UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 11-1390

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

STEVEN KEITH VANDEBRAKE

Defendant-Appellant.

APPEAL FROM THE U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA
HON. MARK W. BENNETT

APPELLANT'S BRIEF

Mark E. Weinhardt
William B. Ortman
BELIN McCORMICK, P.C.
666 Walnut Street, Suite 2000
Des Moines, IA 50309
Telephone: (515) 283-4610
Facsimile: (515) 558-0610
E-Mail: meweinhardt@belinmccormick.com
wbortman@belinmccormick.com

Francis L. Goodwin
BARON, SAR, GOODWIN,
GILL & LOHR
P.O. Box 717
Sioux City, IA 51101
Telephone: (712) 277-1015
Facsimile: (712) 277-3067
E-Mail: flgoodwin@baronsar.com

ATTORNEYS FOR APPELLANT

SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

Appellant Steven VandeBrake managed sales for a ready-mix concrete company in rural northwest Iowa. Pursuant to a binding plea agreement under Fed. R. Crim. P. 11(c)(1)(C), he pleaded guilty to a three-count Information alleging that he conspired to fix prices and rig bids on ready-mix concrete.

The district court rejected the plea agreement, primarily because – as a categorical matter of "judicial philosophy" in antitrust cases – it refused to cede any sentencing discretion. To the limited extent that the district court relied on facts of this case, those facts were impermissible or outside the record. Mr. VandeBrake urges here that the district court erred in rejecting his plea agreement.

Mr. VandeBrake persisted in his guilty plea. Based on its policy disagreement with U.S.S.G. § 2R1.1, the court varied upwards from the Guideline range of 21 – 27 months and imposed a 48-month sentence. That is tied for the longest pure antitrust sentence ever. It is the only above-Guideline sentence in antitrust history. Based on the extreme disparity between the sentence and the facts of this relatively small, mine-run antitrust case, Mr. VandeBrake contends that the prison sentence is procedurally flawed and substantively unreasonable.

To discuss the complex law of this case, Mr. VandeBrake requests fifteen minutes of oral argument.

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JURISDICTIONAL STATEMENT

This is a criminal case in which the Appellant, Steven Keith VandeBrake, pleaded guilty to three counts of conspiring to restrain trade in violation of 15 U.S.C. § 1. The district court's jurisdiction rested on 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY REJECTING THE RULE 11(c)(1)(C) PLEA BARGAIN NEGOTIATED BY THE PARTIES.

United States v. Kling, 516 F.3d 702 (8th Cir. 2008)
In re Morgan, 506 F.3d 705 (9th Cir. 2007)
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II. THE DISTRICT COURT'S 48 MONTH SENTENCE IS PROCEDURALLY FLAWED AND SUBSTANTIVELY UNREASONABLE.

Gall v. United States, 552 U.S. 38 (2007)
Kimbrough v. United States, 552 U.S. 85 (2007)
United States v. Higdon, 531 F.3d 561 (7th Cir. 2008)
United States v. Merced, 603 F.3d 203 (3d Cir. 2010)

III. THE DISTRICT COURT COMMITTED PROCEDURAL ERROR BY FAILING TO CONSIDER THE § 3553(a) FACTORS BEFORE IMPOSING A MASSIVELY ABOVE-GUIDELINES CRIMINAL FINE.

United States v. Elfgeeh, 515 F.3d 100 (2d Cir. 2008)
United States v. Klanecky, 393 Fed. Appx. 409

STATEMENT OF THE CASE

On April 26, 2010, the government charged Appellant, Steven Keith VandeBrake, by Information with three counts of violating the Sherman Act, 15 U.S.C. § 1. Appellant's Appendix ("App.") 55. Pursuant to a binding plea agreement under Fed. R. Crim. P. 11(c)(1)(C), Mr. VandeBrake entered a guilty plea before a magistrate judge to the charges on May 4, 2010.

On May 20, 2010, the district court entered a one-paragraph order announcing that it was "unwilling to be bound to the plea agreement's limitations on the court's discretion regarding the length of the sentence and the amount of the fine." Addendum ("Add.") 1. The court announced that it would conduct a hearing to reject the plea agreement in open court pursuant to Fed. R. Crim. P. 11(c)(5).

The district court conducted the Rule 11(c)(5) hearing on May 26, 2010. It confirmed its rejection of the Rule 11(c)(1)(C) plea agreement. Add. 41-42. The district court made clear that it would reject *any* plea agreement offered pursuant to Rule 11(c)(1)(C). Mr. VandeBrake and the government then reached a plea agreement under Rule 11(c)(1)(B) that was similar in its terms but not binding on the court. App. 74-84. The district court accepted Mr. VandeBrake's guilty plea pursuant to this second plea agreement.

The district court conducted a consolidated sentencing hearing for Mr. VandeBrake and Kent Robert Stewart, a co-conspirator of Mr. VandeBrake.[1] The extensive hearing was spread over three days between December 7 and December 15, 2010. Most of the disputed issues, however, related solely to co-defendant Stewart.

On February 8, 2011, the district court issued its Memorandum Opinion and Order Regarding Sentencing (the "Sentencing Memorandum"). Add. 49-156. The court adopted the parties' undisputed calculation that Mr. VandeBrake's total offense level under the advisory Guidelines was 16 and his criminal history category was I, yielding a sentencing range of 21 to 27 months.[2] Varying upward, the court imposed a sentence of 48 months, well over double the 19-month sentence recommended by the parties in their plea agreement. As explained below, the court imposed the above-Guidelines sentence based largely on its "policy disagreements with the Sentencing Guidelines' relatively lenient treatment of

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[1] The government charged Mr. Stewart separately from Mr. VandeBrake. *See United States v. Stewart*, N.D. Iowa CR10-4028-MWB.

[2] The offense level of 16 is one level higher than that embodied in the plea agreement. At the sentencing hearing, Mr. VandeBrake elected not to object to the district court's imposing a greater enhancement for his role in the offense than had been agreed to between the parties.

antitrust violations when compared to fraud sentences." Add. 140. The court also imposed an above-Guidelines criminal fine of $829,715.85. The court entered judgment on February 10, 2011. This appeal followed.

STATEMENT OF FACTS

The Offense Conduct

This case arises from a federal criminal investigation into bid rigging and price fixing among sellers of ready-mix concrete in rural northwest Iowa. Mr. VandeBrake was a target of that investigation. The facts of his offenses are undisputed. Because he does not challenge those facts in this appeal, they are recounted here in brief.

Prior to 2008, Mr. VandeBrake was the President of Alliance Concrete Inc. ("Alliance"), an Iowa-based ready-mix concrete firm. PSR ¶ 38. In January 2008, Alliance was sold to Grupo Cementos de Chihuahua ("Grupo Cementos"), a Mexico-based concrete company. *Id.* Alliance's operations were folded into GCC Alliance Concrete, Inc. ("GCC"), an Iowa corporation wholly owned by Grupo Cementos. *Id.* Mr. VandeBrake stayed with GCC after the transaction as a sales manager. *Id.* at ¶ 37.

Between June 2008 and March 2009, GCC conspired with another Iowa ready-mix concrete company, Siouxland Concrete Co. ("Siouxland"), to restrain

competition in the market for ready-mix concrete in and north of Sioux City, Iowa. PSR ¶¶ 51-52. The conspiracy included two types of agreements. First, GCC and Siouxland agreed to fix prices on their 2009 price lists. *Id.* ¶ 53.[3] No more than $250,000 of commerce was affected by the price-fixing. *Id.* Second, GCC and Siouxland submitted rigged bids for 15 to 18 specific construction projects. *Id.* at ¶¶ 54-55. Approximately $341,000 of commerce was affected by the bid-rigging that is attributable to GCC. *Id.* at ¶ 55. The conspiracy between GCC and Siouxland formed the basis for Count I of Mr. VandeBrake's Information.

Another two-company conspiracy led to Count II of the Information. Between January 2008 and August 2009, GCC conspired with Great Lakes Concrete, Inc. ("Great Lakes"), and its President, Stewart, to restrain trade in the market for ready-mix concrete in or around Dickinson County, Iowa. *Id.* at ¶¶ 51, 56. GCC and Great Lakes rigged bids on between 12 and 15 construction projects, impacting $95,000 of commerce attributable to GCC. *Id.* at ¶ 58.

The final count of Mr. VandeBrake's Information concerned a third two-company conspiracy. Between January 2006 and August 2009, Alliance – and,

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[3] Ready-mix concrete firms annually issue price lists to establish their base prices. App. 137-38. Very little concrete is actually sold from the price lists, however, as most purchasers receive volume discounts. *Id.*

after the sale of Alliance, GCC – conspired with Tri-State Ready Mix, Inc. ("Tri-State") to restrain competition in the ready-mix concrete market in the area between Rock Valley, Iowa and Sioux Center, Iowa. *Id*. ¶¶ 51, 59. This conspiracy involved price-fixing but not bid-rigging. Early in each year of the conspiracy, Mr. VandeBrake provided Alliance's (later GCC's) planed pricing to Tri-State for the area in which the two companies competed. *Id*. ¶¶ 60-60a. Tri-State then set its prices based on those that it received from Mr. VandeBrake. *Id.* The volume of commerce affected by the price-fixing agreement was $4,980,348.61.

The Rule 11(c)(1)(C) Plea Agreement

Shortly after learning of the government's investigation, Mr. VandeBrake, through counsel, approached the government to initiate plea discussions. Add. 8. Eight months of negotiations followed. Add. 29. The negotiations culminated with a binding plea agreement under Fed. R. Crim. P. 11(c)(1)(C). This agreement was approved by the line prosecutors from the Antitrust Division of the U.S. Department of Justice who were handling the case, and by senior officials in the Antitrust Division in Washington, D.C. Add. 8, 11-12. The plea agreement called for a within-Guidelines prison sentence of 19 months and a $100,000 criminal fine. *See* App. 68-69.

The May 26, 2010 Hearing

The district court rejected the parties' agreement. It did so initially in its brief order entered 16 days after Mr. VandeBrake entered his plea. Add. 1. At the time of its order, the district court had never laid eyes on Mr. VandeBrake, and no presentence investigation report had been prepared.

The district court elaborated on its decision at the May 26, 2010 hearing . The district court stated its primary reason for rejecting the Rule 11(c)(1)(C) agreement was its "unwillingness in this case to cede [its] discretion to the executive branch of government." Add. 31. The topic of judicial "discretion" came up frequently at the May 26 hearing. Within the first few minutes of the hearing, the court indicated its view that the purpose of an 11(c)(1)(C) agreement is to "take away [the court's] discretion and "usurp [its] role." Add. 7. Later, the court stated that it did not "know of a single reason why [it would] want to accept an 11(c)(1)(C) agreement in a white-collar price-fixing case." Add. 24. Then the court reached its "bottom line":

> And here's basically the bottom line. I see it as a separation of powers issue, and I'm unwilling in this case to cede my discretion to the executive branch of government. I'm unwilling to do it. . . . [Y]ou know, we got discretion when the Supreme Court decided United States versus Booker and United States versus Gall, and I was more willing prior to those cases to accept 11(c)(1)(C) agreements. But as a matter of kind of judicial philosophy, what the Supreme Court gave us

> I'm not willing to let the executive branch take away. It's pretty much that simple. I'm just not willing to give up my discretion.

Add. 31. The court thus made clear that it rejected Mr. VandeBrake's Rule 11(c)(1)(C) agreement based principally on "judicial philosophy" rather than the facts and circumstances of his case.

At the conference, the government's lead attorney, Mr. Geverola, offered two principal reasons why the court should accept the agreement. The first was that the agreement was in the public interest because Mr. VandeBrake had promptly accepted responsibility for his offenses. Add. 8. The second was that the negotiated sentence reflected the sentencing values of 18 U.S.C. § 3553(a). Before Mr. Geverola could explain the government's position with respect to § 3553(a), however, the district court engaged him in the following colloquy:

> MR. GEVEROLA: We also believe the sentence is appropriate given the applicable 3553(a) factors.
>
> THE COURT: Okay. Let me interrupt you for a second. How many sentencings have you been involved in?
>
> MR. GEVEROLA: This is my first as a lead, Judge, but I've been involved in one or two others as assistant counsel.
>
> THE COURT: I've been involved in over 2,600. I think I have a little bit more expertise in analyzing the 3553(a) factors, with all due respect to the Justice Department, than you do. So why would I refer – have you ever had a jury trial?
>
> MR. GEVEROLA: Yes, Judge.

THE COURT: How many?

MR. GEVEROLA: One.

THE COURT: Okay. Why would I defer to somebody who's had one trial – I've had more than 400. Why would I defer to somebody who's had one trial and a couple of sentencings in terms of the application of the 3553(a) factors?

MR. GEVEROLA: I'm not asking you to defer, Judge. I'm just presenting our view on the 3553(a) factors, and Your Honor is certainly free to disregard that reasoning.

THE COURT: But you didn't answer my question. My question is why should I defer to someone with such little, infinitesimal experience? You could be the greatest lawyer since Clarence Darrow. That remains to be seen. But I'm saying based on what you've told me you have zilch, nada, none, virtually no real-world experience. So why should I defer to your judgment about how the 3553(a) factors would apply in a case? Give me one reason why I should.

MR. GEVEROLA: We've been investigating this issue and dealing with the defendant since – for over a year now, Judge. So we do have some familiarity with the facts of the case.

THE COURT: Much greater than I do.

MR. GEVEROLA: That's correct, Judge. But obviously our experience is more fact specific to this case. And as far as broader experience, Your Honor certainly has more of that. That's not even a question.

THE COURT: Okay.

MR. GEVEROLA: So –

THE COURT: So I should defer to your lack of experience in sentencings to apply the 3553(a) factors fairly because you know more about the facts of this case than I do.

Add. 10-11. Even after Mr. Geverola explained that the plea agreement was reached in consultation with senior Department of Justice antitrust officials, the court reiterated that it was "not willing to defer to your judgment on it." Add. 13.

The District Court's Comments During A Hearing In An Unrelated Case

On June 2, 2010, the district court conducted a hearing in an unrelated criminal case, *United States v. Pickhinke*. No attorney involved in Mr. VandeBrake's case was present. After the prosecutor, a local Assistant United States Attorney ("AUSA"), finished his presentation, the district court asked him to compare Pickhinke's case to Mr. VandeBrake's. As the AUSA was not familiar with Mr. VandeBrake's case, the court described it for him. The court recounted its colloquy with Mr. Geverola as follows:

> THE COURT: I see. Well, I asked this lawyer, you know, from the antitrust division why I should defer to his judgment on the appropriate sentence, and he said, "Well, because we bargained for it." And I said, "Well, how many antitrust trials have you ever had?" And he said none.
>
> I said, "How many antitrust sentencings have you ever done?" He said one.
>
> And I said, "I've now sent over 2,600 people to federal prison, and I'm supposed to defer to a Department of Justice lawyer that has had one sentencing as to what an appropriate sentence would he?" And he said basically that's right.
>
> And I said, well, I'm unwilling to do that, and I think that would be a total abdication of my judicial responsibility to refer to some – I don't

> know how old he is – 27-year-old snot-nosed Justice Department lawyer who's had one case. He doesn't know what an appropriate sentence would be. That's ludicrous. Might as well do a lottery.

App. 22-23.[4]

The district court continued to explain Mr. VandeBrake's case to the AUSA at the *Pickhinke* sentencing hearing. Although recognizing that it did not "know if this is true or not," the court recounted an allegation that Mr. VandeBrake had coerced another company to join the antitrust conspiracy:

> [H]e said if you don't participate in the Sherman Act antitrust scheme we'll put you out of business, so either fix prices with us or we have leverage to put your company out of business.
>
> So he used his market share, his market power, and the fact that he was violating the antitrust laws to threaten a legitimate company that wasn't violating the law to either go along with it or to put him out of business. And then the government waltzes in and recommends a 19-month sentence. That's really all the facts I needed to know to know that there's a huge discrepancy between that case and this case.

App. 25. Elsewhere in the *Pickhinke* transcript, the district court indicates that it rejected Mr. VandeBrake's 11(c)(1)(C) agreement because of the "discrepancy" between the two cases. App. 21.

This coercion allegation was not part of the record before the district court when it rejected the 11(c)(1)(C) plea agreement. At the May 26 hearing, the

[4] With this brief, Mr. VandeBrake is filing a motion asking this court to take judicial notice of the transcript of the *Pickhinke* sentencing.

district court identified the record materials it had reviewed: the plea agreement, the transcript from the plea hearing before the magistrate judge, and the government's offense conduct statement. Add. 5-6. No coercion allegation appears in any of these sources.

At the *Pickhinke* sentencing, the district court obtained and provided a copy of Mr. VandeBrake's offense conduct statement to the AUSA. When the AUSA could not find the coercion allegation the court had described, the court stated: "Yeah, that's not in this offense conduct statement. It's in another defendant's offense conduct statement who's a co-conspirator." App. 37-38. Neither Mr. VandeBrake nor his counsel, however, were privy to the contents of a co-conspirator's offense conduct statement. While one might assume the court was referring to Mr. Stewart's offense conduct statement, the government will agree in this appeal that no offense conduct statement existed for Mr. Stewart as of June 2, 2010. To this day the parties do not know where the district court got the allegation of coercion. In its sentencing memorandum, filed six months after the May 26 hearing, the government stated, "[T]he evidence does not indicate that VandeBrake coerced or pressured any of the three co-conspirator companies (or their representatives) into participating in the anti-competitive conspiracies. Rather, the evidence indicates that in each conspiracy, high-level representatives of

each company, on equal footing with one another, agreed to violate the antitrust laws . . . ." Dkt. No. 41 at 26.

SUMMARY OF ARGUMENT

The district court made three critical decisions in this case: (1) to reject the parties' plea agreement entered into pursuant to Rule 11(c)(1)(C), (2) to impose an above-Guidelines sentence of 48 months imprisonment, and (3) to impose an above-Guidelines $829,715.85 criminal fine. Each decision was erroneous. This Court should vacate the judgment and remand for further proceedings.

First, the district court's decision to reject the Rule 11(c)(1)(C) plea agreement was an abuse of its discretion. A rejection of a plea agreement must be based on facts and circumstances specific to the case in question. The district court, however, predominantly rejected the agreement based on a "judicial philosophy" regarding sentencing discretion that ignored Mr. Vandebrake's case individually.

To the extent the district court evaluated factors intrinsic to the case before it, those factors were impermissible: (a) the court's negative appraisal of the lead prosecutor's experience, and (b) the court's reliance on evidence outside the record. Neither of these matters should have been considered.

Second, the district court's imposition of an above-Guidelines 48-month prison sentence resulted from both procedural and substantive error. The district court's primary justification for the sentence was its disagreement, as a matter of policy, with the antitrust Guideline, U.S.S.G. § 2R1.1. While policy-based variances from the Sentencing Guidelines are permissible in limited circumstances, the variance was clear error here because the court lacked sufficient justification to categorically reject the Guideline, and because this is a mine-run case.

The district court also erroneously refused to consider the breathtaking and unwarranted disparities its sentence creates vis-à-vis similarly situated – and even dissimilarly situated – antitrust offenders. Finally, the sentence, which is tied for the longest antitrust sentence in history and which is the only above-Guideline antitrust sentence ever, is substantively unreasonable in this relatively small, pedestrian price-fixing and bid rigging case.

Third, the district court committed procedural error by failing to even consider whether the sentencing principles in 18 U.S.C. § 3553(a) justified imposition of a fine that is three times the largest fine provided by the applicable antitrust Guideline on these facts.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY REJECTING THE RULE 11(c)(1)(C) PLEA BARGAIN NEGOTIATED BY THE PARTIES.

After extensive and careful negotiations, the government and Mr. VandeBrake presented the district court with a plea agreement. The agreement was pursuant to Fed. R. Crim. P. 11(c)(1)(C). Unlike other types of plea agreements, the sentence or sentencing range specified in a Rule 11(c)(1)(C) agreement "binds the court once the court accepts the plea agreement." Fed. R. Crim. P. 11(c)(1)(C). Thus, these agreements "are unique in that they are . . . binding on the court *after* the court accepts the agreement." *United States v. Kling*, 516 F.3d 702, 704 (8th Cir. 2008) (emphasis in original).

The decision to accept or reject a Rule 11(c)(1)(C) agreement is committed to the district court's discretion. *Id.* at 704. This discretion has boundaries. As the Ninth Circuit has held, "[W]hen considering a sentence-bargain plea agreement, a district court must provide individualized reasons for rejecting the agreement, based on the specific facts and circumstances presented." *In re Morgan*, 506 F.3d 705, 711 (9th Cir. 2007). If it fails to do so, the district court abuses its discretion. *Id.* at 712. *Cf. United States v. Hernandez-Rivas*, 513 F.3d 753 (7th Cir. 2008) ("[A] court cannot arbitrarily reject a plea, and must articulate on the record a

'sound reason' for the rejection."); *United States v. Maddox*, 48 F.3d 555, 558 (D.C. Cir. 1995) ("[T]he trial judge must provide a reasoned exercise of discretion in order to justify a departure from the course agreed on by the prosecution and defense.").

This Court, too, has suggested that a district court's task in reviewing a Rule 11(c)(1)(C) plea agreement is to determine whether the agreement should be "deemed involuntary or unfair," or "'not in the best interest of justice.'" *Kling*, 516 F.3d at 704 (quoting *Government of the Virgin Islands v. Walker*, 261 F.3d 370, 375 (3d Cir. 2001)*; see also United States v. Scurlark*, 560 F.3d 839, 842 (8th Cir. 2009).[5] In accord with the discretion afforded the district court, this Court reviews a decision to reject a Rule 11(c)(1)(C) plea agreement for abuse of discretion. *See United States v. LeMay*, 952 F.2d 995, 997 (8th Cir. 1991) (per curiam).

The district court's rejection of Mr. VandeBrake's plea agreement was predominantly motivated by a categorical justification that had nothing to do with

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[5] Early decisions of this Court construing Rule 11 suggested that a district court's discretion to reject a binding plea agreement is absolute, such that district courts need not even explain their reasons for rejecting such agreements. *See In re Yielding*, 599 F.2d 251, 252-54 (8th Cir. 1979); *United States v. Moore*, 637 F.2d 1194, 1196 (8th Cir. 1981). In *United States v. LeMay*, 952 F.2d 995 (8th Cir. 1991) (per curiam), however, the Court recognized that following promulgation of the United States Sentencing Guidelines, an ordinary abuse of discretion standard applies to this Court's review of rejected plea agreements. *Id.* at 997.

Mr. VandeBrake. That was improper. To the extent that the district court relied on factors specific to Mr. VandeBrake's case, those factors were inappropriate and, in part, outside the record of these proceedings. The district court's rejection of the plea agreement was therefore an abuse of discretion and must be reversed.

A. A Sentencing Court May Not, As This Court Did, Reject a Plea Bargain Simply To Retain Sentencing Discretion.

The district court was blunt and categorical: It rejected the plea agreement based on its view that the agreement deprived the court of sentencing discretion. *See supra* at 6-7. It did so without any serious consideration or regard for the facts and circumstances of Mr. VandeBrake or his case. Indeed, the district court made its decision to reject the plea agreement well before it saw a presentence investigation report or much of anything else about this case. *See supra* at 10-11.

This was an abuse of discretion. While Rule 11 requires that district courts carefully consider the adequacy of plea agreements in light of the facts and circumstances of particular cases, the district court here did not do that – and said so: "I worked exceedingly hard for a decade fighting for judicial discretion, and now that I have it, you know, I'd probably give up anything else except my firstborn . . . ." Add. 35.

By refusing to exercise the discretion conferred by Rule 11(c)(1)(C), the district court rendered that Rule a dead-letter. The district court's approach

likewise discarded the plea analysis prescribed in U.S.S.G. § 6B1.2(c). In a conflict between a duly-enacted Federal Rule of Criminal Procedure, and a Sentencing Guideline, and a district court's inclination for open-ended sentencing, the former two should prevail. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988) (explaining that the Federal Rules of Criminal Procedure are "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard [their] mandate than they do to disregard constitutional or statutory provisions").

The Ninth Circuit confronted precisely this issue in *In re Morgan*. Using language echoing the district court here, the district judge in *Morgan* rejected a Rule 11(c)(1)(C) plea agreement based on his view that agreements of that sort are "unwise as a matter of policy, because [they] leave[] no judging to the judge." *Morgan*, 506 F.3d at 708 (quoting district court). The judge then explained that such agreements render the entry of judgment a "mere formality," and, in his view, "that's [not] what Article III federal courts should be reduced to." *Id.* (quoting district court). The Ninth Circuit held that the district court's categorical rejection of 11(c)(1)(C) agreements was an abuse of its discretion. Reasoning that "the existence of discretion requires its exercise," the Ninth Circuit explained that "when a court establishes a broad policy based on events unrelated to the

individual case before it, no discretion has been exercised." *Id.* at 712 (internal quotation omitted). The Ninth Circuit thus held the district court was required to "set forth, on the record, the court's reasons in light of the specific circumstances of the case for rejecting the bargain." *Id.* Because the district court failed to do so, the Ninth Circuit remanded "to the district court to make an individualized assessment of the propriety of Morgan's stipulated sentence, in light of the factual circumstances specific to this case." *Id.*

The district court in Mr. VandeBrake's case expressed its "bottom line" that an 11(c)(1)(C) plea agreement was generically unacceptable, at least in a white collar case. The "bottom line" of the law, however, is the opposite: "[C]ategorical rejection of sentence bargain plea agreements is error." *Id.* Mr. VandeBrake's conviction should be reversed and remanded for a proper consideration of his Rule 11(c)(1)(C) plea agreement.

B. The District Court Impermissibly Rejected the Plea Bargain Due to Its Perception of the Lead Prosecutor's Inexperience.

To the extent the district court considered the individual circumstances of Mr. VandeBrake's case at all, impermissible factors dominated. The first such impermissible factor was the district court's perception of the lead prosecutor's inexperience. It is true, of course, that Rule 11 does not "define the criteria by which a district court should exercise the discretion the rule confers." *Morgan*,

506 F.3d at 710. Nonetheless, it seems obvious that the district court's views about the prosecuting attorney should play no part. *Cf. Wersal v. Sexton*, 613 F.3d 821, 844 (8th Cir. 2010) ("Indeed, due process requires that judges be impartial. Actual impartiality means a judge's lack of bias for or against either party to a proceeding." (internal citation omitted)). The district court's comments to the government's lead trial counsel at the hearing – and its description of that counsel as a "27-year-old snot-nosed Justice Department lawyer who's had one case" at an unrelated hearing – leave little doubt that its negative appraisal of the government's representation played a role in the decision to reject the 11(c)(1)(C) agreement.

From the record it appears, in fact, that the government's lawyering in this case was both careful and zealous. The 11(c)(1)(C) plea agreement was negotiated under the supervision of, and approved by, the very highest levels of criminal antitrust enforcement in this country. It was an abuse of discretion to reject that agreement based on an appraisal of the individual characteristics of one lawyer. *Cf. United States v. Brooks*, 145 F.3d 446, 458 (1st Cir. 1998) ("[J]udges must not only be scrupulously fair in the administration of justice, but also must foster an aura of fairness.").

C. To the Extent the District Court Considered the Particular Facts of Mr. VandeBrake's Case, It Relied on Undisclosed Evidence Not Properly Before It.

A third impermissible factor contributed to the district court's rejection of the plea agreement. As noted above, *supra* at 10-12, the district court in part based its rejection of the agreement on an allegation that Mr. VandeBrake threatened another company in northwest Iowa in order to coerce it into price fixing with him. After recounting that allegation, the district court stated, "That's *really all the facts I needed to know* to know that there's a huge discrepancy between [the VandeBrake] case and this [Pickhinke] case." App. 25 (emphasis supplied). That "discrepancy" in part motivated the rejection of the plea agreement. App. 21.

The district court's reliance on the claim VandeBrake threatened and coerced another company to fix prices was an abuse of discretion. There is simply no evidence in the record of this case, from any source, to substantiate that allegation. This by itself renders the district court's decision an abuse of discretion. A court abuses its discretion when it acts on the strength of a factual proposition that in fact is not supported by the record evidence. *See United States v. Jeter*, 315 F.3d 445, 447 (5th Cir. 2002) (a district court abuses its discretion to reject a plea agreement "if it bases its decision on an error of law or a clearly

erroneous assessment of the evidence"); *see also United States v. Hayes*, 535 F.3d 907, 912 (8th Cir. 2008).

Even more confounding is the claimed source of the coercion allegation. The district court asserted that it obtained this information from the offense conduct statement of an unidentified co-conspirator. *See supra* at 11. Despite acting on this information when it rejected the 11(c)(1)(C) agreement on May 26, the district court never disclosed during that hearing that it had relied on such a source. It was patently unfair to both Mr. VandeBrake and the government for the district court to reject their agreement based in part on unannounced considerations that were not part of the record. Hence the sensible requirement that a district court's reasons for rejecting a plea agreement must be "set forth, on the record." *Morgan*, 506 F.3d at 712.

Indeed, the court's comments during the hearing would lead a reasonable observer to believe that it had *not* reviewed information concerning other defendants. During the discussion of whether the court should "defer" to the government's judgment, the court stated:

> But essentially – and you're not going to like my choice of language, but essentially you're asking me to abdicate my independent judicial decision making and judgment and defer 100 percent to your judgment about what would be unwarranted sentencing disparity in order for me to accept an 11(c)(1)(C) agreement *before I've even seen the PSRs and the offense conduct statement for the other defendants.*

Add. 22 (emphasis supplied). One strains to reconcile the court's statement at the hearing that it could not accept a binding agreement before reviewing the offense conduct of co-conspirators with its statement at the *Pickhinke* sentencing that it rejected the binding agreement based on an allegation in a co-conspirator's offense conduct statement. This Court need not, however, decide whether the district court's statements can be reconciled. It is quite enough to say that a district court abuses its discretion when it relies for its decision on evidence that is outside of the record and to which the litigants have no opportunity to respond. *See United States v. Bonas*, 344 F.3d 945, 948 (9th Cir. 2003) (collecting cases). That is what happened here.[6]

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[6] The government may argue that Mr. VandeBrake waived error in the district court's rejection of the 11(c)(1)(C) agreement by entering into a subsequent nonbinding plea agreement under Rule 11(c)(1)(B). While there is dicta in *United States v. Olesen*, 920 F.2d 538, 543 (8th Cir. 1990), to support that argument, the Court should reject it if raised. First, Mr. VandeBrake cannot have knowingly waived his right to complain of the erroneous denial of his 11(c)(1)(C) agreement if the district court never disclosed to him part of its erroneous motivation in rejecting the agreement. Mr. VandeBrake did not know, when he entered into the second agreement, that the district court had considered the coercion allegation. Second, to the extent a district court rejects an 11(c)(1)(C) agreement on grounds that would apply categorically to *any* such agreement, as occurred in large part here, meaningful appellate review of the decision can come only after judgment is imposed based on a disposition *other than* an 11(c)(1)(C) agreement. Appellate review should not be denied to Mr. VandeBrake merely because he entered into a nonbinding agreement rather than proceeding to trial or pleading without an agreement.

II. THE DISTRICT COURT'S 48-MONTH SENTENCE IS PROCEDURALLY FLAWED AND SUBSTANTIVELY UNREASONABLE.

The district court imposed a sentence of 48 months imprisonment. This was a substantial upward variance, twice the median of the applicable 21-27 month Guideline range. The parties agree that this sentence is tied with one other (very different) case for the longest pure antitrust sentence in American history. It is the only upward variance or departure in an antitrust case in the history of the Sentencing Guidelines. The sentence is both procedurally flawed and substantively unreasonable. Despite the substantial discretion accorded to district courts in the current sentencing regime, that discretion was clearly abused here. The sentence must be reversed.[7]

The general standards governing appellate review of a sentence in the post-*Booker* era are now familiar. This Court reviews the sentence for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). This Court "must first ensure that the district court committed no significant procedural error, such as

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[7] In the plea agreement that the parties entered into following the court's rejection of their 11(c)(1)(C) agreement, the government agreed "not to seek or support any sentence outside of the Guidelines range nor any Guidelines adjustment for any reason that is not set forth in [the] Plea Agreement." App. 80. The government cannot, without breaching this agreement, defend the district court's above-Guidelines sentence in this appeal.

failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range." *Id.*; *see also United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc). Thereafter, this Court "should then consider the substantive reasonableness of the sentence . . . tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range . . . ." *Gall*, 552 U.S. at 51.

A. The District Court's Sentence Is Based on Procedural Errors.

The district court here committed two independent procedural errors in setting Mr. VandeBrake's prison sentence.

1. The District Court Erred When It Categorically Rejected the Antitrust Guideline (U.S.S.G. § 2R1.1) On Policy Grounds in This Mine-Run Case.

Any variance from an advisory Guideline sentence must be predicated upon the statutory sentencing factors enumerated in 18 U.S.C. § 3553(a). *See Nelson v. United States*, --- U.S. ---, 129 S. Ct. 890, 891-92 (2009) (per curiam) ("[T]he sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory

sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the former with reference to the latter."). Despite the length of the district court's sentencing memorandum, it is difficult to discern the precise weight the district court gave each of the § 3553(a) factors. It is clear, however, that the predominant factor supporting Mr. VandeBrake's upward variance was the district court's "policy disagreement" with the antitrust Guideline, U.S.S.G. § 2R1.1.

In the well-known and exceptional situation of the sentencing ratio between crack and powder cocaine, the Supreme Court recognized that in certain situations district courts may vary from advisory Guideline sentences based upon a policy disagreement with a Guideline. *See Kimbrough v. United States*, 552 U.S. 85, 110 (2007), *Spears v. United States*, 129 S. Ct. 840, 843 (2009) (per curiam); *see also Pepper v. United States*, --- U.S. ---, 131 S. Ct. 1229, 1247 (2011) (applying *Kimbrough* to a variance from the postsentencing rehabilitation Guideline). A district court's freedom to vary from the advisory Guidelines based on its policy disagreements with those Guidelines is limited, however. Because of the Sentencing Commission's "capacity . . . to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise," the Supreme Court in *Kimbrough* reserved an "important institutional role" for the Commission in sentencing policy. *Kimbrough*, 552 U.S. at 109

(quotation omitted). The Supreme Court stated that district court variances from the advisory Guidelines "may attract greatest respect when the sentencing judge finds a particular case outside the 'heartland' to which the Commission intends individual Guidelines to apply." *Id.* (quotation omitted). Alternatively, a district court's policy disagreement with a particular Guideline may receive deference on review where that Guideline "do[es] not exemplify the Commission's exercise of its characteristic institutional role." *Id.* Such was the case with the crack/powder ratio, where the Supreme Court found the Guideline was not supported by the research and institutional factors that support many Guidelines. *Id.* at 109-10.

By contrast, a variance from the Guidelines merits "closer review" on appeal when that variance is based on the district court's policy disagreement with a Guideline, where that Guideline does "exemplify the Commission's exercise of its characteristic institutional role," and where the case in question is a "mine-run case." *Id.* at 109. Mr. VandeBrake's case falls into this latter category deserving "closer review."

The district court unambiguously found here that the Sentencing Commission's relatively lenient treatment of antitrust defendants under § 2R1.1 – as compared to its treatment of fraud defendants under U.S.S.G. § 2B1.1 – is unjustified as a matter of *sentencing policy*. But despite *Kimbrough's* emphasis on

maintaining the Sentencing Commission's "important institutional role," the district court's Sentencing Memorandum says nothing about the Commission's process for developing § 2R1.1. If the court had inquired into the origins of § 2R1.1, it would have discovered that – unlike the crack/powder ratio at issue in *Kimbrough* and *Spears* – § 2R1.1 "exemplif[ies] the Commission's exercise of its characteristic institutional role." *Kimbrough*, 552 U.S. at 109; s*ee* Mark A. Cohen & David T. Scheffman, *The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?*, 27 Am. Crim. L. Rev. 331, 336-38 (1989) ("Cohen & Scheffman") (explaining that the initial version of § 2R1.1 was based on an assessment of past antitrust sentencing practices, as well as a "deliberate decision to increase sanctions over the estimates provided by the Commission staff's study of past practice"). The Sentencing Commission, moreover, has repeatedly addressed the district court's concerns about parity between § 2R1.1 and § 2B1.1. *See* U.S.S.G. Manual App. C, Amend. 678, at 146 (2010) (noting that the 2005 amendment raising the base offense level of § 2R1.1 "helps restore the historic proportionality in the treatment of antitrust offenses and sophisticated frauds"); *id.* Amend. 377, at 228 (noting that "amendment increases the offense levels for antitrust violations to make them more comparable to the offense levels for fraud with similar amounts of loss"). Because the district court disagreed with a policy

established by the Sentencing Commission pursuant to its "characteristic institutional role," this Court should subject the disagreement to "closer review." The variance here cannot survive that scrutiny.[8]

a. The District Court's Policy Disagreement Fails Closer Review.

As Judge Posner has explained for the Seventh Circuit, "in recognition of the Commission's knowledge, experience, and staff resources, an individual judge should think long and hard before substituting his personal penal philosophy for that of the Commission." *United States v. Higdon*, 531 F.3d 561, 562 (7th Cir. 2008) (vacating sentence in case where "[t]he district judge appears to believe that the sentencing guidelines treat white-collar criminals too leniently"). The Third Circuit has described at length the review appellate courts must give a sentencing court's policy disagreement with the Guidelines:

> [Policy] disagreement is permissible only if a District Court provides sufficiently compelling reasons to justify it. A sufficiently compelling explanation is one that is grounded in the § 3553(a) factors. . . . If a district court concludes that [the § 3553(a)] objectives are not achieved by a sentence within the . . . Guideline range, and that belief is driven by a policy disagreement with the . . . provision, then the court must explain why its policy judgment would serve the § 3553(a)

[8] The Sixth Circuit has noted that appellate review of a district court's policy disagreement with the Guidelines is a procedural, rather than substantive, issue. *United States v. Herrera-Zuniga*, 571 F.3d 568, 583 n.8 (6th Cir. 2009).

> sentencing goals better than the Sentencing Commission's judgments. . . . We require this explanation so that, on appeal, we can determine whether the [court's] disagreement is valid in terms of the § 3553(a) factors, the Sentencing Guidelines, and the perception of fair sentencing.

United States v. Merced, 603 F.3d 203, 221 (3d Cir. 2010) (internal quotations and citations omitted). In this case, the district court failed to offer "sufficiently compelling justifications" for "substituting [its] personal penal philosophy for that of the Commission." Accordingly, this Court should reverse.

The district court's policy disagreement with § 2R1.1 is based on two premises. The first premise is that § 2R1.1 is more lenient than the Guideline governing fraud, § 2B1.1. The second is that "[t]he social utility of the Sherman Act in preventing price-fixing agreements would [] appear to be at least as great, if not greater, than the protections offered by the fraud statutes" because "fraud schemes target only discrete segments of the general population while antitrust violations go to the heart of our economic free enterprise system." Add. 123. From these premises, the district court drew two conclusions: (i) that the Commission's different treatment of antitrust crimes and fraud is unjustified, and (ii) that the fraud Guideline should be used in lieu of the antitrust Guideline.

Whatever the accuracy of its stated premises, the district court's conclusions do not follow. The district court's first conclusion (antitrust and fraud offenses are

equivalent for sentencing purposes) required a third premise – that an offender's sentence must be determined solely by reference to the social harm caused by his offense. That premise, which remains latent in the court's Sentencing Memorandum, is strikingly wrong. The Guidelines' treatment of antitrust offenses – considered on their own or relative to fraud offenses – is justified by several legitimate policy considerations, described below, that the court failed to meaningfully address. But even if the district court's first conclusion withstood scrutiny, its second conclusion (apply § 2B1.1 to antitrust cases) fails as well, as the court never evaluated whether § 2B1.1 or § 2R1.1 better captures the sentencing factors in § 3553(a). For all these reasons, the district court's invocation of "policy disagreement" to justify its sentence fails closer review.

Several policy justifications validate the Commission's different treatment of fraud and antitrust offenders. *First*, as the district court seemed to recognize, Congress – not the Sentencing Commission – decided in the first instance to punish fraud more harshly than antitrust violations. *Compare* 18 U.S.C. §§ 1341, 1343, 1344 (twenty-year maximum for mail and wire fraud; thirty-year maximum for bank fraud) *with* 15 U.S.C. § 1 (ten-year maximum for Sherman Act § 1 violations). The discretion *Kimbrough* afforded district courts to sentence based on policy disagreements, however, applies to the *Commission's* policies, not

Congress's. *See United States v. Gomez-Herrera*, 523 F.3d 554, 563 (5th Cir. 2008) ("*Kimbrough* addressed only a district court's discretion to vary from the Guidelines based on a disagreement with *Guideline*, not Congressional, policy." (emphasis in original)).

Nonetheless, the district court here took direct aim at Congress. Tracing the history of the Sherman Act's criminal penalties, the court speculated that its low sentences might be "the result of [] explicit and/or implicit bias on behalf of Congress" in favor of "wealthy, white, Anglo-Saxon, protestant males who were politically well-connected." Add. 122. Connecting this "explicit and/or implicit bias" to § 2R1.1, the court ruled that the "overly lenient sentencing (in my view) for white collar, antitrust criminals found in the origins of the Sherman Act lingers today in the United States Sentencing Commission Guidelines." Add. 122-23. The court thus recognized that the policy with which it disagreed was Congress's policy. A district court has no business rewriting Congressional policies.

Second, while it is generally true that § 2B1.1 is harsher than § 2R1.1, that is because the "loss amount" table under § 2B1.1 increases a fraud defendant's offense level more quickly than the "volume of commerce" table increases an antitrust defendant's. In 1991, the Sentencing Commission amended § 2R1.1 to make it "more comparable to the offense levels for fraud with similar amounts of

loss." U.S.S.G. Manual App. C., Amend. 377, at 228 (2010). The Commission took the opportunity to explain that "offense levels for antitrust offenses based on volume of commerce increase less rapidly than the offense levels for fraud, in part, because, on the average, the level of mark-up from an antitrust violation may tend to decline with the volume of commerce involved." *Id.* Thus, based on its "knowledge, experience, and staff resources," *Higdon*, 531 F.3d at 562, the Commission determined that antitrust offenses impose diminishing marginal harm as they increase in size, meriting smaller offense-level increases relative to volume. The district court never explained why, as a matter of policy, the Commission's explanation for the difference between the volume tables in § 2B1.1 and § 2R1.1 is unconvincing.[9]

Third, even if fraud and antitrust offenses cause similar social harm – as the district court held – fraudsters have greater *moral* culpability than price-fixers. As Justice Harlan explained, "the State always retains an interest in punishing more severely conduct that, although it causes the same effect, is more morally

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[9] The district court did, however, assert that the Guidelines' "assumption is incorrect in this case." Add. 126. There are two problems with the court's statement. First, by referring to the Commission's judgment as an "assumption," the court failed to respect the Commission's "important institutional role." *Kimbrough*, 552 U.S. at 109. Second, the court's assertion is simply wrong on the facts of this case, as explained *infra* at 41-42.

blameworthy." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 73 (1971) (Harlan, J., dissenting). Fraud, which requires deceit, is inherently immoral. *See Singh v. Gonzales*, 451 F.3d 400, 407 (6th Cir. 2006) ("Fraudulent conduct carries heightened moral and legal culpability and is sanctioned both civilly (as an intentional tort) and criminally (by state and federal laws)."); *see also Rice v. Manley*, 21 Sickels 82 (N.Y. Ct. App. 1876) ("Fraud and falsehood are *mala in se*, and wrongful in the eye of the law . . ."). Antitrust violations are different. As the Supreme Court has noted, "the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 440-41 (1978). Unlike fraud, moreover, which is universally recognized as immoral, "there is no consensus on the morality of antitrust offenses." Maurice E. Stucke, *Morality and Antitrust*, 2006 Colum. Bus. L. Rev. 443, 444 (2006). Indeed, one leading antitrust commentator has gone so far as to say that "antitrust has *no* moral content." Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. Corp. L. 607, 609 (2003) (emphasis added). One need not adopt Professor Hovenkamp's view, however, to conclude that the fraud occupies a different moral stratum than price-fixing. The district court failed to even consider the offenses' differing moral culpabilities.

Fourth, in the antitrust context, unlike the fraud context, there is a risk of *over*deterrence. If antitrust penalties are too high, they will deter legitimate – i.e., welfare-enhancing – business activity that a participant fears will be mischaracterized as price-fixing or bid-rigging. *See* Cohen & Sheffman, *supra*, at 353-54 (1989). The line between legitimate business conduct and antitrust violations can be thin. As Cohen & Sheffman explain, "[t]he business community has reasonable historic basis to fear that federal antitrust authorities may attack efficient conduct, using the threat of the most severe penalties available to the government as at least their legal strategy." *Id.* at 354. Because the line between fraud and not-fraud is much clearer than the line between legitimate business activity and antitrust conspiracies, the possibility of overdeterrence further justifies the different sentencing treatment of fraud and antitrust.

The district court failed to meaningfully address these justifications for § 2R1.1, each of which undermine the logic of its policy disagreement with the Guideline. But even if the district court *had* provided "sufficiently compelling" reasons for its disagreement, there is yet another problem with the court's policy analysis. Though the court never explicitly announced how it arrived at a 48-month sentence, the Sentencing Memorandum strongly hints that it derives from the court's calculation that Mr. VandeBrake's Guidelines range under § 2B1.1

would have been 46-57 months. Add. 136. But while the court extensively – albeit unpersuasively – argued that fraud and antitrust sentences should be co-extensive, it offered no explanation justifying its conclusion that § 2B1.1 trumps § 2R1.1. In other words, having decided that § 2B1.1 and § 2R1.1 should be combined, the court failed to explain why antitrust sentences should rise to the current level of fraud sentences rather than fraud sentences sinking to the current level of antitrust sentences.[10] As Judge Holmes of the Tenth Circuit explained in his concurring opinion in *United States v. Lente*, 323 Fed. Appx. 698 (10th Cir. 2009) (per curiam), an appellate court must "examine the nexus between the district court's policy disagreement with the Guidelines and the magnitude of the variance, to determine if the reasons for the policy disagreement can bear the weight of the variance." *Id.* at 716. Because the district court applied the fraud Guideline to Mr. VandeBrake's case without explaining why it better captures the

[10] The district court's omission is all the more perplexing in light of its announcement at the sentencing hearing that antitrust sentences should *not* be calculated by reference to § 2B1.1:

> THE COURT: . . . There's a big difference between amount of loss and volume of commerce. And so I don't think that's a very – you know, do I still think the guidelines are too low in antitrust? Yes. But do I think they ought to be coextensive with the fraud guidelines? No, because I've had a chance to give that a lot of thought.

App. 237.

§ 3553(a) factors than § 2R1.1, there is simply no way for this Court to evaluate the nexus between the district court's policy disagreement and its sentence. Thus, even if the district court's policy disagreement with § 2R1.1 survived closer review on its own – which it does not – its unexplained and unjustified reliance on § 2B1.1 nonetheless merits reversal.

b. This is a Mine-Run Antitrust Case.

The "closer review" called for in *Kimbrough* applies when a sentencing court rejects a Guideline in a mine-run case. *Kimbrough*, 552 U.S. at 109. It is unclear from the district court's Sentencing Memorandum whether it regarded Mr. VandeBrake's case as mine-run. From its extensive invocation of "policy disagreement" and its reliance on *Kimbrough*, one might conclude that it did. Add. 94-97, 116-23. Elsewhere, however, the district court appears to argue the opposite. To the extent it held that this was not a mine-run case, it was wrong.

The Sentencing Memorandum cites four "unusual circumstances" that, in the district court's view, "reveal the truly serious nature of VandeBrake's commercial crimes": (i) concrete is a "necessity product," (ii) Mr. VandeBrake rigged bids for public projects, (iii) there were few competitors in the market, and (iv) Mr. VandeBrake breached an agreement with a co-conspirator. Add. 123-25. A

cursory review of the antitrust landscape demonstrates that none of these circumstances is at all unusual.

First, price-fixing conspiracies frequently involve "necessity" products. The Department of Justice's "Antitrust Primer," which outlines the conditions that make collusion likely, explains that: "[t]he probability of collusion increases if other products cannot easily be substituted for the product in question or if there are restrictive specifications for the product being procured." Department of Justice ("DOJ"), *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For* (Sept. 28, 2005), available at: http://www.justice.gov/atr/public/guidelines/211578.htm ("*DOJ Antitrust Primer*"). Numerous antitrust conspiracies prosecuted by the Justice Department involve "necessity products" under the district court's logic, including **vitamins**, DOJ, *Appendix A: Antitrust Division Selected Criminal Cases April 1, 1996 through September 30, 1999*, available at: http://www.justice.gov/atr/public/4523d.htm ("*DOJ Selected Cases*"), **air transportation**, DOJ, *Antitrust Division Update* (Spring 2009), available at: http://www.justice.gov/atr/public/244014.htm, **citric acid**, *DOJ Selected Cases*, *supra*, **milk**, *see, e.g.*, *United States v. Pippin*, 903 F.2d 1478, 1479 (11th Cir. 1990), **gasoline**, *see, e.g.*, *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1266-67 (6th Cir. 1995), and **refrigerant compressors**, Press Release,

DOJ, *Panasonic Corp. and Whirlpool Corp. Subsidiary Agree to Plead Guilty for Role in Price-Fixing Conspiracy Involving Refrigerant Compressors* (Sept., 30, 2010), available at: http://www.justice.gov/atr/public/press_releases/2010/262783.htm.

It strains reality to suggest, as the district court implicitly did, that Americans are significantly more dependent on ready-mix concrete than they are on vitamins, air transportation, citric acid, milk, gasoline, and refrigeration. Indeed, Americans purchase these products – directly or indirectly – far more frequently than they purchase concrete. That concrete is a "necessity product" thus does not take this case out of the antitrust mine-run.

Second, bid-rigging conspiracies frequently target government bodies. As the DOJ Antitrust Primer explains: "Bid rigging is the way that conspiring competitors effective raise prices where purchasers – *often federal, state, or local governments* – acquire goods or services by soliciting competing bids." *DOJ Antitrust Primer, supra* (emphasis added). Government bodies are the most likely victims of bid-rigging because they operate under mandatory bidding systems. *See* 64 Am. Jur. *Public Works & Contracts* § 25. Criminal prosecutions for rigging government bids abound. *See, e.g., United States v. Anderson*, 326 F.3d 1319 (11th Cir. 2003); *United States v. Lyons*, 670 F.2d 77 (7th Cir. 1982). The fact that

Mr. VandeBrake's antitrust violations affected government entities is well within the mine-run.

Third, the paucity of other ready-mix concrete providers in northwest Iowa was not a unique circumstance of VandeBrake's offense, but instead a hallmark of collusive behavior. Because price-fixing schemes fail when alternative market options are available, collusion is more likely in concentrated markets. *See DOJ Antitrust Primer*, *supra* ("Collusion is more likely to occur if there are few sellers."). Thus, it is unsurprising that many antitrust conspiracies have involved most of the participants in a given market. *See, e.g.*, *United States v. Haversat*, 22 F.3d 790, 793 (8th Cir. 1994); *United States v. Rose*, 449 F.3d 627, 629 (5th Cir. 2006); *United States v. Andreas*, 216 F.3d 645, 651 (7th Cir. 2000); *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 86 (2d Cir. 1999). The lack of market options for concrete consumers in northwest Iowa is an altogether ordinary circumstance of Mr. VandeBrake's case.

Fourth, "[i]t is not uncommon for members of a price-fixing conspiracy to cheat on one another occasionally." *United States v. Beaver*, 515 F.3d 730, 739 (7th Cir. 2008); *see also United States v. Giordano*, 261 F.3d 1134, 1137 (11th Cir. 2001); *Andreas*, 216 F.3d at 679. Thus, the fact that Mr. VandeBrake breached his

agreement to rig bids with CW-2 is not evidence that his antitrust violations were unusual.[11]

After reviewing the four "unusual circumstances" – all of which turn out to be quite usual – the court identified two "flaws" in § 2R1.1 as applied to Mr. VandeBrake. Each is based on clear legal and/or factual error.

First, the court asserted that "VandeBrake's guideline sentence here is not altered one iota as a result of his involvement in the conspiracies in Counts 1 and 2." Add. 125. The court's concern is both mistaken and misplaced. It is *mistaken* because the Guidelines range *was* increased by the inclusion of Counts I and II. Although Count III of the information provided the bulk of the Mr. VandeBrake's "volume of commerce," it involved no bid-rigging. Thus, without Counts I and II – which did involve bid-rigging – Mr. VandeBrake would not have been subject to the upward bid-rigging adjustment in § 2R1.1(b)(1).

The court's concern about multiple conspiracies is *misplaced* for two reasons. First, the Guideline specifically accounts for multiple conspiracies. *See*

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[11] Logically, Mr. VandeBrake's withdrawal from an illegal bid-rigging agreement is a *mitigating* circumstance. By bidding below its competitor on the Sioux City water treatment plant, Mr. VandeBrake *saved* the municipality money. The district court, however, appears to have viewed Mr. VandeBrake's decision to "double-cross" his co-conspirator as justification for a higher sentence. Add. 124-25.

U.S.S.G. § 2R1.1(b)(2) ("When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level."). The existence of multiple conspiracies therefore cannot take this case out of the mine-run. Second, participating in three small antitrust conspiracies is not inherently worse than participating in one larger conspiracy. As the prosecutor pointed out at the sentencing hearing, for Mr. VandeBrake's three conspiracies to have become one, he would have had to take the "extra step of putting all these companies in one room to make sure everybody was on the same page." App. 238. It is "counterintuitive" that the "extra step" could make him "less culpable." App. 239. The district court did not address this argument in its Sentencing Memorandum.

The district court purported to identify a second "flaw" in § 2R1.1 as applied to Mr. VandeBrake. In the district court's view, the Commission's "assumption" that "the level of mark up from an antitrust violation may tend to decline with the volume of commerce" is "incorrect in this case, particularly with respect to VandeBrake's price-fixing of concrete sales through GCC's price list." Add. 126. The court reasoned that: "Because GCC's price list was based on a per cubic yard price, GCC's price list for its concrete did not decrease with volume. Thus, the level of mark up here for VandeBrake's price-fixing violations did not decline with

the volume of commerce involved." *Id*. The court's logic depends on GCC making significant sales directly from its price sheets. The record evidence, however, showed the opposite. *See* App. 138 (a "[v]ery, very small percentage" of concrete is sold at the "price sheet price"; the rest "gets a discount," which "mean[s] a negotiated price with larger purchasers"); *see also* App. 236. Because the "flaw" the court detected in § 2R1.1 depends on a factual premise directly contradicted by the evidence, the district court abused its discretion in relying on it.

In sum, Mr. VandeBrake participated in mine-run antitrust conspiracies. Nothing about the nature of his offenses takes this case away from the heartland of cases for which the Commission designed § 2R1.1. This is, therefore, a case for "closer review" under *Kimbrough*, unlike the crack/powder cases. By that standard, the court's categorical rejection of § 2R1.1 was reversible procedural error.

2. The District Court's Explicit Rejection of Unwarranted Disparity Among Similarly Situated Defendants (18 U.S.C. § 3553(a)(6)) as a Sentencing Factor Was Error.

18 U.S.C. § 3553(a)(6) directs sentencing courts to "consider" the "need to avoid unwarranted sentence disparities between defendants with similar records who have been found guilty of similar conduct." This Court has confirmed that "[u]nwarranted sentencing disparities among federal defendants" must be

considered during sentencing, "both before and after *Booker*." *United States v. Jeremiah*, 446 F.3d 805, 808 (8th Cir. 2006) (citing § 3553(a)(6)). It has not hesitated, moreover, to reverse for procedural error when a district court imposes a sentence resulting in unwarranted disparities. *See United States v. Lazenby*, 439 F.3d 928, 934 (8th Cir. 2006).

The district court did not "consider" the sentencing disparity factor in § 3553(a)(6) in the sense that statute intended. To the contrary, the court's memorandum opinion essentially flouted that factor. This is what the district court said:

> I appear to be the first federal judge to consider varying upward from the Sentencing Guidelines based on my policy disagreements with the Sentencing Guidelines's relatively lenient treatment of antitrust violations when compared to fraud sentences. This action, by changing the status quo of antitrust sentences, will understandably result in a sentencing disparity between the defendants here and those sentenced previously.

Add. 140.[12]

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[12] The district court paid lip service to §3553(a)(6) by citing to four appellate cases in which antitrust sentences were mentioned. One, *United States v. Green*, 592 F.3d 1057 (9th Cir. 2010), is inapposite because it involved (in addition to Sherman Act counts) eleven counts of wire fraud and a wire fraud conspiracy. The others featured sentences significantly shorter than Mr. VandeBrake's.

The district court thus perceived *Kimbrough* and its progeny to authorize sentencing courts to override § 3553(a) factors when they are incompatible with the court's policy judgment. The cases, however, authorize no such thing. To the contrary, *Kimbrough* recognized that, in appropriate cases, sentencing courts may determine that "the Guidelines range *fails properly to reflect § 3553(a) considerations* even in a mine-run case." 552 U.S. at 109 (quotation omitted) (emphasis supplied). Under *Kimbrough*, therefore, a district court's policy judgment cannot trump § 3553(a); instead, for policy reasons a district court can find, in limited circumstances, that § 3553(a) trumps a Guideline.

Its misreading of *Kimbrough* thus led the district court to err by disregarding national sentencing uniformity in formulating its sentence. That error is magnified by the severity of the disparity it created. The district court's 48-month sentence is staggeringly out of sync with defendants similarly – and, for that matter, dissimilarly – situated to Mr. VandeBrake.

Data from the Sentencing Commission show that Mr. VandeBrake's 48-month sentence – which matches the longest pure antitrust sentence *in history*[13] – is far more severe than sentences imposed for similar offenses:

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[13] DOJ, *Antitrust Division Update* (Spring 2011), available at: http://www.justice.gov/atr/public/division-update/2011/criminal-program.html.

SENTENCES FOR ANTITRUST OFFENSES[14]			
Fiscal Year	**Mean Months**	**Median Months**	**Number**
2010	7.4	8	16
2009	13.2	9	21
2008	7.8	6	24
2007	15.9	9	15
2006	8.2	9	12
2005 (Post-*Booker*)	9.8	10	12
2005 (Pre-*Booker*)	3.5	4.5	6
2004 (Post-*Blakely*)	4.8	4.5	4
2004 (Pre-*Blakely*)	2.3	3	7
2003	7.2	4	12
2002	10	6	17
2001	6	6	19
2000	6.6	4	37
1999	6.7	4	43
1998	6.1	4	11
1997	4.8	3	11
1996	2.4	0	15

The average sentence imposed for an antitrust offense from 1996 to 2010 was 7.6 months. The average sentence imposed since Congress passed the Antitrust Criminal Penalty Enforcement and Reform Act of 2004 ("ACPERA"), nearly tripling the statutory maximum sentence for antitrust violations, was 9.8

[14] Except where specifically noted, all tables in this brief are derived from the Sentencing Commission's *Sourcebooks of Sentencing Statistics* from 1996-2010, available at http://www.ussc.gov/Data_and_Statistics/Archives.cfm (1996 through 2009) and http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/SBTOC10.htm (2010). Both this Court and the Supreme Court have regularly looked to this data in sentencing cases. *See Gall*, 552 U.S. at 52 n.7; *United States v. Booker*, 543 U.S. 220, 262 (2005); *United States v. Smith*, 573 F.3d 639, 663 (8th Cir. 2009) (Loken, C.J., concurring in part and dissenting in part).

months. The average sentence imposed since the Sentencing Commission increased the base offense level of § 2R1.1 from 10 to 12 in 2005 was 10.5 months.[15] Thus, Mr. VandeBrake's sentence is roughly *six times* greater than the average antitrust sentence imposed in the last fifteen years, *five times* greater than the average sentence imposed since ACPERA, and *four times* greater than the average sentence since § 2R1.1 was amended.

The Sentencing Commission data, moreover, reveal that in the entire time-period for which data is available (1996-2010), *not a single court* imposed a sentence for an antitrust offense above the Guidelines range.

[15] The 10.5 month average is based on the sentencing data from fiscal years 2006 through 2010. The 2005 amendment to the sentencing guideline became effective November 1, 2005.

ANTITRUST SENTENCES RELATIVE TO THE GUIDELINE RANGE			
Fiscal Year	**Sentences Within Guideline Range**	**Upward Departures and Above Range Sentences**	**Downward Departures and Below Range Sentences**
2010	3	0	13
2009	0	0	20
2008	4	0	20
2007	2	0	13
2006	0	0	12
2005 (Post-*Booker*)	4	0	7
2005 (Pre-*Booker*)	0	0	6
2004 (Post-Blakely)	3	0	1
2004 (Pre-Blakely)	0	0	5
2003	8	0	4
2002	5	0	11
2001	11	0	8
2000	17	0	21
1999	18	0	26
1998	6	0	5
1997	1	0	10
1996	12	0	2
TOTALS	**94**	**0**	**184**
	33.81%	**0%**	**66.19%**

In over fifteen years and 275 sentences, not a single sentencing judge has found the antitrust Guidelines insufficiently severe. In fact, numerous sentencing judges have concluded that a sentence *below* the Guidelines range was appropriate. And, though not shown on the chart above, Sentencing Commission data reveals that when district courts since 1996 have imposed sentences within the Guideline

range, over 60% of those sentences were at the bottom of the Guideline range, and over 90% of the sentences were in the lower half of the range.

The Sentencing Commission's statistics for antitrust offenses are clear proof that the district court's sentence here was extraordinary – both in its length compared to the average antitrust sentence and in its unprecedented determination that the Sentencing Guidelines are too lenient for antitrust offenders.

The district court did not consider any of these publicly available sentencing statistics. Instead, citing a statistic from the Antitrust Division's website, the court concluded that the "average period of incarceration" for Sherman Act violators in 2010 was "30 months." Add. 138. The enormous discrepancy between that figure and the Sentencing Commission's reported average antitrust sentence for 2010 – 7.8 months – is easily explained. The 30-month figure appears to be based on *all cases prosecuted by the Antitrust Division*, including cases that involved non-antitrust offenses (e.g., fraud, obstruction of justice, etc.). A cursory review of the Antitrust Division's workload reveals that many – sometimes most – of the cases are sentenced under Guidelines that are more harsh than § 2R1.1.[16]

[16] In 2009, the primary charges in 56.7% of the criminal cases won by the Antitrust Division were other financial crimes such as perjury, mail fraud, contempt, obstruction of justice, or false statements. DOJ, *Antitrust Division*

Mr. VandeBrake's 48-month sentence is not only at the very highest end of the spectrum of antitrust sentences, it is higher than the sentences that have been imposed for much more harmful antitrust conspiracies. Since fiscal year 2002, the Sentencing Commission has published data regarding application of the volume-of-commerce adjustments in § 2R1.1(b)(2). The following table displays how often courts applied the § 2R1.1(b)(2) adjustments under the pre-2005 thresholds:

VOLUME OF COMMERCE ADJUSTMENTS[17]							
Fiscal Year	**$400,000-1 Million**	**$1 - 2.5 Million**	**$2.5 - 6.25 Million**	**$6.25 - 15 Million**	**$15 - 37.5 Million**	**$37.5 - 100 Million**	**Over $100 Million**
2009	0	0	1	0	0	0	0
2008	1	1	1	0	1	1	0
2007	2	5	0	0	1	4	0
2006	1	3	1	0	1	3	5
2005 (Post-*Booker*)	1	1	0	1	6	3	0
2005 (Pre-*Booker*)	0	0	0	0	0	1	1
2004 (Post-*Blakely*)	0	1	0	2	0	0	0
2004 (Pre-*Blakely*)	0	1	0	1	1	0	0
2003	1	2	2	0	1	0	0
2002	1	4	3	2	8	2	2
TOTALS	**7**	**18**	**8**	**6**	**19**	**14**	**8**
	8.75%	**22.50%**	**10%**	**7.50%**	**23.75%**	**17.50%**	**10%**

Workload Statistics FY 2000-2009, available at: http://www.justice.gov/atr/public/workload-statistics.html (last visited May 9, 2011).

[17] This and the next table are drawn from the Sentencing Commission's online publication titled "Use of Guidelines and Specific Offense Characteristics," available at: http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/index.cfm.

In 2005, the Sentencing Commission amended the thresholds for the volume-of-commerce adjustments, and the following table reflects the frequency with which the modified adjustments have been applied:

VOLUME OF COMMERCE ADJUSTMENTS							
Fiscal Year	**$1 - 10 Million**	**$10 - 40 Million**	**$40 - 100 Million**	**$100 - 250 Million**	**$250 - 500 Million**	**$500 Million - $1 Billion**	**Over $1 Billion**
2009	1	0	2	1	1	1	3
2008	1	2	0	0	1	0	0
2007	0	1	2	0	0	0	0
TOTALS	**2**	**3**	**4**	**1**	**2**	**1**	**3**
	12.50%	**18.75%**	**25%**	**6.25%**	**12.50%**	**6.25%**	**18.75%**

These statistics make clear that the volume of commerce affected by Mr. VandeBrake's antitrust conspiracies ($5,666,348.61) was small compared to most antitrust offenses. Yet, by imposing a prison sentence tied for the longest in history for an antitrust offense, the district court punished Mr. VandeBrake as severely (compared to one case) or *more severely* (compared to all other cases) than persons who participated in far more wide-reaching and harmful antitrust conspiracies. A more dramatic unwarranted sentencing disparity is hard to conjure.

Setting aside the national sentencing statistics, the unwarranted sentencing disparities are also evident by comparing this case to other particular antitrust cases. The following cases involve defendants that participated in similar or more

harmful antitrust conduct but received substantially shorter prisons sentence than Mr. VandeBrake:

- *United States v. Haversat*, 22 F.3d 790 (8th Cir. 1994) – The district court described the conspiracy, which involved over $15 million in commerce, as "unusually long and harsh and well planned." *Id*. at 798. On remand, two executives involved in the conspiracy were sentenced to four months' imprisonment and twelve months' supervised release. *United States v. Haversat*, 1995 WL 253173, at *1 (8th Cir. 1995) (per curiam).

- *United States v. Rose*, 449 F.3d 627 (5th Cir. 2006) – The defendant led a conspiracy to increase the price of choline chloride, a complex vitamin essential for the proper growth and development of animals. After adjustments for bid-rigging, the defendant's role in the conspiracy, and the volume of commerce ($14.6 million), the base offense level was 18. The district court, on remand, sentenced the defendant to 27 months' imprisonment. Sentencing Memorandum (July 18, 2006), available at: http://www.justice.gov/atr/cases/f217100/217161.htm.

- *United States v. Rattoballi*, 452 F.3d 127 (2d Cir. 2006) – For over seven years, the defendant conspired with others to rig bids and allocate contracts for the supply of printing and graphics services. The defendant was also charged with one count of mail fraud. The district court calculated an offense level of 18. Brief for the United States: *United States v. James Rattoballi* (June 8, 2005), available at: http://www.justice.gov/atr/cases/f209400/209434.htm. After initially imposing a sentence of one year of home confinement, which the Second Circuit vacated, the district court imposed a sentence of 18 months' imprisonment, which the Second Circuit affirmed. *United States v. Rattoballi*, 276 Fed. Appx. 99, 99 (2d Cir. 2008).

Finally, the Court must compare Mr. VandeBrake's antitrust violation with the only other 48-month sentence in a pure antitrust case. In *United States v. Peter Baci*, Case No. 3:08-cr-350-J-32TEM (M.D. Fla.), an executive in the shipping

industry pleaded guilty to criminal charges based on his role in an antitrust conspiracy involving the transportation of goods between the continental United States and Puerto Rico. The conspiracy lasted nearly seven years, and included customer allocation, bid-rigging to government and commercial buyers, and price-fixing. The "[d]efendant's illegal conduct affected *more than $1 billion* in government and commercial shipments of food, medicine, clothing, and other critical products from the United States mainland to millions of people on the island of Puerto Rico." Response of the United States to Defendant Peter Baci's Motion to Reconsider Sentence, Case No. 3:08-cr-350-J-32TEM (Dkt. 46) (emphasis added). Thus, the only antitrust sentence ever imposed as severe as Mr. VandeBrake's involved a conspiracy that massively overshadows the conspiracies in this case. Yet Mr. VandeBrake and Mr. Baci were each sentenced to 48 months imprisonment. As such, the district court created an unwarranted *similarity* among defendants who are *not* similarly situated. *See Gall*, 552 U.S. at 55.

B. A Sentence That is Tied for the Longest Antitrust Sentence in History is Substantively Unreasonable for this Defendant.

In reviewing the substantive reasonableness of a district court's sentence, this Court must "take into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Gall*, 552 U.S. at 51. The Court "may consider the extent of the deviation, but must give due deference to the

district court's decision that the § 3553(a) factors, on whole, justify the extent of the variance." *Id.* In considering the extent of a variance, moreover, the Court must ensure that the district court's "individualized assessment based on the facts presented" yields a "sufficiently compelling" justification to support the "degree of the variance." *Id.* at 50. It is "uncontroversial that a major departure should be supported by a more significant justification than a minor one." *Id.* Although "substantive appellate review in sentencing cases is narrow and deferential," *Feemster*, 572 F.3d at 464 (quotation omitted), it is not toothless. Indeed, this Court recently held that a 120-month sentence in a child abuse case was, by virtue of its lenience, substantively unreasonable. *United States v. Kane*, --- F.3d ---, 2011 WL 1707182 (8th Cir. Apr. 29, 2011). *Kane* confirms that this Court has not "quit the post that [it has] been ordered to hold in sentencing review and the responsibility that goes with it." *Id.* at *14 (quotation omitted).

Mr. VandeBrake organized or participated in three local antitrust conspiracies affecting, all told, less than $6,000,000 in commerce, yet the district court imposed punishment as if Mr. VandeBrake were the world's leading price-fixer. He was not. Because the § 3553(a) factors, properly weighed, do not justify the longest prison sentence in antitrust history, the district court's substantively unreasonable sentence should be reversed.

Because Mr. VandeBrake addresses many of the § 3553(a) factors above, the discussion here can be kept brief. The first part of § 3553(a)(1) required the district court to consider the "nature and circumstances of the offense." Section 3553(a)(2) likewise required the district court to ensure that the sentence reflected the seriousness of the offense and society's corresponding interests in the rule of law, adequate deterrence, and rehabilitation. The district court's analysis of these factors – i.e., its policy view that the Sherman Act protects a vital social interest – dominated its sentencing decision, leading it to categorically reject U.S.S.G. § 2R1.1. *See* supra at Part II.A.1. As detailed above, the district court should not have placed *any* weight on its policy disagreement with § 2R1.1. But even if some weight was appropriate, the *amount* of weight the district court gave to its own philosophical views on antitrust law was grossly out of proportion. That is, even if the district court's philosophical views on antitrust criminal enforcement were relevant, they were not "sufficiently compelling" to justify the degree of the district court's variance from the applicable Guideline range. *See Lente*, 323 Fed. Appx. at 716 (Holmes, J., concurring) ("I conclude that the district court's decision here to deviate from the Guidelines cannot survive scrutiny because the court simply failed to establish the requisite nexus between its policy disagreement and Ms. Lente's sentence.").

In discussing the first part of § 3553(a)(1) and § 3553(a)(2), the district court also suggested that Mr. VandeBrake's offenses were unusually serious. As explained above, these "findings" – to the extent they are intended as findings – are simply wrong. *See* supra at 36-42. Without minimizing the gravity of his crimes, Mr. VandeBrake's offenses were local in scope and limited in commerce affected. Any weight the district court put on its belief that this is not a mine-run case was therefore erroneous.

The second part of § 3553(a)(1) required the district court to consider Mr. VandeBrake's history and characteristics. The court made two key findings on this factor. First, the court found that when Mr. VandeBrake testified at the sentencing hearing, he "rationalized" his conduct. Add. 134. Second, the court noted that Mr. VandeBrake had not done significant community service or given to charity. Add. 135. The court, however, failed to give *any* weight to the "history and characteristics" of Mr. VandeBrake that would have militated against a twice-Guideline sentence.

First, Mr. VandeBrake is a committed father and husband. App. 126-35 (letters submitted to sentencing court). Mr. VandeBrake and Mary VandeBrake, his wife of 17 years, have three young daughters, aged 14, 10, and 8. PSR ¶ 107. As Mary wrote in her letter to the sentencing court, Mr. VandeBrake is "a

wonderful parent" who has helped her "raise the girls to be respectful, intelligent, well-rounded children." App. 130.

Second, although Mr. VandeBrake's sentencing testimony includes comments that, taken out of context, can be characterized as "rationalizing," those remarks were the result of the district court's harsh cross-examination. Add. 128-34; *see, e.g.*, *id.* at 134 ("You were a cheater. You were a thief. That's not being competitive. Is it? Is that what they teach you in church?") In evaluating Mr. VandeBrake's history and characteristics, the district court failed to give any weight to the record evidence from the prosecutor and others that Mr. VandeBrake, in fact, accepts responsibility and is remorseful for his offenses. *See* App. 19-20, 130, 135. Mr. VandeBrake himself said:

> [D]uring this time I've had a lot of time to think about my actions and why I'm here. And I am ashamed to say that I am guilty of what I've been charged with, and I'm not trying to rationalize it because it doesn't matter. What I did was wrong and against the law. I look in the mirror every day and I can only think about how much I've hurt my wife and my children, my mother, my father, and my sister and her husband and those I may have financially harmed and others. And I am truly sorry.

App. 234. The district court improperly declined to assign *any* weight to this evidence of Mr. VandeBrake's history and characteristics.

The final § 3553(a) factor meriting discussion – and the factor most underweighed by the district court – is the "need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). As explained above, the district court disregarded this factor, finding it inconsistent with its policy views. *See supra* at 42-44. Both the statistical data from the Sentencing Commission and comparisons to particular cases demonstrate that the district court's 48-month sentence works appalling disparities. It bears repeating that although Mr. VandeBrake is a mine-run antitrust defendant in a relatively small case, his sentence is tied for the longest in antitrust history. Because the district court's sentence cannot be reconciled with § 3553(a)(6), and because the district court failed to properly weigh the remaining § 3553(a) factors, its sentence is substantively unreasonable and should be reversed.

C. The District Court's Alternative Imposition of Consecutive Sentences Does Not Save the Judgment.

After imposing a single 48-month sentence, the district court declared that if it "did not vary upward, [it] would impose sentences of 27 months on each Count; with 27 months of the sentence on Count 3, 15 months of the sentence on Count 1, and 3 months of the sentence on Count 2 running consecutively; for a total sentence of 48 months imprisonment." Add. 143. The court's "alternative"

sentence has no bearing on this appeal. The district court invoked 18 U.S.C. § 3584 as authority for imposing consecutive sentences in this case. That statute, however, authorizes consecutive sentences only when they are warranted by the § 3553(a) factors. *See United States v. Fight*, 625 F.3d 523, 525-26 (8th Cir. 2010). The district court conducted no new review of the § 3553(a) factors to justify the alternative sentence, instead incorporating its earlier analysis. Add. 144-45. As explained above, however, procedural and substantive errors pervaded that analysis. It can no more support consecutive sentences totaling 48 months than it can support a single sentence of that length.

III. THE DISTRICT COURT COMMITTED PROCEDURAL ERROR BY FAILING TO CONSIDER THE § 3553(a) FACTORS BEFORE IMPOSING A MASSIVELY ABOVE-GUIDELINES CRIMINAL FINE.

U.S.S.G. § 2R1.1(c)(1) provides that for non-corporate defendants, the fine in an antitrust case "shall be from one to five percent of the volume of commerce, but not less than $20,000." The Guidelines thus called for the district court to impose a criminal fine of between $56,663.48 and $283.317.43 on Mr. VandeBrake. PSR ¶ 130. The district court nonetheless imposed an $829,715.85 fine, three times beyond than the high end of the Guidelines range and approximately fifteen times above the low end. "In calculating a defendant's fine, the sentencing court must follow a procedure similar to the post-*Booker* procedure

that it is to follow in calculating a defendant's term of imprisonment." *United States v. Elfgeeh*, 515 F.3d 100, 136 (2d Cir. 2008). Thus, "[i]t must consider the Guidelines recommendation for the imposition of a fine, consider the § 3553(a) factors, and consider the fine-specific factors listed in 18 U.S.C. §§ 3571 and 3572." *Id.*; *see also United States v. Klanecky*, 393 Fed. Appx. 409, 412 (8th Cir. 2010) (reviewing § 3553(a) factors in evaluating criminal fine). In imposing a severely above-Guidelines fine in this case, the district court failed to consider whether *any* of the § 3553(a) factors justified its decision. That was error.

The district court began its discussion of Mr. VandeBrake's fine not by calculating the Guidelines range, but by explaining how it *would* be calculated. Add. 141. Without explanation, the court then found that "the fine authorized by § 2R1.1(c)(1) is woefully inadequate." *Id.* The court left the reader to speculate whether this "inadequacy" stems from the facts of the case or some policy disagreement with the Guidelines' fine methodology for individual offenders.

After declaring the Guidelines fine inadequate, the court listed the factors set forth in § 3572(a)(1)-(6) and U.S.S.G. § 5E1.2. Then, before applying these factors, the court turned to U.S.S.G. § 5E1.2, comment 4, to explain its disregard of the antitrust fine Guideline. But U.S.S.G. § 5E1.2 has no application to this case. It is the Guideline that specifies individual fines for offenses, *unlike Sherman*

Act violations, that do not have a specific fine methodology set forth in the substantive Guideline. Thus, based on a comment to an irrelevant Guideline, § 5E1.2, the court concluded it was "well within its discretion to vary upward" from the applicable Guideline, § 2R1.1(c).[18] Add. 142. Finally, the court considered VandeBrake's wealth. Because VandeBrake's net worth was over $10,000,000, the court ruled that the large fine was appropriate. *Id.*

Nowhere in this analysis did the district court even *mention* the § 3553(a) factors, despite the requirement that they be considered. *See* 18 U.S.C. § 3572(a). The district court's wholesale failure to consider how the § 3553(a) factors applied to Mr. VandeBrake's criminal fine was an obvious procedural error. *Feemster*, 572 F.3d at 461 (noting the failing to consider the § 3553(a) factors is procedural error). That error is magnified by: (i) the fact that the fine imposed was near the top of the $1,000,000 statutory maximum, (ii) the fact that the fine is between three and fifteen times above the Guidelines range, and (iii) as set forth in the chart below, the fact that the fine is far above the median antitrust fine in every year

[18] Ironically, had the court actually applied the fine table in § 5E1.2(c), Mr. VandeBrake's maximum fine would have been $50,000.

from 1996 to 2010, suggesting a significant sentencing disparity between Mr. VandeBrake and similarly situated antitrust offenders.[19]

FINES IN ANTITRUST CASES			
Fiscal Year	**Total Cases**	**Fine or Restitution Ordered**	**Median Payment Ordered**
2010	16	12	$42,500
2009	21	21	$20,000
2008	24	19	$50,000
2007	15	13	$50,000
2006	12	12	$175,000
2005 (Post-*Booker*)	12	10	$212,500
2005 (Pre-*Booker*)	6	6	$250,000
2004 (Post-*Blakely*)	4	4	$22,500
2004 (Pre-*Blakely*)	7	5	$20,000
2003	12	9	$30,000
2002	17	15	$168,000
2001	18	14	$38,079
2000	40	38	$34,827
1999	44	38	$20,000
1998	11	11	$50,000
1997	11	10	$35,000
1996	15	8	$68,750

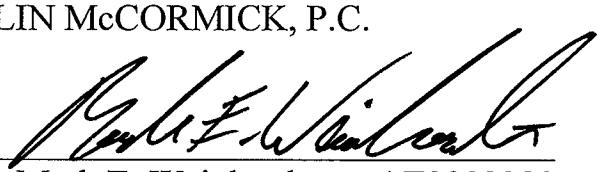
[19] The median fine, rather than the mean fine, is the appropriate comparison because the mean is dramatically influenced by massive fines imposed against corporations involved in multi-billion dollar price-fixing conspiracies. *See, e.g.*, DOJ, *Antitrust Division Update* (Spring 2010), available at: http://www.justice.gov/atr/public/update/2010/criminal-program.html.

Because the district court failed to even consider the § 3553(a) factors in setting Mr. VandeBrake's fine, this Court should vacate the fine and remand to the district court.

CONCLUSION

For the foregoing reasons, this Court should vacate the judgment and remand the case for further proceedings on the parties' Rule 11(c)(1)(C) plea agreement. Failing that, the Court should vacate the judgment and remand for resentencing.

BELIN McCORMICK, P.C.

By 

Mark E. Weinhardt AT0008280
William B. Ortman AT0009127

666 Walnut Street Suite 2000
Des Moines, IA 50309-3989
Telephone: (515) 283-4610
Facsimile: (515) 558-0610
E-Mail: meweinhardt@belinmccormick.com;
wbortman@belinmccormick.com

Francis L. Goodwin
BARON, SAR, GOODWIN, GILL & LOHR
P.O. Box 717
Sioux City, IA 51101
Telephone: (712) 277-1015
Facsimile: (712) 277-3067
E-Mail: flgoodwin@baronsar.com

ATTORNEYS FOR APPELLANT

CERTIFICATE OF TYPE-VOLUME COMPLIANCE

I hereby certify that Appellant's brief, which was prepared using Microsoft Word 2007, contains 13,766 words in 14 point Times New Roman type with serifs. I also certify that this Brief has been scanned for, and is free of viruses.

CERTIFICATE OF FILING

I hereby certify that on May 12, 2011, I filed the foregoing through the Eighth Circuit Court of Appeals CM/ECF filing system.

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2011, the following parties were served through CM/ECF:

John P. Fonte
John J. Powers, III
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave, N.W.
Washington, D.C. 20530

Robert Michael Jacobs
Andre M. Geverola
Laura Heidi Manschreck
U.S. Department of Justice
Antitrust Division
209 S. Lasalle Street, Suite 600
Chicago, IL 60604

Timothy T. Duax
U.S. Attorney's Office
600 4th Street, Suite 670
Sioux City, IA 51101

BELIN\V0214\00988631