IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10671

UNITED STATES OF AMERICA

Appellee-Respondent,

v.

CARLOS VAZQUEZ,

Appellant-Petitioner.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

PETITION FOR REHEARING *EN BANC*

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No. 08-10671

United States of America v. Carlos Vazquez

CERTIFICATE OF INTERESTED PERSONS

The persons listed below are interested in the outcome of this case:

Albritton, A. Brian

Bodnar, Roberta

Brodersen, Daniel N.

O'Neill, Robert E.

Presnell, The Honorable Gregory A.

Rhodes, David P.

Vazquez, Carlos

Wilson, Tanya D.

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the Panel decision is contrary to the following decisions of the Supreme Court of the United States and/or the precedents of this Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions of this Court:

United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005);

Rita v. United States, 551 U.S. 338, 127 S. Ct. 2456 (2007);

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

Gall v. United States, 128 S. Ct. 586 (2007);

Spears v. United States, 129 S. Ct. 840 (2009);

Nelson v. United States, 129 S. Ct. 890 (2009);

Smith v. GTE Corp., 236 F.3d 1292 (11th Cir. 2001);

United States v. Archer, 531 F.3d 1347 (11th Cir. 2008);

United States v. Williams, 456 F.3d 1353 (11th Cir. 2006).

I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

Whether the Panel erred by holding that the district court was prohibited from entering a non-guideline sentence based on its policy disagreement with the career offender guideline.

Daniel N. Brodersen
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STATEMENT OF THE ISSUE

Whether the Panel erred by holding that the district court was prohibited from entering a non-guideline sentence based on its policy disagreement with the career offender guideline.

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Carlos Vazquez pled guilty to conspiracy to possess with intent to distribute 500 grams or more of cocaine hydrochloride. (Docs20, 99). The district court sentenced Vazquez to 110 months incarceration. (Doc120). The government appealed. (Doc127). This Court reversed and remanded for re-sentencing. *See United States v. Vazquez*, No. 05-14242, 240 F. App'x 318 (11th Cir. 2007)(attached as App. A). On remand, the district court sentenced Vazquez to 180 months incarceration. (Doc155). Vazquez appealed. (Doc156). A Panel of this Court affirmed the sentence. *See United States v. Vazquez*, No. 08-10671, 2009 WL 331014 (11th Cir. Feb. 12, 2009)(attached as App. B). Vazquez now moves for rehearing *en banc*.

STATEMENT OF THE FACTS RELEVANT TO REHEARING

A. The district judge disagreed with the career offender guideline as applied to Vazquez.

On January 12, 2005, the Supreme Court held that the guidelines are advisory in all contexts and that 18 U.S.C. § 3553(a) controls sentencing. *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005). In sentencing Vazquez on July 19, 2005, the judge recognized his obligation to consider the factors in § 3553(a), to impose a sentence sufficient but not greater than necessary to comply with the statutory purposes, and to treat the guideline range as "important." (Doc124-Pgs11-12). The guideline range was 210-262 months under the career offender guideline. (PSR ¶¶ 23-26, 35, 59). Vazquez was classified as a "career offender" because his instant offense was a drug conspiracy, and he had qualifying priors: two 1991 Massachusetts drug convictions, each with a maximum sentence of two and a half years,[1] sentenced concurrently, and a 1995 Massachusetts statutory rape conviction based on a

[1]M.G.L. c. 218, § 27; M.G.L. c. 279, § 23.

consensual sexual relationship with a 14-year-old girl. (PSR ¶¶ 30-31, 33). Vazquez had been crime-free since his release eight years previously. (PSR ¶ 33; Doc124-Pg5).

The judge sentenced Vazquez to 110 months, the bottom of the guideline range without the career offender enhancement. (Doc124-Pgs14-15). In considering the nature and circumstances of the instant non-violent drug offense, the judge found that it was a "one-incident offense," "not like an ongoing conspiracy . . . with multiple transactions." (Doc124-Pg12). The judge disagreed with the guideline's "quantum leap" from 110-137 months to 210-262 months as applied to Vazquez because its definitions apply "to all people in all circumstances" and take no account of relevant differences in the "nature" or "timing" of the offenses. (Doc124-Pgs12-13). The judge stated that, while the guideline required the two 1991 state drug charges to be counted separately as indicative of a "career offender," they were committed 15 years ago when Vazquez was 23 years old and were consolidated for sentencing by the state court. (Doc124-Pg13). The statutory rape charge "also was some time ago [10 years] and was not a crime of violence" in that "[i]t was consensual albeit illegal."[2] *Id*. The judge also found that even 110 months was "way in excess of what is necessary to deter this type of criminal conduct," noting that it was "subject to question" that "any sentencing scheme is going to really deter the drug business." (Doc124-Pgs14-15). In considering the kinds of sentences available, the judge observed that only prison was available, and imposed two special conditions of supervised release, a drug aftercare program and 150 hours of community service, to advance the need to protect the public from further crimes of the defendant and the need for rehabilitation. (Doc124-Pgs15-16).

B. *Vazquez* I: The Court failed to acknowledge *Rita*'s requirement that judges be permitted to find that the guideline "itself fails properly to reflect § 3553(a) considerations."

On June 21, 2007, the Supreme Court held that the guidelines may not be presumed reasonable by sentencing judges. *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007). Instead, a sentencing judge is permitted to find that "the Guidelines

[2] *United States v. Ivory*, 475 F.3d 1232 (11th Cir. 2007) was decided later.

sentence itself fails properly to reflect § 3553(a) considerations." *Id*. The judge may base such a decision on arguments that "contest[] the Guidelines sentence generally under § 3553(a)," arguments that "the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way." *Id*. at 2468.

On July 18, 2007, a Panel of this Court, without acknowledging *Rita*, held that the sentence was "procedurally unreasonable" because it rested on the judge's "disagreement with the Guidelines," which was "an impermissible factor." *Vazquez*, 240 F. App'x at 322-323.

C. *Vazquez* II: The district judge and the Panel found that the career offender guideline is immune from the policy disagreements necessarily allowed by *Rita*, *Kimbrough* and *Gall*.

On December 10, 2007, the Supreme Court reiterated that "a district court may consider arguments that 'the Guidelines sentence itself fails properly to reflect § 3553(a) considerations,'" *Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007) (quoting *Rita*, 127 S. Ct. at 2465), and thus, "'may vary [from Guideline ranges] based solely on policy considerations, including disagreements with the Guidelines.'" *Id*.(quoting Brief of the United States at 16). It held that "the cocaine Guidelines, *like all other Guidelines*, are advisory only," and thus, a conclusion that a sentencing judge was barred from considering a policy disagreement with the crack/powder disparity in a "mine-run case" was error because it rendered the guidelines "effectively mandatory." *Id*. at 564, 575 (emphasis added). On the same date, in *Gall v. United States*, 128 S. Ct. 586 (2007), the Court enumerated all types of procedural error, including "treating the Guidelines as mandatory" and "failing to consider the § 3553(a) factors;" disagreement with a guideline, whether based on Commission or congressional policy, was not among them. *Id*. at 597.

On January 30, 2008, in re-sentencing Vazquez, the judge found that "it may be" that the career offender guideline "is immune from the policy criticisms otherwise permissible" because the crack guidelines involved an "implied congressional policy"

while the career offender guideline "is a product of direct congressional expression." (Doc152-Pg2; Doc160-Pg9). After hearing from Vazquez about the lack of violence in his history, including the circumstances of the statutory rape offense, the judge stated, "I don't consider you a violent person. If I did, I wouldn't have given you the sentence I gave you the last time or this time." (Doc160-Pg16). The judge concluded: "[I]f I were allowed to consider what I consider to be the unjust application of 4B1.1 in this case, I would impose a sentence lower than 180 months." (Doc160-Pg18).

On appeal, the Panel held that the judge's refusal to consider its policy disagreement with the career offender guideline was not procedurally unreasonable. The Panel believed itself bound by *United States v. Williams*, 456 F.3d 1353 (11th Cir. 2006), which held that the district court impermissibly ignored congressional policy by generally disagreeing with the career offender guideline. *Vazquez*, 2009 WL 331014, *2. It believed that *Kimbrough* did not overrule *Williams* because the crack guidelines at issue there "were the result of implied congressional policy," while the career offender guideline "was the result of 'direct congressional expression.'" *Id*. at *4. It stated that judges may vary from guidelines based on policy disagreements only "'where Sentencing Commission policy judgment, not Congressional direction, underlies the Guideline at issue,'" and "'where that policy judgment did not arise from the Commission's exercise of its characteristic institutional role.'" *Id*. at *3 (quoting *United States v. Vega-Castillo*, 540 F.3d 1235 (11th Cir. 2008)). Further, the Panel stated, other circuits "have reached similar conclusions." *Id*. at *3 (citing *United States v. Harris*, 536 F.3d 798 (7th Cir. 2008); *United States v. Clay*, 524 F.3d 877(8th Cir. 2008); *United States v. Jimenez*, 512 F.3d 1 (1st Cir. 2007)).

ARGUMENT AND CITATIONS OF AUTHORITY

A. Congress expressly chose to make § 994(h) a directive to the Commission, not the courts, in order to facilitate the guidelines development process.

Congress's "directly expressed policy" in 28 U.S.C. § 994(h) was to "replace" an earlier proposal "that would have mandated a sentencing judge to impose a sentence at or near the statutory maximum" with "a directive to the Sentencing Commission,"

which Congress thought would "be more effective" because "the Guidelines development process can assure consistent and rational implementation of the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 98-225 at 175 (1983). *See also United States v. Sanchez*, 517 F.3d 651, 663-664 (2d Cir. 2008)("Section 994(h) . . . by its terms, is a direction to the Sentencing Commission, not to the courts"); *United States v. Liddell*, 543 F.3d 877, 883-884 (7th Cir. 2009)(same).

The "Guidelines development process" to which Congress referred, S. Rep. No. 98-225 at 175, is set forth in various sections of the Sentencing Reform Act. The Commission was to ensure that the guidelines met the purposes of sentencing set forth in § 3553(a)(2), to avoid unwarranted disparities and unwarranted similarities, to reflect advancement in knowledge of human behavior, and to measure the effectiveness of the guidelines in meeting those goals. 28 U.S.C. § 991(b). To accomplish this, the Commission was to (1) use average time served in the pre-guidelines period as a starting point, *see* 28 U.S.C. § 994(m); (2) continually review and revise the guidelines in light of sentencing decisions, sentencing data, and comments from experts and practitioners, *see* 28 U.S.C. §§ 994(o), 994(x); and (3) conduct empirical research of sentences imposed, the relationship of such sentences to the purposes of sentencing, and their effectiveness in meeting those purposes. *See* 28 U.S.C. § 995(a)(12)-(16).

The ability of judges to disagree with the guidelines in individual cases is a crucial part of the "Guidelines development process." Congress intended the Commission to learn from "individual judicial sentencing actions" and "revise [the guidelines] if for some reason they fail to achieve their purposes." S. Rep. No. 98-225 at 178. The Commission "envisioned that such feedback from the courts would enhance its ability to fulfill its ongoing statutory responsibility under the Sentencing Reform Act to periodically review and revise the guidelines." USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 5 (October 2003). As described in *Rita*:

> The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. . . And it can revise the Guidelines accordingly.

127 S. Ct. at 2464. If judges could not disagree with the career offender guideline, the "Guidelines development process" that Congress intended could not function.

According to a 1996 study by members of the Sentencing Commission, courts frequently disagreed with (*i.e.*, "departed from") the career offender guideline well before *Booker* because the predicates were "minor or too remote in time to warrant consideration," and "typically" imposed the sentence that would have applied absent the career offender provision. *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, 356-357 (December 1996). In disallowing the same kind and extent of disagreement, the Panel's decision makes the career offender guideline more mandatory than it was before *Booker*.

While the Commission has not been responsive to judicial feedback like that noted above, it has "modified" the statutory definition "over time . . . consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute," USSG §4B1.1, comment. (backg'd)(citing S. Rep. No. 98-225 at 175 (1983)), primarily by broadening it. Indeed, Vazquez would not be a career offender if the Commission had followed the statute's express terms, because § 994(h) does not include federal drug conspiracies under 21 U.S.C. § 846 as a qualifying instant offense or state drug offenses as qualifying prior offenses.[3] When the courts of appeals began to hold that the Commission had no authority to include such offenses

[3] Section 994(h) directs the Commission to specify a sentence at or near the maximum if the defendant's instant offense "is . . . an offense described in . . . 21 U.S.C. 841 . . . 21 U.S.C. 952(a), 955, and 959 [or] chapter 705 of title 46," and "has previously been convicted of two or more . . . offense[s] described in . . . 21 U.S.C. 841 . . . 21 U.S.C. 952(a), 955, and 959 [or] chapter 705 of title 46."

in the guideline, it responded by inserting the current background commentary citing Congress's choice of a directive to the Commission rather than a statute binding the courts. *See* USSG, App. C, Amend. 528 (Nov. 1, 1995).

B. Sentencing courts are free to disagree with guidelines based on congressional directives to the Commission.

The distinction between "direct" and "implied" congressional policy upon which the Panel and the district court relied is irrelevant because § 994(h) is not a directive to sentencing courts at all. In *Kimbrough*, the government argued:

> [1] [W]here Congress has made a specific policy determination concerning a particular offense (or offense or offender characteristic) that legally binds sentencing courts, and [2] the Commission (as it must) incorporates that policy judgment into the Guidelines in order to maintain a rational and logical sentencing structure, [3] that specific determination restricts the general freedom that sentencing courts have to apply the factors set forth in 18 U.S.C. 3553(a).

Kimbrough, Brief of the United States, 2007 WL 2461473, *16.

The Court rejected this argument. It rejected the first premise because 21 U.S.C. § 841 legally binds *sentencing courts* only at the statutory minimums and maximums and "says nothing" about appropriate sentences within these brackets. *Kimbrough*, 128 S. Ct. at 571. It rejected the second premise because Congress did not direct *the Commission* to incorporate the ratio into the sentencing guidelines. *Id*. In explaining the latter conclusion, the Court contrasted 21 U.S.C. § 841(b) with 28 U.S.C. § 994(h), which "specifically required the *Sentencing Commission* to set Guidelines sentences for serious recidivist offenders 'at or near' the statutory maximum." *Id*. (Emphasis added). The Court emphasized that § 994(h) was a direction to the Commission, *not* to the courts. *Id. See also Liddell*, 543 F.3d at 883-884 ("*Kimbrough* itself suggested that section 994(h)'s directive targeted the Commission, not the sentencing courts"); *Sanchez*, 517 F.3d at 663 ("Section 994(h) . . . by its terms, is a direction to the Sentencing Commission, not to the courts, and . . . there is no statutory provision instructing the court to sentence a career offender at or near the statutory maximum"). The Court concluded that § 841 "does not require the Commission-or, after *Booker*, sentencing courts-to adhere to the 100-to-1 ratio for crack cocaine quantities other than

those that trigger the statutory minimum sentences." *Kimbrough*, 128 S. Ct. at 572.

In sum, sentencing courts must follow express congressional directives *to the courts*, such as statutory minimum and maximum terms, but are free to disagree with *guidelines* that are based on express (or implied) congressional directives *to the Commission*, such as the career offender guideline. Indeed, the Court in *Gall* held that the judge had committed no procedural error, 128 S. Ct. at 598, in considering as grounds for a non-guideline sentence that Gall had obtained a college degree, started a business, and had strong family ties, *id*. at 593, 600-602, though the Commission deems those factors "not ordinarily relevant" in reliance on its interpretation of a congressional directive.[4] Likewise, in *Rita*, where the Court first established the courts' authority to disagree with the guidelines, the guideline range was based on USSG §2M5.2, *Rita*, 127 S. Ct. at 2460, which had been increased pursuant to an express congressional directive. *See* USSG, App. C, Amend. 633 (Nov. 1, 2001); Pub. L. No. 104-201, § 1423(a). Indeed, the vast majority of the guidelines are based on congressional directives to the Commission,[5] but the Court has repeatedly emphasized that *all* of the guidelines are advisory. *See Kimbrough*, 128 S. Ct. at 564; *Gall*, 128 S. Ct. at 594; *Rita*, 127 S. Ct. at 2465.

Just recently, the Supreme Court warned against courts of appeals "seiz[ing]

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[4] *See* USSG §§5H1.2, 5H1.5; USSG, Chapter 5, Part H, Intro. Comment. ("28 U.S.C. § 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, . . . employment record, and family ties . . . in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment").

[5] At least 75 distinct guidelines and policy statements have been promulgated or amended, some repeatedly, in response to congressional directives. These are USSG §§2A1.2, 2A1.3, 2A2.2, 2A2.3, 2A2.4, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.1, 2A6.2, 2B1.1, 2B1.3, 2B4.1, 2B5.1, 2B5.3, 2C1.8, 2D1.1, 2D1.2, 2D1.10, 2D1.11, 2D1.12, 2D2.3, 2G1.1, 2G1.2, 2G1.3, 2G2.1, 2G2.2, 2G3.1, 2H3.1, 2H4.1, 2H4.2, 2J1.2, 2K1.4, 2K2.1, 2K2.24, 2L1.1, 2L1.2, 2L2.1, 2M5.1, 2M5.2, 2P1.2, 2R1.1, 2T4.1, 2X7.1, 3A1.1, 3A1.2, 3A1.4, 3B1.3, 3B1.4, 3B1.5, 3C1.4, 3E1.1, 4A1.1, 4A1.3, 4B1.5, 5C1.2, 5D1.2, 5E1.1, 5H1.4, 5H1.6, 5H1.6, 5H1.7, 5H1.8, 5K2.0, 5K2.10, 5K2.12, 5K2.13, 5K2.15, 5K2.17, 5K2.20, 5K2.22, 5K3.1, 8B1.1, 8B2.1. *See* Congressional Directives to Sentencing Commission 1988-2008, www.fd.org/pdf_lib/SRC_Directives_Table_Nov_2008.pdf.

upon" and misreading isolated language in *Kimbrough* "in order to stand by the course they had adopted pre-*Kimbrough*." *Spears v. United States*, 129 S. Ct. 840, 845 (2009). In that case, the Court summarily rejected a standard adopted by the First, Third and Eighth Circuits prohibiting the categorical replacement of the 100:1 powder/crack ratio with a different ratio because it would lead district courts to "believ[e] that they are not entitled to vary based on 'categorical' policy disagreements with the Guidelines" and thus to unacceptably "treat the Guidelines' policy . . . as mandatory" or "mask[] their categorical policy disagreements as 'individualized determinations.'" *Id*. at 844. Less than a week later, the Court forcefully reiterated that the "Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable," *Nelson v. United States*, 129 S. Ct. 890, 892 (2009)(emphasis in original), the very point of *Rita*'s authorization of judicial disagreements with the guidelines. 128 S. Ct. at 2465.

C. The career offender guideline did not arise from the Commission's exercise of its characteristic institutional role.

When a guideline was not developed based on "empirical data and national experience," it is not an abuse of discretion to conclude that it "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." [6] *Kimbrough*, 128 S. Ct. at 575; *Gall*, 128 S. Ct. at 594 n.2; *Rita*, 128 S. Ct. at 2465, 2468. The Commission has recognized the flaws in the career offender guideline as applied to offenders like Vazquez for many years but failed to remedy them:

- A 1988 Commission study recognized that the guideline "makes no distinction between defendants convicted of the same offenses, either as to the seriousness of their instant offense or their previous convictions . . . even if one defendant was a drug 'kingpin' with serious prior offenses, while the other defendant was a low-level street dealer [with] two prior convictions for distributing small amounts of drugs." USSC, Career Offender Guidelines Working Group Memorandum at 13 (March 25, 1988). In a sample of 1990 career offender

[6] Disagreement with a guideline that "do[es] not exemplify the Commission's exercise of its characteristic institutional role" is "not suspect." *Spears*, 129 S. Ct. at 843; *Kimbrough*, 128 S. Ct. at 574-575; *Gall*, 128 S. Ct. at 596 ("applying a heightened standard of review to sentences outside the Guidelines range . . . is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions-whether inside or outside the Guidelines range").

cases, 30% of the instant offenses were ongoing conspiracies, 50% were multi-count cases, over 40% involved a weapon, force or threat of force, and over 50% of the offenders played a more culpable role. Eighty percent had been sentenced to at least three prior terms of over five years, more than 50% had at least two revocations, and the average time free before the instant offense was 21 months. *See* USSC, Criminal History Working Group Report at 29-30 (Oct. 17, 1991). The guideline punishes offenders like Vazquez with none of these characteristics just as harshly as those with all of them.

- The Commission's 2004 empirical research showed that the recidivism rate for "career offenders" based on prior drug offenses "more closely resembles the rates for offenders in lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules." *See* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 134 (2004)("Fifteen Year Review")(emphasis in original).

- The Commission's 2004 empirical research showed that drug offenders, along with fraud and larceny offenders, are the least or second least likely of all offenders to recidivate across all criminal history categories except category I. *See* USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 13 & Ex. 11 (May 2004).

- The Commission found in 2004 that the career offender guideline is excessive in light of deterrence needs in drug cases because "retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high." *See* Fifteen Year Review at 134.

- Judges have departed or varied from the career offender guideline at a high rate for many years, before and after *Booker*. *See* Gelacak, Nagel and Johnson, *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 Minn. L. Rev. at 356-357; USSC, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* 137-139 (March 2006)(in 75% of career offender cases with below-guideline sentences in the year after *Booker,* drug trafficking was the instant offense and only 40.5% of sentences in such cases were within the guideline range). The bases for courts' disagreement with the guideline include that the prior offenses were minor, remote, or committed close in time and punished concurrently,[7] the difference between past and present sentences was so great that the deterrent effect far exceeded what was necessary,[8] and the punishment was otherwise unjustified

[7] *See, e.g., United States v. Reyes*, 8 F.3d 1379 (9th Cir. 1993); *United States v. Bowser*, 941 F.2d 1019, 1024-1025 (10th Cir. 1991); *United States v. Moreland*, 568 F. Supp. 2d 674 (S.D. W. Va. 2008); *United States v. Fernandez*, 436 F. Supp. 2d 983 (E.D. Wis. 2006); *United States v. Serrano*, slip op., 2005 WL 1214314 (S.D.N.Y. May 19, 2005); *United States v. Phelps*, 366 F. Supp.2d 580, 590 (E.D.Tenn. 2005); *United States v. Naylor*, 359 F. Supp.2d 521 (W.D. Va. 2005); *United States v. Carvajal*, slip op., 2005 WL 476125, *5-6 (S.D.N.Y. Feb. 22, 2005).

[8] *See, e.g., United States v. Mishoe*, 241 F.3d 214, 220 (2d Cir. 2001); *United States v. Colon*, slip op., 2007 WL 4246470, *7 (D. Vt. Nov. 29, 2007); *United States v. Qualls*, 373 F.Supp.2d 873, 877 (E.D. Wis. 2005).

by the risk of recidivism or the need for deterrence.[9]

- Several courts of appeals have held that consensual statutory rape is not "violent."[10]
- The public disagrees with the harshness of the career offender guideline. *See* Peter H. Rossi & Richard A. Berk, U.S. Sentencing Commission, Public Opinion on Sentencing Federal Crimes, Executive Summary (1997).
- The offense level is far above average past practice.[11]
- he Commission has broadened the definitions of the predicates beyond § 994(h), despite substantial negative feedback and its own empirical research showing that the guideline fails to advance any purpose of sentencing in drug cases, the vast majority of cases in which it applies, and has a disproportionate impact on African-Americans, *see Fifteen Year Report*, at 133-134, and its own recognition that its definition of "crime of violence" includes crimes that are not violent. *See* 58 Fed. Reg. 67522, 67533 (Dec. 21, 1993).

In sum, the career offender guideline fails to "exemplify the Commission's exercise of its characteristic institutional role." *Kimbrough*, 128 S. Ct. at 575.

D. The Panel opinion conflicts with the decisions of every circuit to decide the issue and misreads the law of other circuits.

The First, Second and Seventh Circuits have squarely held that judges may vary based on policy disagreements with the career offender guideline. *See United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *Sanchez*, 517 F.3d at 662-665; *Liddell*, 543 F.3d at 884-885.

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[9] *See, e.g., United States v. Collins*, 122 F.3d 1297, 1299-1301, 1304 (10th Cir.1997); *United States v. Malone*, slip op., 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008).

[10] *See, e.g., United States v. Thornton*, 554 F.3d 443 (4th Cir. 2009); *United States v. Dennis*, 551 F.3d 986 (10th Cir. 2008); *Valencia v. Gonzales*, 439 F.3d 1046 (9th Cir. 2006); *United States v. Sawyers*, 409 F.3d 732 (6th Cir. 2005); *Xiong v. INS*, 173 F.3d 601 (7th Cir. 1999); *United States v. Thomas*, 159 F.3d 296 (7th Cir. 1998). *See also United States v. Meader*, 118 F.3d 876, 884 (1st Cir. 1998) (questioning whether statutory rape is violent).

[11] *See* USSC, *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), www.fd.org/pdf_lib/Supplementary%20Report.pdf.

The Panel cites certain decisions of the First, Seventh and Eighth Circuits in support of its result, but none of them held or suggested that a sentencing judge may not disagree with the career offender guideline. In *Jimenez*, the defendant, sentenced under the career offender guideline, argued that he was entitled to a lower sentence because of the crack/powder disparity. Because the offense level under the career offender guideline was the same regardless of the type of drug involved, the First Circuit stated that "the crack/powder dichotomy is irrelevant to the career offender sentence actually imposed in this case." 512 F.3d at at 8 n.5. Likewise, in *Harris*, the defendant, sentenced under the career offender guideline, challenged his sentence based on the crack/powder disparity. The Seventh Circuit stated that "a sentence entered under the career offender guideline raises no *Kimbrough* problem because to the extent it treats crack cocaine differently from powder cocaine, the disparity arises from a statute [21 U.S.C. § 841], not from the advisory guidelines . . . [b]ut our discussion should not be read to suggest that §4B1.1 is any less advisory for a district judge than the other sentencing guidelines." 536 F.3d at 806 (citing *Sanchez*, 517 F.3d at 663). In *Clay*, the defendant, sentenced under the career offender guideline, argued that the district court erred by failing to grant his motion for a downward variance based on the crack/powder disparity, 524 F.3d at 878, and that he was entitled to a lower sentence based on the recent amendment to the crack cocaine guidelines. *Id*. The Eighth Circuit found that "the downward variance Clay requested based on the sentencing disparity between crack and powder cocaine would have no effect on the career offender provision which determined his guideline range," and that the recent amendments "did not change the career offender provision." *Id*.

E. The position of the Solicitor General of the United States is that courts are free to disagree with the career offender guideline.

In *United States v. Funk*, No. 05-3708 (6th Cir.), the government initially made the very same argument reflected in the Panel's holding, *i.e.*, that "in light of the congressional directive in 28 U.S.C. § 994(h), district courts are 'without discretion' to disagree with the career offender guideline." *See* Letter from the United States to

Clerk of Court, *United States v. Funk*, No. 05-3708, 3709 (6th Cir. 2008)(attached as App. C). It was forced to withdraw the argument, however, when it "became aware" that the argument "does not correctly state the position of the United States." *Id*. Instead, it said, the "position of the United States" is that "*Kimbrough*'s reference to [§ 994(h)] reflected the conclusion that Congress intended the Guidelines to reflect the policy stated in Section 994(h), not that the guideline implementing that policy binds federal courts." *Id*. (emphasis in original).

Nonetheless, a panel of the Sixth Circuit found that § 994(h) "represents a clear direction by Congress . . . that offenders such as Funk be sentenced as [career offenders]," and that disagreement with the policy of the career offender guideline is an "improper" basis for a variance. *United States v. Funk*, 534 F.3d 522, 530 (6th Cir. 2008). The Sixth Circuit thereafter vacated the panel decision for rehearing *en banc*. *See* Order granting rehearing *en banc, United States v. Funk*, 05-3708 (6th Cir. 2008)(attached as App. D). In its supplemental brief, the Solicitor General's Office stated that it "disagrees with the prior panel's conclusion" and "agrees with Funk that sentencing courts are not precluded from entering a below-range sentence based on policy disagreements with the career offender guideline." Supplemental Brief for the United States at 12-13 (attached as App. E)(citing *Liddell*, 543 F.3d at 885; *Boardman*, 528 F.3d at 87; *Sanchez*, 517 F.3d at 663-665). "While Congress directed the Sentencing Commission to set guideline ranges at or near the statutory maximum, it has never directed that sentencing courts must impose sentences at or near the maximum for serious recidivist offenders. Thus, as with other guidelines, district courts may vary from the range recommended by the career offender guideline based on policy disagreements with the guideline, so long as they adequately explain why 'the Guidelines sentence itself fails properly to reflect § 3553(a) considerations.'" *Id.* at 13 (quoting *Rita*, 127 S. Ct. at 2465 and citing *Kimbrough*, 128 S. Ct. at 570.

F. The Panel misapplied the prior precedent rule.

The prior precedent rule provides that a Panel is bound by this Court's precedent

unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or this Court sitting *en banc*. *See Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001).

The Panel stated that, in *Williams*, this Court vacated the defendant's sentence in part because the district court ignored congressional policy regarding the career offender guideline. *Vazquez*, 2009 WL 331014, *2. However, in *Williams*, this Court rejected the judge's "generalized disagreement" with the career offender guideline, 456 F.3d at 1357, and remanded for the judge "to impose a sentence based on the individualized facts and circumstances of the defendant's case bearing upon the sentencing considerations enumerated in § 3553(a)." *Id*. at 1362. On remand, the judge imposed the same sentence, finding that the career offender guideline as applied to the case was at odds with § 3553(a)'s considerations. *See* Memorandum Sentencing Opinion on Remand at 7-11, *United States v. Williams*, 6:04-cr-111 (M.D. Fl. 2007)(attached as App. F). The government initially appealed but then dismissed its appeal. *See* Entry of Dismissal, *United States v. Williams*, 07-11490 (11th Cir. 2007)(attached as App. G).

While judges must be permitted to conclude that a guideline "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case," *Kimbrough*, 128 S. Ct. at 575, that is, even when the "case presents no special mitigating circumstances," *Spears*, 129 S. Ct. at 842; *see also Rita*, 127 S. Ct. at 2465, the basis of the judge's policy disagreement must, of course, be relevant to the case. For example, a judge's disagreement with the crack/powder disparity would be irrelevant in a heroin case. A judge's disagreement with the career offender guideline's inclusion of some non-violent offenses as "crimes of violence" would be irrelevant in a case in which the instant offense is forcible rape and the defendant was convicted twice previously of first degree murder. In this case, the judge's policy disagreements with the career offender guideline were directly relevant to the facts of the case, *i.e.*, the guideline produced a sentence greater than necessary to satisfy the purposes of

sentencing because Vazquez's prior offenses were minor and remote, he was not a violent person, his instant offense was not unduly serious, and deterrence of drug trafficking would not be advanced by a career offender sentence.

If *Williams* means only that a judge's policy disagreement must be relevant to the facts of the case, the prior precedent rule does not stand in the way of reversing the judge's erroneous decision that he could not disagree with the career offender guideline. If, instead, *Williams* means that judges may vary from the career offender guideline based only on special individualized mitigating circumstances, then it has been "undermined to the point of abrogation" by the Supreme Court's decisions. [12] *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

CONCLUSION

For the reasons stated herein, Mr. Vazquez respectfully requests this Honorable Court to grant his petition for rehearing *en banc*.

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[12] The Panel did not suggest that *Vega-Castillo*, 540 F.3d 1235, controls this case, and it clearly does not. It did not address whether a judge may disagree with a guideline because it fails properly to reflect § 3553(a) considerations, the question at issue here, which is controlled by *Rita* and *Kimbrough*. Rather, it upheld prior precedent holding that the disparity between sentences in districts with and without fast track programs is not "unwarranted" within the meaning of § 3553(a)(6) because the disparity was authorized by Congress, and that sentences in districts without fast track programs were not necessarily greater than necessary "solely" because similarly situated defendants in districts with fast track programs receive lesser sentences. *Id*. at 1238. Congress placed no conditions on judges' consideration of any purpose or factor under § 3553(a) in career offender cases, S. Rep. No. 98-225 at 175, while it intended fast track departures to apply "if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney," Pub. L. No. 108-21, § 401(m)(2)(B), thus at least implying that selective application of the departure, if based on caseload needs, may not be unwarranted. Further, because the fast track directive is at best an "implied congressional policy" which says nothing about courts' discretion to vary based on disparity among districts, *Vega-Castillo* may be overruled *en banc* when the appropriate case presents itself. *See United States v. Vega-Castillo*, 548 F.3d 980, 981-983 (11th Cir. 2008)(Carnes, J., concurring); *Vega-Castillo*, 540 F.3d at 1239-1242 (Barkett, J., dissenting); *United States v. Rodriguez*, 527 F.3d 221, 229-231 (1st Cir. 2008); *United States v. Seval*, 293 F. App'x 834, 836-838 (2d Cir. 2008).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Rehearing *En Banc* was furnished by hand delivery to Roberta J. Bodnar, Assistant United States Attorney, 501 West Church Street, Suite 300, Orlando, Florida 32805, on this 9th day of March, 2009.

Daniel N. Brodersen, Esquire

APP. A

***United States v. Vazquez*, No. 05-14242, 240 F. App'x 318 (11th Cir. 2007)**

H

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)

United States Court of Appeals,
Eleventh Circuit.
UNITED STATES of America, Plaintiff-Appellee-Cross-Appellant,
v.
Carlos VAZQUEZ, Defendant-Appellant-Cross-Appellee.
No. 05-14242
Non-Argument Calendar.

July 18, 2007.

Background: Defendant was convicted on guilty plea in the United States District Court for the Middle District of Florida of conspiracy to possess with intent to distribute 500 grams or more mixture containing cocaine powder. United States appealed.

Holding: The Court of Appeals held that downward departure sentence of 110 months based on District Court's disagreement with career-offender enhancement was unreasonable.
Vacated; remanded.

West Headnotes

Sentencing and Punishment 350H ⇐1285

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)2 Offenses in Other Jurisdictions
350Hk1283 Violent or Nonviolent Character of Offense
350Hk1285 k. Particular Offenses. Most Cited Cases

Sentencing and Punishment 350H ⇐1307

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(G) Number of Prior Adjudications
350Hk1307 k. Convictions Counted as Separate. Most Cited Cases
Sentence of 110 months for conspiracy to possess with intent to distribute 500 grams or more substance containing cocaine powder, which was downward variance from guidelines range of 210 to 262 months, based on district court's disagreement with application of career-offender enhancement, was unreasonable; defendant had two prior drug felony convictions and prior conviction for statutory rape, yet district court counted two drug felonies as one, without authority to do so, and reasoned that, although statutory rape offense was "reprehensible," it "was not a crime of violence, unless that's how you want to define it," which reasoning was in direct conflict with law defining rape as crime of violence. U.S.S.G. § 4B1.1(a), 18 U.S.C.A.
***318** Ernest L. Chang, Attorney at Law, Reading, PA, for Defendant-Appellant-Cross-Appellee.

Roberta Josephina Bodnar, U.S. Attorney's Office, Orlando, FL, for Plaintiff-Appellee-Cross-Appellant.

Appeals from the United States District Court for the Middle District of Florida. D.C. Docket No. 04-00212-CR-ORL-31-DAB.

Before TJOFLAT, HULL and MARCUS, Circuit Judges.

PER CURIAM:

**1 On cross-appeal, the government challenges Carlos Vazquez's 110-month sentence, imposed after he pled guilty to conspiring to possess with the intent to distribute 500 grams or more of a mixture containing cocaine powder, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(ii), and 846.[FN1] The 110-month sentence was a *319 downward variance from the advisory Guidelines range of 210 to 262 months' imprisonment. The government argues that the sentence imposed by the district court is unreasonable because the court erroneously considered an impermissible factor-the court's own disagreement with the career-offender provision of § 4B1.1 of the Sentencing Guidelines-thus, rendering Vazquez's sentence procedurally unreasonable. The government also argues that a sentence of 110 months' imprisonment is substantively unreasonable. After thorough review of the record and careful consideration of the parties' briefs, we vacate Vazquez's sentence and remand for further proceedings, consistent with this opinion.

FN1. Before the government's filing of the cross-appeal, Vazquez filed a notice of appeal to challenge his conviction. Vazquez's attorney, Ernest L. Chang, then filed a motion to withdraw from representation on appeal, pursuant to *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). With regard to Vazquez's conviction, an independent review of the entire record reveals that counsel's assessment of the relative merit of the appeal is correct. Because independent examination of the entire record reveals no arguable issues of merit regarding Vazquez's conviction, counsel's motion to withdraw is GRANTED, and Vazquez's conviction is AFFIRMED.

As to the government's cross-appeal of Vazquez's sentence, Mr. Chang has filed a brief in opposition to the government's arguments. Accordingly, we DENY AS MOOT the motion to withdraw as to Vazquez's sentence.

The relevant facts are these. On December 15, 2004, Vazquez and co-defendant Adalberto Rosa were indicted on one count of conspiracy to possess with the intent to distribute 500 grams or more of a mixture containing cocaine powder, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(ii), and 846. Vazquez pled guilty, pursuant to a written plea agreement, which included a statement providing the factual basis for Vazquez's guilty plea. According to that statement, a confidential informant ("CI") contacted agents with the Drug Enforcement Administration ("DEA") to alert them that Vazquez and co-defendant Rosa were traveling from Massachusetts to Orlando, Florida, with the intent of purchasing multi-kilogram quantities of cocaine powder. Once they arrived in Orlando, Vazquez called the CI to complete the transaction. The CI came to the hotel where Vazquez and Rosa were staying, at which point Vazquez presented the CI with the money. Vazquez then followed the CI to his car, where the CI produced a duffel bag containing cocaine. As Vazquez walked with the duffel bag back towards the his hotel room, he was intercepted and arrested by DEA agents. Rosa also was arrested. Vazquez subsequently waived his right to remain silent and admitted "that he had picked up money earlier in the day from various Western Union money locations to buy three kilograms of cocaine and was planning on transporting the cocaine back to Massachusetts." After two change-of-plea colloquies, at which Vazquez agreed with the foregoing factual description of his offense, the district court accepted his plea and he proceeded to sentencing.

According to the Presentence Investigation Report ("PSI"), Vazquez had provided $18,000 in U.S. currency to the CI, in exchange for 3 kilograms of cocaine, which he intended to transport back to Massachusetts. The PSI recommended that because the offense involved between 2 kilograms and 3.5 kilograms of cocaine, Vazquez's base offense level was a 28, pursuant to U.S.S.G. § 2D1.1(c)(6). The

PSI further recommended that Vazquez qualified as a career offender, under § 4B1.1 of the Guidelines, because he previously had pled guilty to a controlled substance offense and had at least two prior felony convictions for either a crime of violence or *320 a controlled substance offense. In support of its recommendation, the PSI noted that Vazquez was convicted on two separate occasions of possession with intent to distribute a controlled substance (heroin) in April 1991, and was convicted of the rape of a child, a crime of violence, in January 1996. The PSI recommended that as a career offender facing a statutory maximum penalty of 25 or more years, Vazquez's offense level should be adjusted from 28 to 34, pursuant to § 4B1.1. The PSI also recommended a 2-level downward adjustment for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1(a), resulting in a total offense level of 32.

**2 Based on 12 criminal history points, Vazquez's criminal history category was V. Due to Vazquez's career-offender status, his criminal history category was adjusted to VI, pursuant to § 4B1.1. With an adjusted offense level of 32 and a criminal history category VI, Vazquez faced an advisory Guidelines range of 210 and 262 months' imprisonment.

At sentencing, Vazquez did not object to the PSI's factual findings or the calculation of his Guidelines range, prior to application of § 4B1.1. Vazquez did challenge the application of the Guidelines' career-offender provision, arguing that the two qualifying drug convictions occurred approximately 15 years prior to the instant offense, and that the qualifying crime of violence (rape of a child) occurred 10 years prior to the instant offense. Vazquez stated that he had served two years for sexual battery, stemming from a "consensual-type offense," and had not committed a crime in the past eight years, since he was released. Vazquez argued that the remoteness of his past crimes and his willingness to accept responsibility warranted imposition of a sentence closer to the 37-month term of imprisonment that co-defendant Rosa received. Vazquez acknowledged that "in terms of ... community deeds and so on, [he] does not have that sort of mitigation," but asked that the court consider that he had a close family that had traveled from Massachusetts to support him.

The government requested that the court sentence Vazquez to a term of imprisonment within the Guideline range of 210 to 262 months' imprisonment, as scored by the PSI after application of § 4B1.1. As for Vazquez's challenge to the PSI's application of the career-offender provision, the government responded to Vazquez's request for mitigation by stating that Vazquez had committed an act of sexual battery when he was 28 years old and the victim was only 14. The government argued that the sentence issued to Vazquez should "not be close" to the term given to Rosa because Rosa had a lesser criminal history and was issued a downward departure for his substantial assistance, to which Vazquez was not entitled.

After hearing the parties' arguments, the district court stated that "we've established a guideline range of 210 to 262 months; but while the guidelines, of course, are important and entitled to deference ... I have a statutory obligation to consider the factors in [18 U.S.C. § 3553(a)], in determining a reasonable sentence in the context of guideline scoring." The district court stated that the career-offender provision found in § 4B1.1 created "a quantum leap in the guideline calculation," in which the Sentencing Commission "attempt[ed] to come up with a definition that applie[d] to all people in all circumstances, without regard to the actual offenses or the nature of the offense or the timing of the offense." The court explained that it felt "the guidelines simply cannot operate realistically on the human level" and take the proceedings "astray in situations where you have these quantum-type leaps." The court then stated its had *321 considered the nature and circumstances of the offense and noted the "fairly significant amount of drugs involved," but also indicated that this case was "not like an ongoing conspiracy in which the

defendant is charged with multiple transactions of trafficking. It's a one-incident offense."

**3 As for Vazquez's criminal history, the district court stated that Vazquez was 23 when he committed two drug felonies in 1991, which it noted were sentenced together concurrently. The court opined that the career-offender provision failed to take into account that the two convictions "w[ere] a drug offense or offenses, if you want to separate them, that occurred almost 15 years ago." The court also found that "the other offense that r[an] his score up and qualifies him under [the career offender provision] [wa]s the statutory rape charge; and, while reprehensible, it also was some time ago and was not a crime of violence, unless that's the way you want to define it. It was consensual albeit illegal."

The district court determined that, absent the career-offender enhancement, Vazquez would be subject to a Guidelines imprisonment range of 110 to 137 months. Questioning the value of criminal sentences as deterrence to the illicit drug trade, the court explained that it felt a mandatory minimum sentence of five years would "be adequate deterrence" and a sentence "in the hundred-plus range" was "way in excess of what is necessary to deter this type of criminal conduct." The court then stated that, after considering the § 3553(a) sentencing factors, the arguments by the parties, and the Guidelines range, a 110-month sentence was appropriate, as it was "at the low end of what would be the non-enhanced guideline, just in terms of reference as to how the Court arrived at that, that sentence as being, in the Court's view, reasonable." The court explained that after considering the advisory Guidelines and the sentencing factors, it found that its sentence was reasonable, "not greater than necessary to comply with the statutory purposes," and in excess of the mandatory minimum. This appeal followed.

We review the district court's interpretation of the Sentencing Guidelines *de novo* and its factual findings for clear error, and then review the defendant's ultimate sentence for reasonableness. *United States v. Williams,* 456 F.3d 1353, 1360 (11th Cir.2006), *cert. petition dismissed,* --- U.S. ----, 127 S.Ct. 3040, 168 L.Ed.2d 755 (2007) (" *Aaron Williams* "). Although the Sentencing Guidelines are advisory, the district court is required to correctly calculate the sentencing range and take that range into account when imposing a sentence. *United States v. Crawford,* 407 F.3d 1174, 1178-79 (11th Cir.2005). Once the court correctly calculates the advisory sentencing range, "it may impose a more severe or more lenient sentence as long as it is reasonable." *United States v. Pope,* 461 F.3d 1331, 1336-37 (11th Cir.2006).

The Sentencing Guidelines contain a career-offender provision, in accordance with Congressional dictates, to avoid unwarranted sentencing disparities amongst recidivist offenders who commit crimes of violence or drug offenses. *See*U.S.S.G. § 4B1.1 (comment. background (2004)) (citing 28 U.S.C. § 994(h)). The provision applies to a defendant who is at least eighteen years of age, with at least two prior felony convictions of either a crime of violence or a controlled substance offense, and has committed, as the instant offense, a felony that is a crime of violence or a controlled substance offense. *See*U.S.S.G. § 4B1.1(a). The provision enhances the offense level of the instant offense, in accordance with a table contained in the ***322** section, and the criminal history category to a category VI. *See*U.S.S.G. § 4B1.1(b).

**4 There is no question, and the parties do not argue otherwise, that the district court correctly calculated the Sentencing Guideline range of 210 to 262 months' imprisonment, after application of § 4B1.1's enhancement provision. The PSI stated that Vazquez was convicted of two felony drug offenses in 1991 and, in 1996, he was convicted of the rape of a child, a felonious crime of violence. Because Vazquez faced a statutory maximum of 40 years imprisonment on his current drug offense, the court properly scored his offense level at 34, which was reduced to a 32 after factoring in a 2-level reduction for his acceptance of responsibility, and classi-

fied his criminal history as a category VI. The court then correctly announced that it "established a guideline range of 210 to 262 months." The remainder of the sentencing hearing was devoted to ascertaining a reasonable sentence and it is that which we now review.

Regardless of whether the court imposed a sentence within the correctly calculated sentencing range, we next consider whether the sentence is reasonable. *Aaron Williams,* 456 F.3d at 1360. The party challenging the sentence has the burden of proving the sentence unreasonable. *Id.* at 1361. A sentence can be deemed unreasonable because of the procedure used to derive the sentence (procedural unreasonableness) or because the length of the sentence is unreasonable (substantive unreasonableness). *Id.* at 1361-63. A sentence is reasonable if it achieves the purposes of sentencing as stated in 18 U.S.C. § 3553(a). *Id.* That provision requires that the district court "shall impose a sentence sufficient, but not greater than necessary"'to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense,"'to afford adequate deterrence to criminal conduct," and "to protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(A-C). The court also may consider "the nature and circumstances of the offense and the history and characteristics of the defendant," "the kinds of sentences available," the Sentencing Guideline range, and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(1), (a)(3), (a)(4), (a)(6).

"The reasons given by the district court for its selection of a sentence are important to assessing reasonableness." *Aaron Williams,* 456 F.3d at 1361. If the party challenging the sentence as unreasonable demonstrates that the district court's imposition of sentence "was substantially affected by its consideration of impermissible factors," we will vacate the sentence and remand, unless the party defending the sentence can establish that the error is harmless. *Id.* at 1361-62. Whether a factor is impermissible is a matter of law that is reviewed *de novo. Id.* at 1361. We will uphold a sentence as procedurally reasonable where we are convinced that the district court did not impose the sentence "based solely on its disagreement with the Guidelines," which is one "impermissible factor" we have recognized. *United States v. Williams,* 435 F.3d 1350, 1354-55 (11th Cir.2006), (" *Marcus Williams* ").

5 In the instant case, the district court began its § 3553(a) analysis with a discussion of how the career-offender enhancement creates a "quantum leap in the guideline calculation" that does not accurately apply to "all people in all circumstances." Accordingly, the court explained that the provision "cannot operate realistically on a human level" and leads the court "astray" at sentencing. These views ***323 permeate the court's subsequent discussion of the § 3553(a) sentencing factors. The district court explained that the career-offender enhancement did not adequately consider Vazquez's criminal history, then discredited the predicate offenses based on their remoteness and their characteristics. With regard to the two drug felonies, the court stated that they could be considered as one offense because they were sentenced concurrently. The court cited no authority for its treatment of the two prior drug felony convictions as one. The court also reasoned that although the statutory rape offense was "reprehensible," it "was not a crime of violence, unless that's how you want to define it." This reasoning was in direct conflict with our precedent on the issue-we recently defined statutory rape, even if "consensual," as a crime of violence that qualifies towards the career-offender enhancement. *United States v. Ivory,* 475 F.3d 1232, 1238 (11th Cir.2007).

Based on its own personal disagreement with the way that the career-offender provisions affected the instant case, and its decision to treat the *two* prior drug felony convictions as *one* and the statutory rape conviction as *not* a crime of violence, the district court then proceeded to determine what the

sentencing range would be if the career-offender provision did not apply. The court arrived at a sentence of 110 months' imprisonment, which was "at the low end of what would be the non-enhanced guideline, just in terms of reference as to how the [c]ourt arrived at that ... sentence."

The court's disagreement with the effect of the career-offender provision in this case imbued the entire sentencing hearing, and we readily conclude that the court's disagreement with the Guidelines, an impermissible factor, "substantially affected" its sentencing calculus. *Aaron Williams,* 456 F.3d at 1361-62. In *Aaron Williams*, we vacated and remanded a below-Guidelines sentence that was based on similar disagreement with the effect of the career-offender provision of § 4B1.1. In that case, the district court said that the career-offender enhancement "is a totally inappropriate way to consider the individual nature of an offense or a defendant's individual background" and said it was not going to sentence Williams as a career offender. In its sentencing memorandum, the district court again explained what it considered to be the "arbitrary compounding" effect of the career-offender enhancement. *Id.* at 1369.

Section 4B1.1 embodies Congressional policy, reflected in 28 U.S.C. § 994(h),[FN2] "that repeat drug offenders receive sentences 'at or near' the enhanced statutory maximums set out in [21 U.S.C.] § 841(b)." *Id.* This Congressional goal-to target specific recidivists, particularly repeat drug offenders and violent criminals-clearly is implicated here, as there is little question that Vazquez is a recidivist, within the meaning of 28 U.S.C. § 994(h), and therefore § 4B1.1 applies to him. On this ***324** record, the government has met its burden to prove that the district court's imposition of sentence was "substantially affected" by an impermissible factor, the district court's disagreement with the Guidelines.

> FN2. In § 944(h), Congress directed the Sentencing Commission to:
>
> assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and-
>
> (1) has been convicted of a felony that is-
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841) ...; and
>
> (2) has previously been convicted of two or more prior felonies, each of which is-
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841)....
>
> 28 U.S.C. § 994(h).

****6** Moreover, Vazquez has not shown that the district court's erroneous consideration of its disagreement with the career-offender provision was harmless. The court did not otherwise reasonably justify its sentence, which varied downwards from the sentencing range by a period of 100 months and was based, in part, on other impermissible factors. The other factors that the court considered were the remoteness of Vazquez's prior felonies, the court's belief that Vazquez's two prior drug convictions should count as only one, the court's belief that Vazquez's statutory rape conviction was not a crime of violence, and that Vazquez was engaged in a drug conspiracy that involved a single objective rather than an ongoing conspiracy. Vazquez even admitted that he had not participated in any "community deeds" that warranted mitigation. Although the court expressed its belief that the statutory mandatory minimum would sufficiently deter such conduct, and that a sentence "in the hundred-

plus range" was "in excess of what [wa]s necessary to deter this type of criminal conduct," it was only considering a sentence in that range because it felt that a reasonable sentence in this case would be one not enhanced by the career-offender provision. The government has met its burden to show that Vazquez's sentence is procedurally unreasonable due to the district court's use of a faulty procedure to fashion Vazquez's sentence. *Aaron Williams,* 456 F.3d at 1361.[FN3] Accordingly, we vacate and remand for re-sentencing consistent with this opinion.

FN3. Because we have found procedural unreasonableness, we need not, and do not, reach the government's alternative argument, that the sentence also was substantively unreasonable. For purposes of the re-sentencing hearing, we observe that the district court must start with the correctly calculated advisory Guidelines range of 210 to 262 months' imprisonment. In consideration of the § 3553(a) factors, the court may impose a higher or lower sentence, with the caveat that a sentence constituting an "extraordinary reduction" from the Guideline range should be supported by "extraordinary circumstances." *United States v. McVay,* 447 F.3d 1348, 1357 (11th Cir.2006). A district court has discretion regarding the weight to be given any one sentencing factor, however, "this Court will remand for resentencing if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *United States v. Clay,* 483 F.3d 739, 746 (11th Cir.2007).

SENTENCE VACATED AND REMANDED.

C.A.11 (Fla.),2007.
U.S. v. Vazquez
240 Fed.Appx. 318, 2007 WL 2050903 (C.A.11 (Fla.))

END OF DOCUMENT

APP. B

***United States v. Vazquez*, No. 08-10671 2009 WL 331014**
(11th Cir. Feb. 12, 2009)

H

Only the Westlaw citation is currently available.

United States Court of Appeals,
Eleventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Carlos VAZQUEZ, Defendant-Appellant.
No. 08-10671
Non-Argument Calendar.

Feb. 12, 2009.

Background: Defendant was convicted on a guilty plea in the United States District Court for the Middle District of Florida of conspiracy to possess with intent to distribute 500 grams or more mixture containing cocaine powder, and was sentenced to 110 months in prison. Government appealed, challenging the sentence. The Court of Appeals, 240 Fed.Appx. 318, vacated and remanded for resentencing. On remand, the United States District Court for the Middle District of Florida, No. 04-00212-CR-ORL-19-KRS,Gregory A. Presnell, J., 2008 WL 252641, imposed 180-month sentence. Defendant appealed.

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:
(1) waiver of right to appeal was ambiguous;
(2) waiver did not bar defendant's appeal; and
(3) District Court properly refused to consider its disagreement with the career offender sentencing guideline.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⇐1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In General. Most Cited Cases
The Court of Appeals reviews de novo whether a defendant effectively waived his right to appeal.

[2] Criminal Law 110 ⇐1156.2

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1156.1 Sentencing
110k1156.2 k. In General. Most Cited Cases
The Court of Appeals reviews the sentence imposed by a district court for reasonableness, which merely asks whether the trial court abused its discretion.

[3] Criminal Law 110 ⇐1134.75

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)8 Sentencing
110k1134.75 k. In General. Most Cited Cases

Criminal Law 110 ⇐1134.77

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)8 Sentencing
110k1134.77 k. Application of Guidelines. Most Cited Cases
In reviewing sentences for reasonableness, the appellate court must ensure that the district court committed no significant procedural error, such as failing to calculate or improperly calculating the Sentencing Guidelines range, treating the Guidelines as mandatory, failing to consider the statutory sentencing 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. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et

seq., 18 U.S.C.A.

[4] Criminal Law 110 ⚿1156.2

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1156.1 Sentencing
110k1156.2 k. In General. Most Cited Cases

If the reviewing court concludes that the district court did not procedurally err in imposing a sentence, it must then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard, based on the totality of the circumstances.

[5] Criminal Law 110 ⚿1026.10(2.1)

110 Criminal Law
110XXIV Review
110XXIV(D) Right of Review
110k1025 Right of Defendant to Review
110k1026.10 Waiver or Loss of Right
110k1026.10(2) Plea of Guilty or Nolo Contendere
110k1026.10(2.1) k. In General. Most Cited Cases

Waivers of appeal rights, included in plea agreements, are effective if they were knowingly and voluntarily made.

[6] Criminal Law 110 ⚿1026.10(2.1)

110 Criminal Law
110XXIV Review
110XXIV(D) Right of Review
110k1025 Right of Defendant to Review
110k1026.10 Waiver or Loss of Right
110k1026.10(2) Plea of Guilty or Nolo Contendere
110k1026.10(2.1) k. In General. Most Cited Cases

If a waiver of the right to appeal was not effective, the proper remedy is for it to be severed from the plea agreement.

[7] Criminal Law 110 ⚿273.1(2)

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases

In interpreting a plea agreement, the court will not accept a rigidly literal approach or a hyper-technical reading of the agreement.

[8] Criminal Law 110 ⚿273.1(2)

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases

A written plea agreement should be viewed against the background of the negotiations.

[9] Criminal Law 110 ⚿273.1(2)

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases

In interpreting a plea agreement, ambiguities are construed against the government.

[10] Criminal Law 110 ⚿1026.10(2.1)

110 Criminal Law
110XXIV Review
110XXIV(D) Right of Review
110k1025 Right of Defendant to Review
110k1026.10 Waiver or Loss of Right
110k1026.10(2) Plea of Guilty or Nolo Contendere
110k1026.10(2.1) k. In General.

Most Cited Cases
Waiver of the right to appeal contained in plea agreement, providing that if the government appealed the sentence imposed, then defendant would be released from the waiver and could appeal the sentence, was ambiguous.

[11] Criminal Law 110 ⇐1026.10(4)

110 Criminal Law
110XXIV Review
110XXIV(D) Right of Review
110k1025 Right of Defendant to Review
110k1026.10 Waiver or Loss of Right
110k1026.10(2) Plea of Guilty or Nolo Contendere
110k1026.10(4) k. Issues Considered. Most Cited Cases
Waiver of right to appeal contained in plea agreement did not bar defendant convicted of conspiracy to possess with intent to distribute cocaine from appealing the 180-month prison term imposed on resentencing after remand; exception to the waiver provided that if the government appealed the sentence imposed, then defendant would be released from the waiver and could appeal the sentence, and government had previously appealed the initial 110-month sentence that was imposed.

[12] Sentencing and Punishment 350H ⇐1207

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(A) In General
350Hk1207 k. Recidivist Treatment as Mandatory or Discretionary. Most Cited Cases
District Court properly refused to consider its disagreement with the career offender sentencing guideline when it sentenced defendant convicted of conspiracy to possess with intent to distribute cocaine to a 180-month prison term under that guideline, since the career offender guideline encapsulated congressional intent to impose sentences for repeat drug offenders at or near the enhanced statutory maximums. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b), 21 U.S.C.A. § 841(b); 28 U.S.C.A. § 994(h); U.S.S.G. § 4B1.1, 18 U.S.C.A.

[13] Courts 106 ⇐90(2)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k90 Decisions of Same Court or Co-Ordinate Court
106k90(2) k. Number of Judges Concurring in Opinion, and Opinion by Divided Court. Most Cited Cases
Under the prior panel precedent rule, a later panel of the Court of Appeals may depart from an earlier panel's decision only when an intervening Supreme Court decision is clearly on point.
Daniel N. Brodersen (Court-Appointed), Beusse, Brownlee, Wolter, Mora & Maire, P.A., Orlando, FL, for Vazquez.

Roberta Josephina Bodnar, Orlando, FL, for U.S.

Appeal from the United States District Court for the Middle District of Florida.

Before CARNES, MARCUS and WILSON, Circuit Judges.

MARCUS, Circuit Judge:

*1 Carlos Vazquez appeals from his sentence of 180 months' imprisonment for conspiracy with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(ii), and 846. In his first appeal, we vacated his original sentence of 110 months' imprisonment upon holding that it was procedurally unreasonable because the district court based it on an impermissible factor-its disagreement with how the Guidelines' career offender provision, U.S.S.G. § 4B1.1, applied. *United States v. Vazquez*, 240 F. App'x 318 (11th Cir.2007)

(unpublished). In this appeal, Vazquez argues that his new sentence is procedurally unreasonable because the district court refused to consider this factor on remand, which, he says, it now may do under recent Supreme Court case law. After careful review, we affirm.

[1][2][3][4] We review *de novo* whether a defendant effectively waived his right to appeal. *United States v. Bushert,* 997 F.2d 1343, 1352 (11th Cir.1993). We review the sentence imposed by a district court for "reasonableness," which "merely asks whether the trial court abused its discretion." *United States v. Pugh,* 515 F.3d 1179, 1189 (11th Cir.2008) (quoting *Rita v. United States,* 551 U.S. 338, 127 S.Ct. 2456, 2465, 168 L.Ed.2d 203 (2007)). In reviewing sentences for reasonableness, we perform two steps. *Pugh,* 515 F.3d at 1190.First, we must " '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,[FN1] 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.'" *Id.* (quoting *Gall v. United States,* ---U.S. ----, 128 S.Ct. 586, 597, 169 L.Ed.2d 445 (2007)). If we conclude that the district court did not procedurally err, we must consider the " 'substantive reasonableness of the sentence imposed under an abuse-of-discretion standard,' " based on the " 'totality of the circumstances.' " *Id.* (quoting *Gall,* 128 S.Ct. at 597).

[5][6][7][8][9] As an initial matter, we agree with Vazquez that he may proceed with this appeal, despite the sentence appeal waiver included in his plea agreement. Waivers of appeal rights are effective if they were knowingly and voluntarily made. *Bushert,* 997 F.2d at 1351.The waiver can include the waiver of the right to appeal "difficult or debatable legal issues or even blatant error." *United States v. Frye,* 402 F.3d 1123, 1129 (11th Cir.2005) (quotation omitted). If a waiver was not effective, the proper remedy is for it to be severed from the agreement. *See Bushert,* 997 F.2d at 1353."Plea agreements are interpreted and applied in a manner that is sometimes likened to contractual interpretation," but this analogy is not perfect. *United States v. Jefferies,* 908 F.2d 1520, 1523 (11th Cir.1990). We do not accept a "rigidly literal approach" or a "hyper-technical reading of the written agreement." *Id.* (quotation omitted). Also, "the written agreement should be viewed against the background of the negotiations." *Id.* (quotation omitted). Finally, ambiguities are construed against the government. *Id.*

[10][11] Vazquez's waiver, providing that if the government appealed "the sentence imposed," then Vazquez would be "released from the waiver" and could appeal "the sentence," was ambiguous. Because the government appealed Vazquez's original sentence, it is arguable that the exception to the sentence appeal waiver was triggered, thereby allowing him to appeal his new sentence. On the other hand, it is also arguable that Vazquez may appeal only the particular sentence that the government has appealed. In light of this ambiguity, we construe the provision in Vazquez's favor, and conclude that this appeal may proceed.

*2 [12] Turning to the merits, Vazquez essentially argues that his new sentence is procedurally unreasonable, *see Kimbrough v. United States,* ---U.S. ----, 128 S.Ct. 558, 575-76, 169 L.Ed.2d 481 (2007) (analyzing the district court's consideration of relevant factors and finding that the court committed no procedural error), because the district court refused to consider its disagreement with U.S.S.G. § 4B1.1, the Guideline provision that increases penalties for career offenders, in imposing his sentence. We are unpersuaded. We previously addressed this very issue in *United States v. Williams,* 456 F.3d 1353 (11th Cir.2006), where the district court had based its decision, in part, on its disagreement with Section 4B1.1. In reaching our decision, we noted that Section 4B1.1 encapsulates the congressional policy articulated in 28 U.S.C. § 994(h) that "repeat

drug offenders receive sentences 'at or near' the enhanced statutory maximums set out in § 841(b)," and that by disregarding Section 4B1.1, the district court impermissibly "ignored Congress's policy of targeting recidivist drug offenders for more severe punishment." *Id.* at 1370.Because the district court ignored this congressional policy, among other things, we ultimately vacated Williams' sentence.[FN2] Applying *Williams* here, then, the district court properly refused to consider its disagreement with the Guidelines' treatment of career offenders when it imposed its sentence on Vazquez, a repeat drug offender.

[13] Vazquez now claims that *Williams* is no longer binding precedent following the Supreme Court's decision in *Kimbrough*."Under our prior panel precedent rule, a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is clearly on point." *Atlantic Sounding Co. v. Townsend,* 496 F.3d 1282, 1284 (11th Cir.2007) (quotations omitted). Because *Kimbrough* is not "clearly on point," and rather, supports the reasoning we employed in *Williams,* Vazquez's argument fails.

In *Kimbrough,* the Supreme Court held that a sentencing court may consider the Guidelines' disparate treatment of crack and powder cocaine offenses as part of its consideration of § 3553(a)(6), the need to avoid sentencing disparities. *United States v. Vega-Castillo,* 540 F.3d 1235, 1238 (11th Cir.2008). The Supreme Court based its decision in part on its conclusion that Congress did not explicitly direct the Sentencing Commission to adopt Guidelines that punish crack and powder cocaine offenses according to a particular ratio. *Kimbrough,* 128 S.Ct. at 570-73.In contrast, the Court noted that "Congress has specifically required the Sentencing Commission to set Guidelines sentences for serious recidivist offenders 'at or near' the statutory maximum." *Id.* at 571 (citing 28 U.S.C. § 994(h)). It then concluded that (1) the cocaine Guidelines, "like all other Guidelines, are advisory only"; (2) "the Court of Appeals erred in holding the crack/powder disparity effectively mandatory"; and (3) district courts may consider the disparity when determining whether a within-range sentence is "greater than necessary" to serve the objectives of sentencing. *Id.* at 564.

As this discussion reveals, *Kimbrough* does not gut our analysis in *Williams.*To the contrary, the Supreme Court expressly made a distinction between the Guidelines' disparate treatment of crack and powder cocaine offenses-where Congress did *not* direct the Sentencing Commission to create this disparity-and the Guideline's punishment of career offenders-which was explicitly directed by Congress. Because *Kimbrough* highlights this distinction, it cannot be read to create a conflict with our *Williams* decision, nor to suggest that district courts may base their sentencing decisions on any disagreement they may have with the policy behind the career offender guidelines, which are directly driven by congressional pronouncement.

***3** Several of our sister circuits have reached similar conclusions. In these cases, the courts were confronted with defendants that were sentenced as career offenders under Section 4B1.1, though the underlying convictions involved crack cocaine. *See United States v. Harris,* 536 F.3d 798, 812 (7th Cir.2008); *United States v. Clay,* 524 F.3d 877, 878-79 (8th Cir.2008); *United States v. Jimenez,* 512 F.3d 1, 9 (1st Cir.2007). Yet even in these cases, the courts rejected the defendants' claims that their sentences were invalid in light of *Kimbrough.*In *Harris,* for example, the Seventh Circuit clarified that "a sentence entered under the career offender guideline, § 4B1.1, raises no *Kimbrough* problem because to the extent it treats crack cocaine differently from powder cocaine, the disparity arises from a statute, not from the advisory guidelines." 536 F.3d at 812;*see also Clay,* 524 F.3d at 878-79 ("Although the recent amendments to the sentencing guidelines lowered the offense levels associated with crack in the drug quantity table in U.S.S.G. § 2D1.1, they did not change the career offender provision in § 4B1.1...."); *Jimenez,*

512 F.3d at 9 ("the decision in *Kimbrough*-though doubtless important for some cases-is of only academic interest [in a case arising under the career offender guideline]").

Indeed, since the Supreme Court issued *Kimbrough,* we have held that it did not overrule our prior precedent prohibiting courts from considering sentence disparities caused by "fast-track" programs which only some districts employ to provide lesser sentences to alien defendants who agree to quick guilty pleas and uncontested removals. *Vega-Castillo,* 540 F.3d at 1238-39.We explained that *Kimbrough* addressed a district court's discretion to vary from the Guidelines "based on a disagreement with *Guideline,* not Congressional, policy," and concluded:

> [T]he most that could possibly be argued is that *Kimbrough* overruled the following: prior precedents holding that a district court cannot vary from the advisory Guidelines based on a disagreement with a Guideline, even where Sentencing Commission policy judgment, not Congressional direction, underlies the Guideline at issue, and even where that policy judgment did not arise from the Commission's exercise of its characteristic institutional role.

*4 *Id.* at 1239 (emphasis in original); *see also United States v. Gomez-Herrera,* 523 F.3d 554, 563 (5th Cir.2008) ("[A]ny sentencing disparity resulting from fast track disposition programs is not unwarranted as the disparity was also intended by Congress.... [This] holding[ ] that a district court may not vary from the Guidelines on the basis of sentencing disparity intended by Congress w[as] not called into question by *Rita* or *Kimbrough.*"). In other words, because the fast-track disparity was expressly driven by Congress, a district court may not consider its disagreement with this policy in making its sentencing decisions.

The same result is warranted here. As the district court aptly recognized, the Guideline at issue in Vazquez's sentence, U.S.S.G. § 4B1.1-which was the result of "direct congressional expression"-is distinguishable from *Kimbrough*'s crack cocaine Guidelines, which were the result of implied congressional policy. The district court therefore did not procedurally err when it declined to mitigate Vazquez's sentence due to its concern over the application of the career offender provision. Moreover, since the district court imposed a below-range sentence, it clearly understood its discretion to apply the Guidelines in an advisory manner.

Accordingly, we affirm Vazquez's sentence.

AFFIRMED.

> FN1. The § 3553(a) factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for the sentence imposed to afford adequate deterrence; (4) the need to protect the public; (5) the need to provide the defendant with educational or vocational training or medical care; (6) the kinds of sentences available; (7) the Sentencing Guidelines range; (8) the pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwanted sentencing disparities; and (10) the need to provide restitution to victims. 18 U.S.C. § 3553(a).
>
> FN2. In *Williams,* we also held that the sentencing court erred by considering the Guidelines' disparate treatment of crack and powder cocaine offenses. *Williams,* 456 F.3d at 1369.On this point, *Williams* was directly overruled by *Kimbrough.See United States v. Stratton,* 519 F.3d 1305, 1306-07 (11th Cir.2008).

C.A.11 (Fla.),2009.
U.S. v. Vazquez

--- F.3d ----, 2009 WL 331014 (C.A.11 (Fla.))

END OF DOCUMENT

APP. C

Letter from the United States to the Clerk of Court,
***United States v. Funk*, No. 05-3708, 05-3709 (6th Cir. 2008)**

U.S. Department of Justice

United States Attorney
Northern District of Ohio

Four Seagate
Suite 308
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(419) 259-6376
Fax (419) 259-6360

March 14, 2008

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

RE: Case No. 05-3708, 05-3709
United States of America v. James M. Funk
District Court No. 3:02CR708

Dear Mr. Green:

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

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

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

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

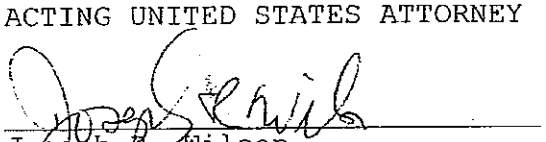
The language in Kimbrough on which the government relied in its supplemental brief (at 16) does not indicate that sentencing courts lack all discretion to disagree with the career offender guideline on policy grounds. In explaining its conclusion that Congress had not required the Commission (and the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

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

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

Very truly yours,

WILLIAM J. EDWARDS
ACTING UNITED STATES ATTORNEY



Joseph R. Wilson
Assistant United States Attorney

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

APP. D

Order granting rehearing *en banc*,
***United States v. Funk*, No. 05-3708 (6th Cir. 2008)**

No. 05-3708

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 18, 2008
LEONARD GREEN, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JAMES M. FUNK,

Defendant-Appellee.

ORDER

BEFORE: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, GRIFFIN, KETHLEDGE, and WHITE, Circuit Judges.

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 35(a) provides as follows:

> "The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is **ORDERED**, that the previous decision and judgment of this court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

APP. E

Supplemental Brief for the United States,
***United States v. Funk*, No. 05-3708, 05-3709 (6th Cir. 2009)**

No. 05-3708

In the

United States Court of Appeals

For the Sixth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JAMES M. FUNK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION
The Honorable James G. Carr, United States District Judge.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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FOR THE SIXTH CIRCUIT

No. 05-3708

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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

INTRODUCTION

This is a government appeal of the defendant's sentence, now before the en banc court on remand from the Supreme Court for further consideration in light of Gall v. United States, 128 S. Ct. 586 (2007). The government files this supplemental brief in response to the en banc court's order of December 16, 2008.

JURISDICTIONAL STATEMENT

This is a government appeal of the defendant's sentence. The district court (Carr, J.) had jurisdiction over the case under 18 U.S.C. § 3231. The judgment of the district court was imposed on April 25, 2005, and entered on the court's docket on May 2, 2005. (R. 309, Judgment; Apx. 61-67). The government's notice of appeal, filed on May 17, 2005, was timely under Fed. R. App. P. 4(b)(1)(B). (R. 311, Notice of Appeal; Apx. 68). The jurisdiction of this Court is invoked under 18 U.S.C. § 3742(b).

STATEMENT OF THE ISSUE

Whether the district court failed to provide an adequate explanation for the below-Guidelines sentence it imposed.

STATEMENT OF THE CASE

On January 18, 2002, defendant James Funk and seven others were charged in a one-count indictment with conspiracy to possess with intent to distribute cocaine and marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846. (R. 10, Indictment; Apx. 42). The indictment charged Funk and the other defendants with conspiring from 1998 onward to obtain over 15 kilograms of cocaine and over 2,000 pounds of marijuana from Texas and Illinois, which they then distributed in the Marion, Ohio area. (R. 10, Indictment ¶¶ 1-2; Apx. 42-43).

After the other defendants pleaded guilty, a jury trial commenced against Funk on January 14, 2003. (R. 188, Minute Entry; Apx. 29). On January 17, 2003, the jury found Funk guilty. (R. 196, Minute Entry; Apx. 30).

The presentence report (PSR) found Funk responsible for at least 600 pounds of marijuana and 15 ounces of cocaine. (PSR ¶ 11; Apx. 150-152). Under Sentencing Guidelines § 2D1.1(c)(7), this quantity of drugs converted for guidelines purposes to a minimum of 289.62 kilograms of marijuana and a base offense level of 26. (PSR ¶¶ 11, 17; Apx. 152, 153). Had that base offense level applied, Funk's Criminal History category (VI) would have produced a guidelines range of 120-150 months' imprisonment. See Guidelines Ch. 5, Pt. A (Sentencing Table). However, Funk qualified as a career offender under Sentencing Guidelines § 4B1.1, which provides for a higher guideline range for a defendant who commits either a crime of violence or a controlled substance offense, and has at least two prior felony convictions for either a crime of violence or a controlled substance offense. Funk had two prior convictions for crimes of violence, a 1984 aggravated burglary conviction and a 1996 aggravated assault conviction (based on Funk's attempt to attack two law enforcement officers and a police dog with a metal pole), and one prior controlled substance offense, a 1990 marijuana trafficking conviction. (PSR ¶¶ 28-30, 35-36, 43-45; Apx. 154-157). Under

In its statement of reasons attached to the judgment, the court found that "the career enhancement was excessive and unreasonable," and reiterated that Funk's "extremely serious offense" did not involve firearms or drugs other than marijuana, and that the 150-month sentence would satisfy the purposes of sentencing. (R. 309, Judgment; Apx. 170).

The United States appealed, and this Court vacated Funk's sentence. United States v. Funk, 477 F.3d 421 (6th Cir. 2007). Funk sought a writ of certiorari, which the Supreme Court granted, vacating this Court's judgment and remanding for reconsideration in light of Gall v. United States, 128 S. Ct. 586 (2007). See Funk v. United States, 128 S. Ct. 861 (2008).

After receiving supplemental briefs, this Court again held that Funk's sentence was unreasonable. 534 F.3d 522, 530 (6th Cir. 2008). Citing the Supreme Court's statement in Kimbrough v. United States, 128 S. Ct. 558, 575 (2007), that "closer review" may be appropriate when a district court varies based solely on its disagreement with the Guidelines' application in a typical case, the majority found that "[b]ased on the district court's reasoning, ... this appears to be the type of 'mine-run case'" which would be subject to "closer review." 534 F.3d at 527-528. Under that "more skeptical" standard, the majority held, the justification stated by the district court did not support the substantial variance

from the advisory Guidelines range. Id. at 529-530.[2]

STATEMENT OF THE FACTS

The pertinent facts are summarized in greater detail in this Court's prior unpublished order in United States v. Funk, 124 Fed. Appx. 987 (6th Cir. 2005), and vacated panel opinion in United States v. Funk, 477 F.3d 421, 423 (6th Cir. 2007), but are briefly stated below.

In 1994, Funk delivered 35 pounds of marijuana to Chester Blanton on behalf of Anthony Smith, who was smuggling drugs to Ohio from Florida and Texas. (Blanton TR 70, 72; Apx. 72, 75). From that point until 1998, Funk and Blanton received monthly loads of 40 to 80 pounds of marijuana from a supplier in Florida. (Blanton TR 75-79, Cosgrove TR 246-247; Apx. 78-82, 107-108). Funk also conducted a "half dozen" 20 to 30 pound marijuana transactions with his lifelong friend Kevin Thacker between 1998 and 2000. (Thacker TR 169-170; Apx. 100-101).

Other witnesses testified that Funk distributed cocaine and marijuana in Marion County throughout the conspiracy period. (Valdez TR 211-213; Apx.

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

538 n. 3 (6th Cir. 2008) (holding that if district court "simply disagreed with the guidelines," Court would affirm variance imposed under "closer" review). In Kimbrough v. United States, 128 S. Ct. 558, 574-575 (2007), the Supreme Court identified "discrete institutional strengths" of the Sentencing Commission and sentencing courts and observed that in light of the sentencing judge's "'greater familiarity with ... the individual case and the individual defendant before him..., a district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case 'outside the "heartland" to which the Commission intends individual Guidelines to apply.'" (quoting Rita v. United States, 127 S. Ct. 2456, 2465, 2469 (2007)). "On the other hand," the Court stated, "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." 128 S. Ct. at 575, quoting Rita, 127 S. Ct. at 2465.

The Court in Kimbrough found "no occasion" to further explicate this "closer review" standard because the crack cocaine guideline at issue in that case had been extrapolated from statutory mandatory minimum sentences rather than formulated through the Commission's normal practices, and the Commission itself had concluded that the guideline produced sentences greater than necessary to

achieve the purposes of sentencing. 128 S. Ct. at 575. While Justice Scalia expressed reservations about the content and application of this "closer review" standard, no other members of the Court joined his opinion. Id. at 576-577 (Scalia, J., concurring). Even if this Court views the Supreme Court's discussion of the "closer review" standard to be dicta, that "dicta is of persuasive precedential value." Wright v. Morris, 111 F.3d 414, 419 (6th Cir. 1997) (internal quotation omitted), and should be adopted.

A "closer review" standard is also consistent with Gall v. United States, 128 S. Ct. 586 (2007). Gall holds that appellate courts must review all sentences – whether inside or outside the Guidelines – "under a deferential abuse-of-discretion standard." Id. at 591. Nonetheless, appellate courts may presume that sentences imposed within the advisory Guidelines range in "mine-run" cases are reasonable. Rita, 127 S. Ct. at 2467.

By contrast, when a court reviews a sentence outside the advisory Guidelines range, it may not presume that the sentence is unreasonable, but may "take the degree of variance into account and consider the extent of a deviation from the Guidelines" in conducting its abuse of discretion review. Gall, 128 S. Ct. at 595. As a result, a district court judge "must explain his conclusion" that a sentence outside the range recommended by a sentencing guideline that is "the

product of careful study based on extensive empirical evidence" is justified. Id. at 594. Ordinarily, that explanation will be based on facts specific to a particular case. Kimbrough, 128 S. Ct. at 575; see, e.g., Gall, 128 S. Ct. at 599-602 (upholding below-range sentence based primarily on individual defendant's extraordinary self-motivated rehabilitation); United States v. Vonner, 516 F.3d 382, 392 (6th Cir.) (en banc) ("Booker breathes life into the authority of district court judges to engage in individualized sentencing"), cert. denied, 129 S. Ct. 68 (2008). When a district court rejects a Guideline sentence based not on the facts of a particular case but on disagreement with a Guideline itself, it is not making "an individualized assessment based on the facts presented," a fact critical to the Court's decision in Gall. 128 S. Ct. at 597. As such, the lower court's rationale is appropriately subjected to "closer" scrutiny than are reasons based on case-specific facts. See United States v. Cavera, ___ F.3d ___, 2008 WL 5102341, *9 (2d Cir. Dec. 4, 2008) (en banc) ("varying from the Guidelines in a 'mine-run' case may invite closer appellate review").

Funk has argued (En Banc Pet. 12-15) that "closer" review is not appropriate because the career offender guideline, like the cocaine guidelines at issue in Kimbrough, originated from a congressional directive, in this case 28 U.S.C. § 994(h), which requires that the Commission assure that the guidelines for

recidivist defendants convicted of crimes of violence and controlled substance offenses are near the maximum authorized terms. But Kimbrough did not hold that the Commission's policy judgments are suspect whenever they are consistent with a direction from Congress; rather, the Supreme Court concluded that there was no congressional direction for the Commission to follow in formulating the Guidelines for crack cocaine offenses. The Court rejected the government's argument that the Guidelines reflected a congressional policy determination that sentences for crack and powder offenses must comport with the 100:1 quantity ratio in 21 U.S.C. § 841(b), 128 S. Ct. at 571-573, holding that the statute "mandates only maximum and minimum sentences" and "says nothing about the appropriate sentences within these brackets." Id. at 571. In fact, the Court explicitly contrasted the drug statute with 28 U.S.C. § 994(h), which "specifically required the Sentencing Commission to set Guidelines sentences for serious recidivist offenders 'at or near' the statutory maximum." 128 S. Ct. at 571.

II. Under the Appropriate Standard of Review, the District Court Did Not Adequately Explain and Justify the Sentence Imposed

In this case, the district court did not adequately explain its conclusion that the career offender enhancement is "excessive and unreasonable." The government agrees with Funk that sentencing courts are not precluded from entering a below-range sentence based on policy disagreements with the career

offender guideline. See United States v. Liddell, 543 F.3d 877, 885 (7th Cir. 2008); United States v. Boardman, 528 F.3d 86, 87 (1st Cir. 2008); United States v. Sanchez, 517 F.3d 651, 663-665 (2d Cir. 2008). While Congress directed the Sentencing Commission to set guideline ranges at or near the statutory maximum, it has never directed that sentencing courts must impose sentences at or near the maximum for serious recidivist offenders. Thus, as with other guidelines, district courts may vary from the range recommended by the career offender guideline based on policy disagreements with the guideline, so long as they adequately explain why "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations." Rita, 127 S. Ct. at 2465; see also Kimbrough, 128 S. Ct. at 570; United States v. White, ___ F.3d ___, 2008 WL 5396246, *5 (6th Cir. Dec. 24, 2008) (en banc) ("a district judge may disagree with the application of the Guidelines to a particular defendant because the Guideline range is too high or too low to accomplish the purposes set forth in § 3553(a)").

Because of this fact, the government disagrees with the prior panel's conclusion that 28 U.S.C. § 994(h) represents a "clear direction by Congress ... that offenders such as Funk be sentenced as [career offenders]," and that disagreement with the policy of the career offender guideline is an "improper" basis for a variance. 534 F.3d at 530. Nonetheless, when a district court chooses

to reject the advice given through a guideline, it must justify that decision. See Vonner, 516 F.3d at 387 ("'[w]here the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so"), quoting Rita, 127 S. Ct. at 2468. In Kimbrough itself, the Supreme Court upheld the district court's decision to reject the crack cocaine guideline only because the lower court "properly homed in on the particular circumstances of [the defendant's] case and accorded weight to the Sentencing Commission's consistent and emphatic position" criticizing its own guideline. 128 S. Ct. at 576.

Unlike the district judge in Kimbrough, the court here did not adequately explain its conclusion that the career offender enhancement was "excessive and unreasonable." The Sentencing Commission has raised questions about specific applications of the career offender enhancement, but it has not deemed the enhancement generally unwarranted. See U.S. Sent. Comm'n, Fifteen Years of Guideline Sentencing [Fifteen Year Report] 133-134 (2004) (questioning application of career offender enhancement to "offenders qualifying only because of prior drug offenses"); see generally U.S. Sent. Comm'n, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 10-16 (2004) (discussing relative recidivism rates for categories of offenses and offenders). The Commission's stated concern that the career offender

enhancement may overstate the risk of recidivism for defendants who qualify as career offenders based solely on prior drug offenses has no application to Funk, who has two prior violent felony convictions. PSR ¶¶ 28-30, 43-45; Apx. 154, 156-157. See Fifteen Year Report at 134 (52% of career offenders with prior violent felonies recidivate within two years; incapacitation of "repeat violent offenders" may "protect the public from additional crimes by the offender"). While the Commission has shown concern that the guideline may sweep in low-level, non-violent drug sellers, see United States v. Pruitt, 502 F.3d 1154, 1168 (10th Cir. 2007) (McConnell, J., concurring), vacated, 128 S. Ct. 1869, and reinstated, 2008 WL 4218798 (2008), Funk was selling massive amounts of drugs and has a violent past, including burglary and an attack on law enforcement officers.

The district court failed to provide any reasoned basis for disagreeing with the policy reflected in the guidelines and recent Commission reports to impose lengthy sentences on violent repeat offenders who continue to commit crimes. In an advisory guidelines system with reasonableness review, a court's explanation for its sentence is vital to permit meaningful appellate review. See Gall, 128 S. Ct. at 597 (district court must "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing");

United States v. Jones, 531 F.3d 163, 172 (2d Cir. 2008) (when sentence varies significantly from guideline range, district court must "identif[y] a significant justification"). Such an explanation "is especially important when the district court has significantly departed from the Guidelines range." United States v. Henry, 545 F.3d 367, 385 (6th Cir. 2008); see also United States v. Davis, 537 F.3d 611, 615-616 (6th Cir.) (finding inappropriate district court's reliance on lapse of time between crimes and sentencing in imposing one day sentence), cert. denied, ___ S. Ct. ___, 2008 WL 4898439 (2008).

The career offender guideline reflects Congress's considered judgment about the need for severe punishment of career offenders, and Congress's judgment must be assumed to be compatible with the application of the Section 3553(a) factors in a "mine-run" case. Accordingly, a sentencing court that reaches a judgment contrary to the general view reflected in a guideline must, under abuse of discretion review, provide a reasonable explanation. See, e.g., United States v. Martin, 520 F.3d 87, 93 (1st Cir. 2008) (career offender enhancement rejection upheld where decision rested on defendant's family support, "personal qualities," and a desire to avoid disparity with coconspirators' sentences); United States v. Smart, 518 F.3d 800, 809-810 (10th Cir. 2008) (affirming below-range sentence based on defendant's "relatively minor role in the offense" and need to avoid

sentencing disparity with co-defendant).

The court here did not provide such an explanation. The district court's written statement of reasons offers no indication that it based its departure on an individualized assessment. Instead, it simply states that it "found that the career enhancement was excessive and unreasonable" based largely on a boilerplate recitation of generic Section 3553(a) factors such as "just punishment" and "adequate public deterrence and safety," and an erroneous factual finding that the defendant and his cohorts did not distribute cocaine. (Judgment; Apx. 170). Such a justification cannot be upheld on the "closer" review Kimbrough mandates.

Funk has suggested that additional comments the district court made at sentencing (Apx. 126-128) are enough for this Court to uphold his sentence as reasonable, but the government respectfully disagrees. The court's comments once again are little more than boilerplate recitations of some of the § 3553(a) factors. When rejecting a considered guideline, a district court must do more than regurgitate 18 U.S.C. § 3553(a), as the court here did, to survive reasonableness review. Compare Henry, 545 F.3d at 386-387 (vacating sentence where court recited § 3553(a) factors but "failed to explain how [they] specifically applied to Henry's non-Guidelines sentence or articulate why the sentence constituted an adequate punishment"). Indeed, this Court has found equally brief discussions of

§ 3553(a) factors insufficient where a district court has imposed a within-range sentence applying the career offender enhancement. See United States v. Stephens, 549 F.3d 459, 466-467 (6th Cir. 2008). Where a court is rejecting the wisdom of the range established by the Sentencing Commission, it surely must do at least as much. It is possible that the district court could justify a 150 month sentence, but it has not done so on this record, and the case should therefore be remanded for reconsideration of the sentence.

CONCLUSION

The judgment of the district court should be reversed, and the case should be remanded for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that I caused two true and correct copies of the foregoing Supplemental Brief for the United States to be served by first class mail, postage prepaid, on:

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I FURTHER CERTIFY that I caused twenty-five (25) true and correct copies of the foregoing Supplemental Brief for the United States to be sent, via Federal Express, for overnight delivery, to the Clerk of the Court.

Dated: January 15, 2009

David Hollar

DAVID E. HOLLAR
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APP. F

Memorandum Sentencing Opinion on Remand,
***United States v. Williams*, 6:04-cr-111 (M.D. Fl. 2007)**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

-vs- Case No. 6:04-cr-111-Orl-31JGG

AARON ERIC WILLIAMS

MEMORANDUM SENTENCING OPINION ON REMAND

On May 3, 2005, Aaron Eric Williams came before me for sentencing.[1] At that proceeding, the government took its usual position that anything less than a guideline sentence would be unreasonable, notwithstanding the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). I found that position troubling and engaged the prosecutor in a colloquy concerning judicial sentencing discretion. I eventually stated my belief that "the [Supreme] Court has not only given me the discretion but the obligation to consider Mr. Williams as an individual in the context of the factors set forth in 18 U.S.C. Section 3553, and I'm going to do that." (Sentencing hearing transcript at 23).[2]

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[1] I have never before written an opinion in the first person. However, because in this case the Court of Appeals saw fit to interpret my inner thoughts, it seemed appropriate to do so here.

[2] I note that, last week, while arguing on behalf of the Department of Justice before the Supreme Court in the case of *Rita v. United States*, Case No. 06-5754, Deputy Solicitor General Michael Dreeben said that the *Booker* decision "necessarily implies that a judge does have a certain amount of freedom in an advisory guidelines system to disagree with what the Sentencing Commission has found." (*Rita* transcript at 34-35). In other words, the government concedes that under an advisory guidelines system, the trial judge necessarily has discretion to rule that a sentence within the guidelines is not consistent with an individualized application of the Section 3553(a) factors.

I then reviewed the sentencing factors as they pertained to Mr. Williams and the criminal conduct for which he was being held accountable. In considering the nature and circumstances of the offense, I shared defense counsel's "concern about the discrepancy between powder and crack cocaine,"[3] but concluded that the offense was serious. (Sentencing hearing transcript at 24). After reviewing all of the statutory sentencing factors, I imposed a below-guideline, but nevertheless harsh, sentence of 204 months.

In order to further elucidate my sentencing rationale, I issued a memorandum sentencing opinion on May 5, 2005 (Doc. 48). The crux of that opinion concerned the government's "effort to completely usurp the Court's sentencing function" and the Court's duty to exercise its discretion by considering the guidelines on an advisory basis in the context of the Section 3553(a) factors. (Doc. 48 at 3). The crack-powder disparity was not a significant factor in my consideration of the sentencing factors. Indeed, the issue was relegated to a footnote. (Doc. 48 at 6, n.8). Rather, I focused on the compounding effects of the Chapter 4B enhancements which, I concluded, produced a guideline sentence much greater than that necessary to comply with the statutory purposes of sentencing.

On appeal, the Eleventh Circuit reversed, holding that the crack-powder disparity is an impermissible sentencing consideration, and that this Court erred in mitigating Williams' sentence based on its personal disagreement with the 100:1 ratio. *United States v. Williams*, 456 F.3d 1353 (11th Cir. 2006) ("*Williams I*"). The Circuit Court found similar error in this Court's mitigation of

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[3]Generally speaking, the guidelines treat 1 gram of crack cocaine as equivalent to 100 grams of powder cocaine for sentencing purposes. This 100:1 ratio is commonly referred to as the "crack-powder disparity."

Williams' sentence based on disagreement with the career offender guideline provision and remanded for resentencing based on the individual facts and circumstances set forth in Section 3553(a).[4]

On December 13, 2006, the Eleventh Circuit issued an *en banc* order, denying rehearing in this case. *United States v. Williams*, 472 F.3d 835 (11th Cir. 2006) ("*Williams II*"). In her concurring opinion, Judge Black distinguished between sentences based on case-specific, individualized application of the 3553(a) factors and those based on a "categorical rejection of Congress's clearly expressed sentencing policy. . . ." *Id.* After considering prior precedent, including the sentence imposed by this Court upon a similarly named defendant in *United States v. Williams*, 435 F.3d 1350 (11th Cir. 2006), Judge Black reasoned that the reversal in *Williams I* was because this Court's sentence varied from the guidelines due "overwhelmingly" to a "categorical" rejection of clearly expressed Congressional policy, rather than because of case-specific, individualized application of the Section 3553(a) factors. *Williams II*, 472 F.3d at 840. Indeed, I was accused of merely having "couched" some of my rationale in the Section 3553(a) factors – presumably because I lacked the courage or the honesty to admit why I was not adhering to the guidelines.

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[4]The Court noted that a below-guidelines sentence in a crack-cocaine case may be reasonable, so long as it reflects the case-specific factors in Section 3553(a). *Williams*, 456 F.3d at 1369. The Court expressed no opinion as to what sentence should be imposed upon remand. *Id.* at 1372.

It is true that I disagree with the 100:1 crack-powder ratio.[5] However, as reflected in the transcript of the sentencing hearing and this Court's memorandum opinion, such disagreement was not an overwhelming factor in Mr. Williams' sentence and has not led me to a categorical rejection of Congressional policy. Did I consider the crack-powder disparity in determining Mr. Williams' sentence? The answer is yes, because it bears upon the nature of the offense, as stated in my memorandum opinion.[6] Was it an overwhelming factor? Absolutely not.[7] Had it been an important factor, I would have said so, and would not have relegated the subject to a footnote. Did I categorically reject Congressional sentencing policy? The answer is no. Had I done so, I would have sentenced Mr. Williams as if he had sold powder cocaine, or I would have adopted a different

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[5]I am not alone in this regard. Many courts, commentators and the Sentencing Commission itself have criticized this disparity as irrational and totally unwarranted. *See, e.g.*, Louis Oberdorfer, *Perspectives on the Federal Sentencing Guidelines and Mandatory Sentencing: Lecture: Mandatory Sentencing: One Judge's Perspective*, 40 Am. Crim. L. Rev. 11, 16-17 (Winter 2003); *and* U.S. SENTENCING COMM'N, COCAINE AND FEDERAL SENTENCING POLICY 91-93 (May 2002) (stating that "the Commission firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act" because, among other things, the 100:1 ratio "greatly overstates the relative harmfulness of crack cocaine.").

[6]The D.C. Circuit Court of Appeals recently held that it was reversible error for a District Court to *fail* to consider the crack-powder disparity when that issue was raised by the Defendant. *U.S. v. Pickett*, 2007 WL 2445937 (D.C. Cir. 2007). In reaching this decision, the appellate court carefully considered (and rejected) the notion that the 100:1 ratio reflected the will of Congress. *Id.* at *7.

[7]*Compare United States v. Hamilton*, 428 F.Supp.2d 1253 (M.D.Fla. 2006) (Presnell, J.) (analyzing history of crack-powder disparity, concluding that the disparity is arbitrary and discriminatory and results in unjust sentences that promote disrespect for the law).

ratio (*e.g.*. 20:1), as other courts have done.[8] Yet. the Court of Appeals, having "thoroughly reviewed the record," determined that I had only paid lip service to the statutory factors.[9]

The import of *Williams I* and *Williams II* is that any criticism of the guidelines when considering a sentence will be taken as impinging on the prerogative of Congress and trumping the statutory factors actually considered by the trial court. The natural result of this will be to shield the guidelines from judicial scrutiny and to stifle the development of sentencing law. The Sentencing Commission will receive little meaningful input from district judges who, being on the front lines of sentencing issues but without a personal or professional stake in their outcome, are among those best able to provide objective, informed analysis.

Such an outcome seems contrary to the intent of Congress. Even the proponents of the Sentencing Reform Act envisioned that judges would play an active role in the development of the common law of sentencing.[10] The drift toward mandatory guidelines, of course, inhibited such development. Now, notwithstanding *Booker*, it seems as though we have come full circle.

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[8]*See, e.g.*. *United States v. Judon*, 472 F.3d 575, 586 (8th Cir. 2007) (holding that the district court abused its discretion when it rejected the 100:1 ratio and instead employed a 20:1 ratio).

[9]It is difficult to understand how or why the Court of Appeals concluded that the sentencing rationale I set out was mere subterfuge. I thought perhaps something was said during oral argument on appeal that influenced the panel's judgment. So I requested a copy of the transcript from the Court of Appeals. My request was denied. Unlike the United States Supreme Court and most of the other courts of appeal, the United States Court of Appeals for the Eleventh Circuit maintains the transcripts of these public hearings in secret.

[10]"In particular, the Senate Report stresses that the articulation and review of decisions to depart from the guidelines will 'provide case law development of the appropriate reasons for sentencing outside the guidelines [and,] in turn. will assist the Sentencing Commission in refining the sentencing guidelines.'" Douglas Berman. *Symposium: A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*. 11 Stan. L. & Poly. Rev. 93, 98 (Winter 1999) (quoting Sen. Rep. 98-225).

Apparently the guidelines are sacrosanct and beyond the court's critical review – even if the court does not act upon that criticism. It is certainly easier for a trial judge to calculate a guideline sentence than to spend time scrutinizing its foundation. But I do not think that such a system is most likely to produce justice, and I find it hard to believe that anyone in Congress would think so, either.

So what am I to do? I am instructed to resentence Mr. Williams using only individualized consideration of the statutory factors. Am I to (somehow) ignore the widely held belief that the crack-powder disparity is inherently unjust; or may I subconsciously consider it in relationship to the offense conduct so long as it does not overwhelm my subjective judgment? And what about the compounding effect of the Section 4B enhancements? Based on my experience in sentencing hundreds of individuals, I believe that Section 4 enhancements often produce grossly unjust results. Should I ignore that well-founded belief and thereby subvert my own sense of justice in order to purify my consideration of the statutory factors? Is that even humanly possible?

I don't know. But I am obliged to honor the Circuit Court's mandate, and I will do so to the best of my ability.

It is now well established that sentencing is a two-step process. *See United States v. Crawford*, 407 F.3d 1174, 1178-79 (11th Cir. 2005). First, the Court must determine the applicable guideline score, resolving any material factual disputes while considering pertinent policy statements issued by the Sentencing Commission. Second, the Court must consider all of the Section 3553(a) factors, including the guideline sentencing range. The ultimate goal is to impose a sentence that is sufficient, but not greater than necessary to comply with the statutory purposes set forth in 18 U.S.C. § 3553(a)(2).

Because the guidelines are now only advisory, and because a guideline sentence is not presumptively reasonable in this circuit, it follows that a reasonable sentence may fall above or below the guideline range, so long as it comports with the Section 3553(a) factors. *United States v. Talley*, 431 F.3d 784 (11th Cir. 2005).

Williams' Guideline Score

Having sold 34.8 grams of crack cocaine to a government agent, Williams had an offense level score of 28. Based on a criminal history score of 20, Williams fell within criminal history category VI. A score of 28VI produces a guideline sentencing range of 140-175 months. However, because Williams qualifies as a career offender under U.S.S.G. 4B1.1,[11] his guideline score is enhanced to offense level 34, producing a guideline range of 262-327 months. Moreover, because of an additional enhancement under 21 U.S.C. § 851(b), his score is increased to offense level 37, with a guideline range of 30 years to life in prison.

Thus, for purposes of sentencing, the guidelines suggest a sentence of 30 years to life for this crime.

The 3553(a) Factors

(1) The nature and circumstances of the offense and the history and characteristics of the Defendant.

The nature of the offense and characteristics (history) of the defendant are captured in a general way by the guidelines.[12] However, these specific statutory sentencing factors require a separate individualized inquiry as well.

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[11]Williams was scored using the 2004 edition of the Guidelines Manual.

[12]The guidelines are supposed to lessen sentencing disparity by providing a benchmark against which to measure individual circumstances. However, sentencing disparity is a natural byproduct of the art of judging, and should not be disparaged when viewed in its proper context.

As noted in my prior opinion, at the time of sentencing Williams was a 29-year-old male who had engaged in a consistent pattern of criminal conduct since age 16. He had a ninth-grade education and marginal employment skills. Prior to his arrest, he used alcohol and cannabis daily, as well as cocaine and ecstacy on occasion. (PSR at ¶73). In sum, Williams was a petty street-level drug user/dealer. His history of violence is limited to a couple of incidents of domestic battery.

The offense here involves three separate sales of crack cocaine to a confidential source working for the DEA:

	4.6 grams on 4/23/03 for	$ 760
	10.1 grams on 5/29/03 for	$1,000
	20.1 grams on 7/26/03 for	$1,380
Total	34.8 grams	$3,140

Thus, over a four-month period, Williams sold a modest amount of crack cocaine for a total sale price of $3,140.00.

(2) The need for the sentence imposed

(A) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.

The sentencing of a defendant (at least since *Booker*) is not a mechanical exercise based purely on objective criteria. Rather, these sentencing factors call for the use of subjective judgment, *i.e.*, the exercise of judicial discretion based on consideration of the human condition and the vagaries of human conduct.

In essence, these factors express the "just desserts" concept of justice. As stated in the Senate Report, "It is another way of saying that the sentence should reflect the gravity of the defendant's conduct." Sen. Rep. 98-225 at 75 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3258. The sentence should thus reflect both the public's interest in the harm done and the defendant's interest in avoiding an unreasonably harsh sentence under all the circumstances of the case. *Id.*

Moreover, one of the basic tenets of the sentencing guidelines is to seek proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity. U.S.S.G. 1A1.1. Here, a guideline sentence is at complete odds with this goal. For example, a 30-year sentence equals or exceeds the maximum statutory punishment for the following offenses: sexual abuse, 18 U.S.C. § 2242: sexual exploitation of children, 18 U.S.C. § 2251; enticement into slavery, 18 U.S.C. § 1583; torture, 18 U.S.C. § 2340A; and seditious conspiracy, 18 U.S.C. § 2384.[13] And Congress has determined that a person convicted of producing and threatening to use smallpox virus against the United States (18 U.S.C. § 175c) may be sentenced to as little as 25 years, while a person convicted of kidnapping (18 U.S.C. § 1201) or bombing a government building (18 U.S.C. § 2332f) faces no mandatory minimum sentence at all.

In sum, Williams is a street-level dealer of crack cocaine. He is not a kingpin, managing a large-scale drug enterprise. While the sale of crack cocaine is a serious offense, severity is a relative concept, and a guideline sentence of 30 years would be grossly disproportionate to the

[13]The undersigned notes that recognition of these disparities is not intended to be a categorical rejection of Congress's prerogative to establish disparate maximum statutory sentences for different crimes.

seriousness of this offense. It would not provide just punishment. Indeed, in this case, I find that it offends the very notion of justice. As such, it would obviously not promote respect for the law. These factors therefore weigh heavily against the imposition of a guideline sentence.

(B) To afford adequate deterrence to criminal conduct.

This factor concerns the concept of sending a message to the community at large, advising other would-be offenders of the consequences of their actions. Presumably, the threat of punishment will deter others from engaging in similar criminal conduct. But how much deterrence is enough? What is the correlation between the length of one person's sentence and the willingness of others to risk receiving it? I am not aware of any empirical analysis that answers these questions. So again, subjective judgment is inescapable. Also, it seems appropriate to consider the deterrence factor in light of the seriousness of the offense: that is, the deterrent effect of a harsh sentence should be reserved for those serious crimes where society's need for protection is the greatest.[14]

Mandatory minimum sentences already provide substantial deterrence in the area of drug-related crimes. For example, in this case, Williams is subject to a mandatory minimum sentence of ten years for the sale of a relatively small amount of cocaine. 21 U.S.C. § 841(b)(1)(B)(viii). How much more deterrence is necessary, and at what point does the sentence become unduly harsh? In this Court's opinion, a sentence above the mandatory minimum is appropriate, but a guideline sentence is not.

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[14]The Senate Report finds this factor to be particularly important in the area of white collar crime. Sen. Rep. 98-225 at 76 (1984). *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3259.

(C) To protect the public from further crimes of the defendant.

This factor is unique to the particular defendant being sentenced, and relates to the problem of recidivism. Thus, the longer one spends in prison, the less opportunity he will have to commit other crimes during or after his period of incarceration. Williams' criminal history weighs in favor of a relatively harsh sentence, because his prior punishments have not deterred him from continued criminal conduct.

(D) To provide defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Williams needs educational and vocational training as well as drug treatment. Under the circumstances, the most effective manner of providing these services (at least initially) is by way of incarceration.

(E) Other sentencing considerations

Considering the remaining Section 3553(a) factors, the only kind of sentence available here (factor 3) is incarceration. Factors 4 and 5 involve the guidelines and policy statements issued by the Sentencing Commission, which have already been addressed. Also, factor 6 states the underlying purpose of the guidelines: to avoid unwarranted sentencing disparities. Factor 7, restitution, is not applicable here.

Conclusion

Based upon a case-specific, individualized application of the Section 3553(a) factors, including the guidelines score, and accepting at face value the wisdom of the advisory guidelines, I conclude that a reasonable sentence in this case is 204 months.

DONE and **ORDERED** in open court this 1st day of March, 2007.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

United States Marshal
United States Attorney
United States Probation Office
United States Pretrial Services Office
Counsel for Defendant
Aaron Eric Williams

APP. G

Entry of Dismissal,
***United States v. Williams*, 07-11490 (11th Cir. 2007)**

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-11490-JJ

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

6:04CR111

versus

AARON ERIC WILLIAMS,

Defendant-Appellee.

Appeal from the United States District Court for the

Middle District of Florida

ENTRY OF DISMISSAL

Pursuant to the appellant's motion for voluntary dismissal, Fed.R.App.P. 42 and 11th Cir. R. 42-1(a), the above referenced appeal was duly entered dismissed this 18th day of May, 2007.

THOMAS K. KAHN
Clerk of the United States Court
of Appeals for the Eleventh Circuit

By: Carol P. Lewis
Deputy Clerk

FOR THE COURT - BY DIRECTION