "heartland" as understood for Guideline departure purposes. If in the appellate court's own view the case falls in the heartland (e.g., does not merit a departure), then the court gives relatively strict review to the sentence, and is free to disagree, for example, with the sentencing judge's "judgments" that may be characterized as "subjective." *Id.* at 7. In sum, the appellate court selects its standard of review based on its view of the merits. If the court takes a dim view of the case, it can review the sentence more strictly.

The Majority applied its two-tier test to Funk's sentence. It found Funk's case was "not the unusual case outside the heartland." *Id.* at 6. Applying its stricter review, it found the judge's reasons for the sentence imposed "subjective"

and unconvincing. *Id.* at 7. And it found the 12.5 year sentence unreasonable.⁵

Argument

I. The Majority's two-tier standard of review is prohibited by Supreme Court precedent and has been rejected by other Courts of Appeals.

There are at least three ways to show the fatal flaws in the Majority's new standard, which keys the strictness of review to the court's view of the merits.

A. By creating two tiers of review, the Majority's standard tends to create an impermissible presumption of unreasonableness.

The Supreme Court has offered sentencing judges a number of rationales for imposing a sentence outside the Guidelines range. Judges can sentence outside the range "because (as the Guidelines themselves foresee) the case at hand falls outside the 'heartland' to which the Commission intends individual sentences to apply," "because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations," or "because the case warrants a different sentence *regardless*." *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007) (emphasis added). Moreover, "[c]ourts may vary [from Guidelines ranges] based solely on policy considerations,

⁵Notably, the Majority addressed a straw man. In *Funk I*, the Court grappled with the District Judge's oral statement of reasons. *Funk I*, 477 F.3d at 423-25. But in *Funk II*, the Majority addressed only the District Judge's less-detailed written statement. *Funk II*, slip op. at 7 (reviewing only the reasons "as documented in its sentencing order"). The Majority took this blinkered approach even though oral sentencing statements take precedence over written ones. See *United States v. Martin*, 520 F.3d 87, 96 n.6 (1st Cir. 2008).

including disagreements with the Guidelines.” *Kimbrough*, 128 S. Ct. at 570 (internal citation and quotation marks omitted); see *Cunningham v. California*, 127 S. Ct. 856, 862-70 (2007) (judge must be permitted to sentence outside range based on “general objectives of sentencing” alone without a “factfinding anchor” to comply with Sixth Amendment).

While identifying these various rationales for sentencing outside the range, the Supreme Court has identified a singular, uniform standard of review for “all sentencing decisions,” *Gall*, 128 S. Ct. at 598, whether the sentence falls inside or outside the range. *Rita*, 127 S. Ct. at 2467. Indeed, “courts of appeals must review all sentences – whether inside, just outside, or significantly outside the Guideline range – under a deferential abuse-of-discretion standard.” *Gall*, 128 S. Ct. at 592. Thus, so long as the sentencing judge acts in a procedurally reasonable manner, see *Gall*, 127 S. Ct. at 597, the appellate court is left with “only one question”: “whether the District Judge abused his discretion in determining that the § 3553(a) factors supported” the sentence imposed. *Gall*, 128 S. Ct. at 600.

For reasons rooted in the Sixth Amendment, *Gall*’s “one question” must be the “only” question for substantive-reasonableness review. *Id.* *Gall* prohibited sliding-scale standards of review that invited appellate courts to give the Guidelines special weight depending on the sentence’s relation to the guidelines

range. *Id.* at 598. It did so because such standards “come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.” *Id.* at 595; *see Kimbrough*, 128 S. Ct. at 577 (Scalia, J., concurring) (“[i]f there is any thumb on the scales; if the Guidelines must be followed even where the district court’s application of the § 3553(a) factors is entirely reasonable; then the ‘advisory’ Guidelines would, over a large expanse of their application, entitle the defendant to a lesser sentence but for the presence of certain additional facts found by judge rather than jury. This, as we said in *Booker*, would violate the Sixth Amendment.”) A sliding-scale of review keyed to the “uniqueness” of the case, *Gall*, 128 S. Ct. at 598, creates a thumb on the scale and an unconstitutional sentencing regime.⁶

The Majority announced a two-tiered standard applicable to the substantive-reasonableness review of *each and every*⁷ outside-the-range sentence, regardless

⁶Such sliding-scale standards are also impermissible because the controlling sentencing statute necessarily trumps any contrary guideline. *Stinson v. United States*, 508 U.S. 36, 44 (1993). Here, the controlling statute is § 3553(a) under which the Guidelines are just one of many factors to be considered. *Gall*, 128 S. Ct. at 596. By focusing on § 3553(a), the uniform, “one question” review ensures that the statute, not the guideline, has primacy in sentencing decisions.

⁷Notably, because it applies to *all* outside-the-range sentences, the Majority’s standard does *not* apply exclusively to sentences for which the judge has relied “solely on the judge’s view that the guidelines range fails to properly reflect §
(continued...)

of the grounds given for the sentence. *Funk II*, slip op. at 4-6. This standard would direct appellate panels to assess de novo whether the case is unique enough to fall outside its “heartland.” *Id.* If the panel believes it is, then it reviews with great deference. *Id.* But if the panel believes it is not so unique, then the panel reviews more strictly. *Id.* Again, this type of sliding-scale standard of review, keyed to the “uniqueness” of the case, is prohibited by precedent. *Gall*, 128 S. Ct. at 598 (“The uniqueness of the individual case . . . does not change the deferential abuse-of-discretion standard of review that applies to all sentencing decisions.”). At bottom, the standard announced in *Funk II*, like the sliding scale in *Funk I*, “come[s] too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.” *Id.* at 595. It must be corrected.

B. The Majority’s standard misuses the terms “mine-run” and “heartland,” rendering it indefensible.

When cobbling together its two-tier standard of review, the Majority misused the terms “mine-run” and “heartland.” This misuse has two aspects.

⁷(...continued)

3553(a) considerations.” *Id.*, 128 S. Ct. at 499. Thus, the *dicta* from *Kimbrough* upon which the Majority places all of its reliance is not only a slender reed for its artifice, see *United States v. Jones*, ___ F.3d ___, 2008 U.S. App. LEXIS 13278, at *26-28 (2d Cir. June 24, 2008) (rejecting idea that the *Kimbrough* *dicta* could establish a “higher standard of review” for some outside-the-range sentences), but it is irrelevant precisely because the Majority creates a standard reaching far beyond any subclass of cases referenced in the *dicta*.

First, the Majority equated “mine-run” and “heartland.” *Funk II*, slip op. at 3-6. Under its standard, a case is either “mine-run” or it is “outside the Guidelines’ ‘heartland’ of cases.” *Id.* But those two terms are not synonyms. “Heartland” is a term of art applicable to Guideline-sanctioned departures, a “narrow category of cases.” *See United States v. Irizarry*, 128 S. Ct. 2198, 2202 (2008) (explaining that an outside-the-heartland “departure” is “a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines”); *Koon v. United States*, 518 U.S. 81, 95 (1996); USSG § 5K2.0. Indeed “heartland” is tied to a departure system that was too restrictive to save the mandatory Sentencing Guidelines from being found unconstitutional. *United States v. Booker*, 543 U.S. 220, 233-34 (2005). In contrast, after *Booker*, Justice Breyer brought “mine-run” into the federal sentencing lexicon to describe cases that present a typical fact pattern. *See Rita*, 127 S. Ct. at 2464-65; *cf. Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2640 (2008) (Breyer, J., concurring in part and dissenting in part). And that is how precedent has used “mine-run” since. *Kimbrough*, 128 S. Ct. at 575; *United States v. Vonner*, 516 F.3d 382, 391 (6th Cir. 2008) (en banc). The Majority was wrong to equate the two terms because they have distinct meanings.

Second, the Majority declared that a case is “mine-run” (or within the

“heartland”) only if it both: (a) presents an ordinary fact pattern; and (b) does *not* present a problematic guideline. *Id.* at 3, 6. But, as mentioned above, “mine-run” as used in *Rita* and its progeny only carries the former meaning, not the latter. Thus, the Majority classified Kimbrough’s case as *not a mine-run* case (because it involved a problematic guideline) whereas, to the contrary, the *Kimbrough* Court classified the case as “mine-run.” *Compare id.* at 6 with *Kimbrough*, 128 S. Ct. at 575 (rendering its holding to apply to cases, as Kimbrough’s, that are “mine-run”). The Majority’s novel use of “mine-run” is illogical and contrary to the Supreme Court’s usage of the term.

These contradictions render the Majority’s standard of review indefensible. First, they make the standard nonsensical because it relies on idiosyncratic meanings for terms that already have different meanings in the relevant context. These contradictions also show that the Majority’s interpretation of *Kimbrough* – the case upon whose *dicta* the Majority purports to plant its edifice – is fundamentally untrustworthy. Finally, these contradictions reveal the Sixth Amendment violation at the heart of the Majority’s standard. Its standard invites courts to reverse sentences they believe fall short of an outside-the-heartland departure standard. Its misuse of terms infects *post-Booker* reasonableness review with a “heartland” doctrine that left the pre-*Booker* regime unconstitutional.

C. The Majority was wrong in its ultimate conclusion.

Applying its new standard, the Majority ultimately concluded that Funk's 12.5 year sentence was unreasonable. That conclusion was most clearly error because the District Judge reasonably based that sentence on "a number of individualized considerations," *United States v. Grossman*, 513 F.3d 592, 598, (6th Cir. 2008), some of which correlated to the judge's objections to the guideline applied to Funk. *See Funk I*, 477 F.3d at 425-25. Applying a uniform standard like this Court did in *Grossman*, other courts have found similar career-offender sentences reasonable. *See, e.g., United States v. Williams*, 435 F.3d 1350 (11th Cir. 2006) (affirming 90-month sentence when sentencing judge decided the guideline range "does not promote respect for the law and is way out of proportion to the seriousness of the offense"); *United States v. Martin*, 520 F.3d 97 (1st Cir. 2008) (affirming 144-month sentence where the judge's reasons for varying, *e.g.* remorse, family, and an "unusually low likelihood of recidivism," were sufficiently "plausible" although "not unique" to that defendant). Because its review was too strict, the Majority erred in its ultimate conclusion.

II. The Majority erred in claiming the career-offender guideline exemplifies the Sentencing Commission's exercise of its role as an independent expert agency.

Necessary to the Majority's holding is the premise that the career-offender

guideline ““exemplif[ies] the [Sentencing] Commission’s exercise of its characteristic institutional role.”” *Funk II*, slip op. at 6 (quoting *Kimbrough*, 128 S. Ct. at 575).⁸ That premise is false.

As described by the Supreme Court, the Commission’s characteristic institutional role has two components: (1) reliance on empirical evidence of pre-guidelines practice, and (2) review and revision in light of judicial decisions, sentencing data, comments from experts and practitioners, and research. *See Kimbrough*, 128 S. Ct. at 574; *Rita*, 127 S. Ct. at 2464.

The career-offender guideline does not exemplify the Commission’s characteristic institutional role. *Id.* The guideline was not based on past practice, as the Commission acknowledged in its past-practice study.⁹ And, over time, the Commission’s own studies and data showed that the guideline was too severe in many ways, including those that Funk has described above and that correspond to the District Judge’s explanation for the below-the-range sentence in this case. *See*

⁸This premise is necessary because, if it is false, Funk’s case certainly would, even in the Majority’s view, fall outside the Majority’s “heartland” (since his case then would clearly involve a problematic guideline).

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.

p.1-2 & 3 n.4, *supra*. Yet the guideline was not revised 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. Although Congress told the Commission to advise relatively long sentences for serious recidivist offenders, 28 U.S.C. § 994(h), it explicitly chose to make this a directive to the Commission, not the courts, so the “guideline development process” – that is, review and revision in light of data, research, and feedback – would produce “rational and consistent” punishment under the guideline. S. Rep. No. 98-225 at 175 (1983). Instead of being “constantly refin[ed]” in light of this “empirical data and national experience,” *Kimbrough*, 128 S. Ct. at 574, the guideline remained deeply flawed, right through the date of Funk’s sentencing.

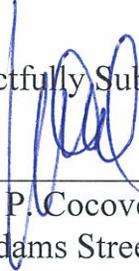
Precisely because the District Judge recognized some of these flaws, he reasonably disagreed with Funk’s guideline range. To dismiss the judge’s reasoning, the Majority emphasized that the career-offender guideline originated in a Congressional directive, § 994(h). *Funk II*, slip op. at 7-8. On this score, the Majority not only got it wrong, it got it backwards. Just as with the crack guideline, the fact that the career-offender guideline is the product of a statute rather than the Commission’s exercise of its characteristic institutional role,

resulting in a guideline that the Commission's own research shows to be unsound, means that a judge can reject its advice and sentence below it without abusing his discretion. *Kimbrough*, 128 S. Ct. at 574-75. The Majority was wrong, and created a circuit split, by concluding the career-offender guideline exemplifies the Commission's exercise of its characteristic institutional role and is thus essentially beyond reproach. See *United States v. Sanchez*, 517 F.3d 651, 664-65 (2d Cir. 2008) ("we conclude that Congress did not intend § 994(h) to deprive the courts of authority to impose on a career offender a prison term that is not near the statutory maximum"); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (concluding career-offender guideline can be treated like crack guideline in *Kimbrough*); see generally *United States v. Pruitt*, 502 F.3d 1154, 1168 (10th Cir. 2007) (McConnell, J., concurring) (reviewing the significance of § 994(h) and concluding that sentencing judges must be allowed to disagree with the career-offender guideline). The Court should correct the Majority's error.

Conclusion

Because the Majority's new two-tier standard of review is so flawed, and because his sentence of 12.5 years is reasonable, Funk seeks rehearing, with a suggestion for rehearing en banc.

Respectfully Submitted,

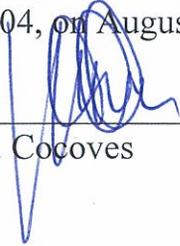


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Certificate of Service

I certify that a copy of the foregoing petition for rehearing has been served by U.S. mail to Joseph R. Wilson and Ava Rotell Dustin, Assistant United States Attorney, Four SeaGate, Suite 308, Toledo, Ohio 43604, on August 12th, 2008.



Spiros P. Cocoves

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JAMES M. FUNK,

Defendant-Appellee.

No. 05-3708

On Remand from the United States Supreme Court.
No. 02-00708—James G. Carr, Chief District Judge.

Argued: June 23, 2006

Decided and Filed: July 22, 2008

Before: BOGGS, Chief Judge; BATCHELDER, Circuit Judge; BELL, Chief District Judge.*

COUNSEL

ARGUED: Joseph R. Wilson, ASSISTANT UNITED STATES ATTORNEY, Toledo, Ohio, for Appellant. Spiros P. Cocoves, LAW OFFICE, Toledo, Ohio, for Appellee **ON BRIEF:** Joseph R. Wilson, ASSISTANT UNITED STATES ATTORNEY, Toledo, Ohio, for Appellant. Spiros P. Cocoves, LAW OFFICE, Toledo, Ohio, for Appellee.

BATCHELDER, J., delivered the opinion of the court, in which BELL, D. J., joined. BOGGS, C. J. (p. 9), delivered a separate dissenting opinion.

OPINION

ALICE M. BATCHELDER, Circuit Judge. On remand from the Supreme Court, we are charged with deciding whether a district court's below-Guidelines sentence was reasonable. Because we conclude that it was not, we VACATE and REMAND for resentencing.

I.

From 1998 to 2001, James Funk was part of a conspiracy to bring drugs from Florida and Texas to Marion, Ohio. In 2002, the federal government indicted Funk and seven of his cohorts for

*The Honorable Robert Holmes Bell, Chief United States District Judge for the Western District of Michigan, sitting by designation.

conspiring to possess cocaine and marijuana with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The indictment specified that beginning in 1998 the defendants conspired to obtain over 15 kilograms of cocaine and over 2,000 pounds of marijuana and to distribute it in the Marion area. The case went to trial and while most of the trial testimony focused on marijuana trafficking, one witness testified to purchasing cocaine from Funk; specifically, eleven ounces on one occasion, and one ounce on each of three other occasions, all during 1998.

The jury convicted Funk as charged and the court sentenced him to 262 months in prison, which was the low end of the then-mandatory sentencing range, calculated at 262 to 327 months, pursuant to the United States Sentencing Guidelines. On direct appeal, we affirmed Funk's conviction, but vacated his sentence and remanded the case for re-sentencing in light of *United States v. Booker*, 543 U.S. 220 (2005). See *United States v. Funk*, 124 F. App'x. 987, 991 (6th Cir. 2005).

On remand, Funk argued to the district court that the career offender enhancement, U.S.S.G. § 4B1.1 — which had previously been included without protest — made the sentence unreasonably high, and Funk urged the court to calculate the advisory Guidelines range without the career offender enhancement. At the sentencing hearing, the court indicated some agreement with this proposition, expressing a disregard for the Guidelines formulation on this issue and announcing that it was “inclined to apply the [G]uideline range as if the career offender enhancement was not there.”

In its written judgment entry, however, the court included the career offender enhancement in calculating the advisory Guideline range, which it properly recognized as 262 to 327 months. But the court did not sentence Funk within the calculated range. Instead, the court granted Funk a downward variance, sentencing him to only 150 months and stating its reasons as follows:

The Court, pursuant to 18 U.S.C. § 3553(a), did not sentence the defendant under the advisory [G]uideline range. The Court found that the career enhancement was excessive and unreasonable. In making that determination, the Court found:

1. that even though the underlying charge was marijuana, which is an extremely serious offense, the defendant and his cohorts did not participate in cocaine, heroin, ecstasy, methamphetamine[,] or firearms;
2. a term of 150 months provides a just punishment, one that incapacitates this defendant and deters the defendant in the future[:];
3. a term of 150 months appropriately fits this defendant and his offense;
4. [a term of 150 months] provides an adequate public deterrence and safety[.]

On appeal, we vacated the sentence as unreasonable, concluding that the court considered “impermissible factors” and failed to justify adequately its substantial downward variance from the applicable Guidelines range. *United States v. Funk*, 477 F.3d 421, 423 (6th Cir. 2007).

Funk appealed to the United States Supreme Court, which vacated our decision without opinion and remanded the case with instruction to reconsider our prior holding in light of its recent opinions on federal sentencing. *Funk v. United States*, -- U.S. --, 128 S. Ct. 861 (2008). Having now reconsidered the district court's sentencing decision — and Funk's sentence — in light of the recent Supreme Court case law, we conclude that the district court did not justify the variance in this case adequately, and therefore, the sentence is substantively unreasonable.

II.

In three companion cases — *Rita*, *Kimbrough*, and *Gall* — the Supreme Court continued to clarify what it meant in *Booker*, 543 U.S. at 262, when it instructed the “appellate courts to determine whether the sentence ‘is unreasonable’ with regard to § 3553(a).” See *Rita v. United States*, 551 U.S. --, 127 S. Ct. 2456 (2007); *Kimbrough v. United States*, 552 U.S. --, 128 S. Ct. 558 (2007); *Gall v. United States*, 552 U.S. --, 128 S. Ct. 586 (2007). In doing so, the Court has drawn a distinction between those cases that fall within the “heartland” of cases “to which the Commission intends individual [G]uidelines to apply,” *Rita*, 127 S. Ct. at 2465 (citing U.S.S.G. § 5K2.0), which the Court has dubbed “mine-run cases” — and those that do not:

[I]n the ordinary case, the Commission’s recommendation of a sentencing range will reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives. The sentencing judge, on the other hand, has greater familiarity with the individual case and the individual defendant before him than the Commission or the appeals court. [The sentencing judge] is therefore in a superior position to find facts and judge their import under § 3553(a) in each particular case.

In light of these discrete institutional strengths, a district court’s decision to vary from the advisory Guidelines may attract greatest respect [from the reviewing court on appeal] when the sentencing judge finds a particular case outside the ‘heartland’ to which the Commission intends individual Guidelines to apply.

On the other hand, while the Guidelines are no longer binding, closer review [by the appellate court] 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.

Kimbrough, 128 S. Ct. at 574-75 (certain quotation marks, editorial marks, and citations omitted; paragraph breaks inserted) (quoting *Rita*, 127 S. Ct. at 2465, and *Gall*, 128 S. Ct. at 586).

Rita, 127 S. Ct. at 2465, was the epitome of the mine-run case, in which “[a]n individual judge [] imposes a sentence within the range recommended by the Guidelines[,] thus mak[ing] a decision that is fully consistent with the Commission’s judgment in general,” and entitling that decision to a presumption of reasonableness. *Kimbrough* and *Gall*, on the other hand, were cases “outside the heartland” (*Gall* because it involved an unusually sympathetic and repentant defendant, 128 S. Ct. at 600-02, and *Kimbrough* because it involved unusual Guidelines that “do not exemplify the Commission’s exercise of its characteristic institutional role,” 128 S. Ct. at 575), thus implicating the second stanza of the above block quote and correspondingly entitling the district courts’ decisions — both of which departed dramatically from the advisory ranges — to the “greatest respect.” The Court has yet to consider a case implicating the third stanza, in which a sentencing judge, in a mine-run case, departed from the advisory range “based solely on the judge’s view that the Guidelines range fail[ed] properly to reflect § 3553(a) considerations” — and consequently authored a decision that warrants some type of “closer review.” See *Kimbrough*, 128 S. Ct. at 575.

In addition to the foregoing, the Court also reiterated the proper standard of review and further distinguished procedural from substantive error. That is, “courts of appeals must review all sentences — whether inside, just outside, or significantly outside the Guidelines range — under a deferential abuse-of-discretion standard.” *Gall*, 128 S. Ct. at 591. Abuse of discretion occurs when the district court relies on clearly erroneous findings of fact, improperly applies the governing law, or uses an erroneous legal standard. *United States v. Lineback*, 330 F.3d 441, 443 (6th Cir. 2003). The Supreme Court further specified that the reviewing court must follow a two-step analysis, to wit:

[1] It must first ensure that the district court committed no significant *procedural error*, such as

- failing to calculate (or improperly calculating) the Guidelines range,
- treating the Guidelines as mandatory,
- failing to consider the § 3553(a) factors,
- selecting a sentence based on clearly erroneous facts, or
- failing to adequately explain the chosen sentence — including an explanation for any deviation from the Guidelines range.

[2] [If] the district court’s sentencing decision is procedurally sound, the appellate court should then consider the *substantive reasonableness* of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will take into account the totality of the circumstances, including

- the extent of any variance from the Guidelines range.
 - ▶ If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness.
 - ▶ But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness.
- [The reviewing court] may consider the extent of the deviation, but must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that [it] might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.

Gall, 128 S. Ct. at 597 (emphasis added; paragraph breaks, numbering, and bullets inserted; citations omitted). Procedural error, then, is abuse of discretion *per se*, inasmuch as the court applied the law improperly. See *Lineback*, 330 F.3d at 443. But substantive error is far more ambiguous — it is an error so serious that the decision is not entitled to deference, just as if the court had relied on a clearly erroneous finding of fact, clearly misapplied the law, or applied the wrong law. See *id.* Furthermore, the amount of deference that is due in any particular case varies, depending on whether the case is outside the Guidelines’ “heartland” and therefore entitled to the “greatest respect,” or alternatively, is a “mine-run case” warranting “closer review.” See *Kimbrough*, 128 S. Ct. at 575.¹

In our prior decision in this case, we held “that the district court erred in mitigating Funk’s sentence on the basis of an impermissible sentencing factor, namely, the court’s disagreement with Congress’s policy decisions as implemented by the Sentencing Commission in the career offender provisions [§ 4B1.1], and by failing adequately to justify its substantial deviation from the applicable [G]uidelines range.” The district court had calculated an advisory range of 262 to 327 months,

¹ We note that, despite Funk’s protests, our recent decisions are not to the contrary. See, e.g., *United States v. Vonner*, 516 F.3d 382, 392 (6th Cir. 2008) (en banc) (discussing the “pattern that emerges from *Rita*, *Gall*, and *Kimbrough*,” and concluding that they favored deference); *United States v. Grossman*, 513 F.3d 592, 597-98 (6th Cir. 2008) (emphasizing the “number of individualized considerations” that made that sentence unique).

based in part on a career offender enhancement, U.S.S.G. § 4B1.1(a). But the court ultimately sentenced Funk to only 150 months in prison, based on the reasoning stated in its judgment entry:

The [district court], pursuant to 18 U.S.C. § 3553(a), did not sentence the defendant under the advisory guideline range. The [c]ourt found that *the career enhancement was excessive and unreasonable*. In making that determination, the [c]ourt found:

1. that even though the underlying charge was marijuana, which is an extremely serious offense, the defendant and his cohorts did not participate in cocaine, heroin, ecstasy, methamphetamine or firearms;
2. a term of 150 months provides a just punishment, one that incapacitates this defendant and deters the defendant in the future[;]
3. a term of 150 months appropriately fits this defendant and his offense;
4. [a term of 150 months] provides an adequate public deterrence and safety[.]

See *Funk*, 477 F.3d at 425 (emphasis added). Based on the district court’s reasoning, then, this appears to be the type of “mine-run case” implicated by *Kimbrough*’s third stanza — one in which “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.” See *Kimbrough*, 128 S. Ct. at 575.

In our prior opinion, we found the sentencing (and the sentence) procedurally reasonable, *Funk*, 477 F.3d at 430 (“The error here is not a procedural one; the district court did in fact consider various of the § 3553(a) factors.”), but found the sentence substantively unreasonable, on two bases. First, the district court refused to sentence Funk in accordance with § 4B1.1, the career-offender guideline. *Id.* at 427 (“In essence, then, the court disregarded the ‘type’ of criminal Funk is and sentenced him as if he were not a career offender, and particularly, as if he did not have ‘at least two prior felony convictions of either a crime of violence or a controlled substance offense.’”); see also *id.* at 428 (“We think it is clear that in sentencing Funk as if he were not a career offender, the district court erred.”). Also, we held that the court failed our then-prevailing proportionality test. *Id.* at 430 (“The district court has not provided a sufficient justification based on factors in [§] 3553(a) to support a reduction of more than 40% from the bottom of the applicable [G]uidelines range.” (citation omitted)); see also *United States v. Klups*, 514 F.3d 532, 539-39 (6th Cir. 2008) (citing *Funk*, 477 F.3d at 426, for the Sixth Circuit’s pre-*Gall* proportionality rule).

Neither of these holdings survives *Gall*, and consequently, the Supreme Court vacated the decision and sent it back for reconsideration. *Funk v. United States*, -- U.S. --, 128 S. Ct. 861 (2008). The latter of our two holdings is most directly rejected by *Gall*, inasmuch as *Gall*, 128 S. Ct. at 594, states expressly: “the Court of Appeals’ rule requiring ‘proportional’ justifications for departures from the Guidelines range is not consistent with our remedial opinion in *United States v. Booker*.” Although not as expressly as the latter, the former holding is also refuted, particularly in light of Justice Alito’s dissent, *id.* at 603-10, which is a more elaborate argument on the same theme and, being a dissent, was implicitly rejected by the *Gall* majority.

Thus, we are left to reconsider Funk’s sentencing in light of *Gall*, and as explained in the foregoing, that necessitates consideration, and ultimately determination, of a series of questions:

1. Is this an atypical case, outside the Guidelines’ “heartland” of cases, that entitles the district court’s decision the “greatest respect”; or, is it — as the evidence suggests — a “mine-run case,” warranting some “closer review”?

2. If this is a “mine-run case,” what exactly is this “closer review”?
3. Taking into account the appropriate standard of deference — greatest respect or closer review — did the district court abuse its discretion by imposing a sentence of only 150 months when the advisory Guidelines range was 262 to 327?

These are questions of law for this court to decide, and we have determined that there is no need to remand this case to the district court for further development of the record.

This appears to be a mine-run case and not the unusual case outside the heartland. Certainly, Funk is not the unusually sympathetic and repentant figure depicted in *Gall*, 128 S. Ct. at 600-02, and the district court recognized as much. *Funk*, 477 F.3d at 424-25. And, unlike the 100-to-1 crack-to-cocaine ratio in *Kimbrough*, 128 S. Ct. at 575, the career offender guideline in this case (§ 4B1.1) is exactly the type of guideline issue that “exemplif[ies] the Commission’s exercise of its characteristic institutional role.” In fact, this provision is the direct result of Congress’s directive:

Section 994(h) of Title 28 [] mandates that the Commission assure that certain ‘career’ offenders receive a sentence of imprisonment ‘at or near the maximum term authorized.’ Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h).

U.S.S.G. § 4B1.1 Commentary (Background). This alone is likely sufficient to distinguish the outcome of this case from that in *Kimbrough*. Furthermore, nothing in the district court’s explanation of its reasoning, as documented in its sentencing order, indicates that this case is atypical.

In *Rita*, the Court acknowledged that, in every case, “both the sentencing judge and the Sentencing Commission will have reached [a] conclusion as to the proper sentence in [that] particular case.” *Rita*, 127 S. Ct. at 2463 (“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.”).² Thus, we find that “closer review,” from this perspective, means that when the sentencing judge disagrees with the Commission’s determinations in these “mine run cases” — which, by definition, fall squarely within the Commission’s province of expertise, i.e., within “the ‘heartland’ to which the Commission intends individual Guidelines to apply,” *id.* at 2463 (citing U.S.S.G. § 5K2.0) — a reviewing court can look with a little more skepticism at a sentencing judge’s individualistic determination and with a little more favor towards the Commission’s advisory-Guidelines. Otherwise stated, the sentencing judge’s decision — being contrary to the Commission’s established Guidelines in a case perfectly suited to the Commission’s

² The Supreme Court was exceptionally clear on this point in *Kimbrough*, when it emphasized the Commission’s role, again citing to *Rita* and *Gall*, while explaining:

While rendering the Sentencing Guidelines advisory, we have nevertheless preserved a key role for the Sentencing Commission. As explained in *Rita* and *Gall*, district courts must treat the Guidelines as the ‘starting point and the initial benchmark.’ Congress established the Commission to formulate and constantly refine national sentencing standards. Carrying out its charge, the Commission fills an important institutional role: It has the capacity courts lack to ‘base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.’

We have accordingly recognized that, in the ordinary case, the Commission’s recommendation of a sentencing range will ‘reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.’ The sentencing judge, on the other hand, has ‘greater familiarity with . . . the individual case and the individual defendant before him than the Commission or the appeals court.’ He is therefore ‘in a superior position to find facts and judge their import under § 3353(a)’ in each particular case.

Kimbrough, 128 S. Ct. at 574 (citations omitted) (citing *Booker*, *Rita*, and *Gall*).

determination, and hence, the Guidelines — does not receive as much deference as it would in an unusual case, when the Guidelines calculations do not fit the circumstances quite so neatly.

After specifically saying that it found the career enhancement “excessive and unreasonable,” the district court stated four reasons for its refusal to sentence Funk within the properly calculated Guidelines range: (1) Funk “did not participate in cocaine, heroin, ecstasy, methamphetamine or firearms”; (2) “150 months provides a just punishment, one that incapacitates this defendant and deters the defendant in the future”; (3) “150 months appropriately fits this defendant and his offense”; (4) “[150 months] provides an adequate public deterrence and safety.” *Funk*, 477 F.3d at 425. It is evident from the foregoing that the court did not make any clearly erroneous findings of fact. See *Lineback*, 330 F.3d at 443.

The question, then, is whether the district court clearly misapplied the law, namely § 3553(a), and this being a “closer review,” we may be more skeptical than we otherwise might in considering the reasonableness of the district court’s findings under § 3553(a). The district court’s first proffered reason is true, but it is indisputable that this factor is completely and effectively encompassed in the Guidelines calculations and offers no support for a departure from those calculations. By stating that “the career offender enhancement [is] excessive and unreasonable,” the sentencing judge appears to have concluded that — because a controlled substance offense involving marijuana is not as serious as one involving “cocaine, heroin, ecstasy, methamphetamine, or firearms” — Guideline § 4B1.1 (the career offender enhancement)³ should not include marijuana convictions. Either the sentencing judge categorically excluded Funk’s marijuana conviction, without any explanation of why Funk’s marijuana conviction merited exclusion while other marijuana convictions do not; or the court presumed that the Sentencing Commission included marijuana convictions erroneously when it implemented the directive of 28 U.S.C. § 994(h), despite marijuana’s inclusion as a controlled substance in 21 U.S.C. § 841. Regardless, by concluding that a conviction involving marijuana is not serious enough to warrant inclusion in the career offender calculus of § 4B1.1 and § 4B1.2(b), it is clear that the sentencing judge sought to impose his own policy determination, vis-a-vis marijuana convictions, and to supplant that of the Sentencing Commission (and Congress). We find this to be insupportable and incorrect. Consequently, this is an improper judicial explanation for a departure, as it has nothing to do with § 3553(a) factors.

Whether the other three proffered reasons, which are all subjective judgments, are reasonable depends on the level of deference we are to afford the sentencing court — at a high level of deference, these judgments will likely be found reasonable, but at a low level of deference (such as here), they likely will not. Just to be clear, these three purported reasons are certainly “based solely on the judge’s view that the Guidelines range fails properly to reflect § 3553(a) considerations.” See *Kimbrough*, 128 S. Ct. at 575. Thus, “tak[ing] into account the totality of the circumstances,” as *Gall*, 128 S. Ct. at 597, instructs, “including the extent of any variance from the Guidelines range,”

³ Guideline § 4B1.1(a) provides:

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

The definitions for § 4B1.1 are provided by § 4B1.2(b), which defines “controlled substance offense” as:

[A]n offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Here, Funk’s “instant offense of conviction” is for conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. §§ 841(a) and 846, and is indisputably a controlled substance offense.

which in this case is extensive,⁴ we conclude that the sentencing court abused its discretion by departing as it did from the Guidelines range in this particular case. The sentencing court did not justify this variance with any fact or circumstance unique to this defendant (such as in *Gall*) or to this crime (such as in *Kimbrough*) that was not fully addressed by the Commission in the Guidelines. Rather, the sentencing court clearly indicated that it would not sentence Funk as a career offender, despite the clear direction by Congress, *see* 28 U.S.C. § 994(h), that offenders such as Funk be sentenced as such. The resulting sentence is therefore substantively unreasonable.

III.

For the foregoing reasons, we **VACATE** the sentence and **REMAND** this case to the district court for **RESENTENCING** in accordance with this opinion.

⁴ The sentence of 150 months is 112 months below the bottom of the calculated advisory range and 144 months below the middle of the range, meaning that it is about half of the sentence anticipated by the Guidelines. But, note that we relegate this point to a footnote to emphasize that our intent is to show, in a general way, that the district court's variance in this case was extensive, not to suggest any sort of proportionality review, as is disallowed by *Gall*.

DISSENT

BOGGS, Chief Judge, dissenting. This case represents essentially a judgment call under the rather unclear standard of “reasonableness” that we have been given by the Supreme Court in the wake of *Rita*, *Kimbrough*, and *Gall*. Although I recognize that it is a close question, I am persuaded by the emphasis on the discretion of district courts in the recent Supreme Court cases that the sentence here should be affirmed. See *United States v. Vonner*, 516 F.3d 382, 392 (6th Cir. 2008) (en banc) (affirming sentence and noting that “the central lesson [of] these decisions [is] that district courts . . . deserve the benefit of the doubt when we review their sentences and the reasons given for them.”). I therefore respectfully dissent.

I do not read the district court’s statement here as saying that the “career offender” guidelines should never be applied to result in a sentence that is in fact within those guidelines. Although the district judge was somewhat cursory in stating, as our court summarizes at page 5, that the chosen sentence of 150 months of imprisonment would “provide[] a just punishment . . . appropriately fit[] this defendant and his offense . . . [and] provide[] an adequate public deterrence,” I believe enough was said to indicate that the court exercised, and did not abuse, its discretion.

In logic, I find it difficult to express a way in which a judge can adequately say that a sentence is “too much” or “too little” in any form of words. As I read the trial transcript, 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.

While a more extensive, fact-laden, or lyrical exegesis might have been possible or preferable, what I take from the record is that the judge did consider thoughtfully the facts of this case and did enough that he did not abuse his discretion.