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

PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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Pursuant to Federal Rules of Appellate Procedure 35 and 40, Steven Keith VandeBrake requests that the Court grant panel rehearing or rehearing en banc.

FED. R. APP. P. 35(b) STATEMENT

The panel's decision conflicts with decisions of the United States Supreme Court and/or presents questions of exceptional importance as follows:

- In this mine-run case, the panel declined to apply "closer review" to the district court's policy disagreement with a Sentencing Guideline that exemplifies the United States Sentencing Commission's exercise of its characteristic institutional role. That decision nullifies the Commission's policymaking function in this Circuit and conflicts with *Kimbrough v. United States*, 552 U.S. 85 (2007), and decisions of other circuits.

- The panel created a "*Kimbrough* exception" to 18 U.S.C. § 3553(a)(6), pursuant to which a sentencing court that exercises its discretion to disagree with the Guidelines is exempt from the requirement that it consider and give weight to the need to avoid unwarranted sentencing disparities. This "exception" defies express statutory instructions and, independently of the holding described above, conflicts with *Kimbrough* and decisions of other circuits.

STATEMENT OF THE CASE

Mr. VandeBrake pleaded guilty to violating the Sherman Act, 15 U.S.C. § 1, by conspiring to fix prices and rig bids in the northwest Iowa market for ready-mix

concrete. At sentencing, the district court found that Mr. VandeBrake's conspiracies affected $5,666,348.61 of commerce. In the context of criminal antitrust enforcement, where volumes of commerce are commonly eight, nine, and even ten-digit figures, that made Mr. VandeBrake a small-time offender. The government and Mr. VandeBrake each sought a sentence within the twenty-one to twenty-seven month range specified by the applicable Sentencing Guideline, U.S.S.G. § 2R1.1.

The district court rebuffed the parties and imposed the longest sentence ever given by a federal judge in a case involving only Sherman Act violations: forty-eight months. It justified the variance by invoking its "policy disagreements with the Sentencing Guidelines's relatively lenient treatment of antitrust violations when compared to fraud sentences." *United States v. VandeBrake*, 771 F.Supp.2d 961, 1011 (N.D. Iowa 2011). The court selected the duration of Mr. VandeBrake's sentence after using the fraud Guideline, U.S.S.G. § 2B1.1, to calculate an alternative range of forty-six to fifty-seven months. 771 F.Supp.2d at 1008-9. The court also varied from the Guidelines fine range of $56,663.48 to $283,317.43 and imposed a criminal fine of $829,715.85.

Mr. VandeBrake appealed. As relevant to this Petition, Mr. VandeBrake argued: (i) that the sentence was procedurally flawed because the district court's disagreement with § 2R1.1 cannot survive "closer review" under *Kimbrough* and

because the court failed to consider the unwarranted sentencing disparity it had wrought, (ii) that the sentence was substantively unreasonable, and (iii) that the district court erred procedurally in setting the fine.

A divided panel affirmed. Judge Bye's majority opinion rejected Mr. VandeBrake's substantive reasonableness challenge, holding that the district court's policy dispute with the Sentencing Commission was not subject to closer review and that the district court's policy disagreement justified the disparities created by the sentence. The majority did not, however, address Mr. VandeBrake's claims that procedural errors affected the sentence and fine.

Chief Judge Riley concurred in the "general reasoning and the conclusion of Judge Bye's opinion." Slip Op. at 17 (Riley, C.J., concurring). He wrote separately, however, "to disassociate [himself] from the district court's comments about economic success and status, race, heritage, and religion." *Id.; see, e.g.*, *VandeBrake*, 771 F.Supp.2d at 1002-3.

Judge Beam filed a lengthy dissent. Slip Op. at 17-36 (Beam, J., dissenting). He found that the district court's policy disagreement was an "assault on the Sentencing Commission" that should not survive substantive appellate scrutiny. *Id.* at 32 (Beam, J., dissenting). He also concluded that the district court committed procedural error by using § 2B1.1 rather than § 2R1.1 as its baseline. *Id.* at 18-19.

REASONS FOR GRANTING THE PETITION

I. THE PANEL'S REFUSAL TO CLOSELY REVIEW THE DISTRICT COURT'S POLICY DISAGREEMENT WITH THE SENTENCING COMMISSION CONFLICTS WITH *KIMBROUGH v. UNITED STATES* AND DECISIONS OF OTHER CIRCUITS.

The district court's policy-based disagreement with the pertinent Sentencing Guideline, U.S.S.G. § 2R1.1, dominated the sentencing decision in this case. *See VandeBrake*, 771 F.Supp.2d at 1011. Indeed, as Judge Beam explained in dissent, the district court's disagreement was so severe that it rejected the antitrust Guideline outright and inserted the fraud Guideline in its place. Slip Op. at 18-19 n.9 (Beam, J., dissenting).

After *United States v. Booker,* which made the Guidelines "effectively advisory," 543 U.S. 220, 245 (2005), sentencing judges have some latitude to disagree with the Commission's policy choices embodied in the Guidelines. *Kimbrough*, 552 U.S. at 109-111. *Kimbrough*, however, did not write district courts a blank check. In both *Booker* and *Kimbrough*, the Court preserved a policymaking role for the Sentencing Commission even as it delegated discretion to sentencing judges. Accordingly, in light of the Commission's "important institutional role" in sentencing policy, the Court held in *Kimbrough* that when a sentencing judge in a mine-run case disagrees with a Guideline that "exemplif[ies]

the Commission's exercise of its characteristic institutional role," "closer review" of its sentence "may be in order." *Id.* (quotation omitted).[1]

The panel's opinion appears to be this Court's most extensive treatment of a district court's policy disagreement with the Guidelines. Instead of subjecting the district court's exercise of policy discretion to closer review, the panel accorded it absolute deference. Two aspects of that holding, described below, conflict sharply with *Kimbrough* and post-*Kimbrough* decisions of other circuits. Unless the Court grants rehearing en banc, these errors will do in the Eighth Circuit what the Supreme Court refused to do in *Booker* and *Kimbrough*: nullify the Commission's policymaking function in criminal sentencing.

A. The Panel's Erroneous Conclusion that U.S.S.G. § 2R1.1 Does Not Exemplify the Sentencing Commission's "Characteristic Institutional Role" Threatens the Commission's Viability.

As noted, *Kimbrough* exempted from closer review a sentencing judge's disagreement with a Guideline that does not "exemplify the Commission's exercise of its characteristic institutional role." 552 U.S. at 575. Applying this exemption,

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[1] In using the word "may," *Kimbrough* stopped short of formally imposing a "closer review" requirement. *See United States v. Feemster*, 572 F.3d 455, 468 n.12 (8th Cir. 2009) (en banc) (Colloton, J., concurring). But because *Kimbrough* fully developed the justification for closer review, other circuits confronted with policy disagreements in mine-run cases have applied it or its functional equivalent. *See United States v. Irey*, 612 F.3d 1160, 1202-3 (11th Cir. 2010) (en banc); *United States v. Merced*, 603 F.3d 203, 220 (3d Cir. 2010); *United States v. Lychock*, 578 F.3d 214, 219 (3d Cir. 2009).

Kimbrough declined closer review of a district court's policy disagreement with the crack cocaine ratio in U.S.S.G. § 2D1.1 on the grounds that the ratio was not the product of the Commission's institutional tools, and it had been repeatedly criticized by the Commission itself. *See United States v. Bistline*, 665 F.3d 758, 763 (6th Cir. 2011).

The panel here invoked *Kimbrough's* "characteristic institutional role" exemption to justify not closely reviewing the district court's disagreement with U.S.S.G. § 2R1.1. It explained that the Guideline does not embody the Commission's institutional strengths because it was revised "in response to Congressional acts." Slip Op. at 13. The Commission has substantively modified § 2R1.1 in response to congressional action only once, however, increasing the offense levels in 2005 after Congress raised the Sherman Act's statutory maximum from three years to ten. *See* Slip Op. at 23-27 (Beam, J., dissenting).[2] The panel's opinion thus stands for the proposition that if the Commission has ever modified a Guideline in response to congressional action, even once, that Guideline no longer exemplifies the Commission's characteristic institutional role.

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[2] The panel also suggested that Congress influenced § 2R1.1 because a Senate Report accompanying the Sentencing Commission's organic statute indicated that the Commission may decide to increase sentences for white-collar offenses. Slip Op. at 13. Because it predates the initial version of § 2R1.1, however, the Senate Report cannot be example of congressional meddling with the Commission. *See also* Slip Op. at 25-26 (Beam, J., dissenting).

In so holding, the panel weighed in on a question that has divided the circuits since *Kimbrough*: whether congressional influence on a Guideline is toxic to the Commission's institutional role. *Compare Bistline*, 665 F.3d at 761-64 (finding that U.S.S.G. § 2G2.2 is entitled to respect because it is based on Congress's policy choices); *United States v. Pugh*, 515 F.3d 1179, 1201 n.15 (11th Cir. 2008) (similar) *with United States v. Henderson*, 649 F.3d 955, 962-63 (9th Cir. 2011) (finding that § 2G2.2 is *not* entitled to respect because it is based on Congress's policy choices); *United States v. Grober*, 624 F.3d 592, 608-9 (3d Cir. 2010) (similar); *United States v. Dorvee*, 616 F.3d 174, 184-86 (2d Cir. 2010) (similar).

The viability of the Sentencing Commission is at stake in this split. Section 2R1.1 is a compelling example of dialogue between the Sentencing Commission and Congress. *See* Slip Op. at 23-27 (Beam, J., dissenting) (describing § 2R1.1's history). Similar success stories can be found across the Sentencing Guidelines. This dialogue is possible, however, only if the Commission can modify the Guidelines in response to congressional action. The panel here stands with those circuits that declare inter-branch dialogue between the Commission and Congress institutionally out-of-bounds.

If the panel's holding survives, the Commission will, to the extent it has any interaction with Congress, become irrelevant to sentencing policy. That outcome is

directly contrary to the Supreme Court's pronouncements in *Booker* and *Kimbrough*.[3] The Court should grant rehearing en banc to lift the threat the panel's opinion poses to the Commission's viability.

B. The Panel Erroneously Permitted the District Court To Avoid Closer Review By Masking A Policy Disagreement As An Individualized Determination.

The panel gave a secondary justification for refusing closer review. Relying on the district court's discovery of a purportedly case-specific "flaw" in § 2R1.1, the panel ruled that the sentence was "based on the *particular* facts of an *individual* case, which is entitled to 'greatest respect' because it exemplifies the district court's institutional strengths." Slip Op. at 15 (quotation omitted). The district court, however, made no institutionally-appropriate case-specific finding about § 2R1.1. The panel's refusal to apply closer review thus conflicts with *Kimbrough*.

The panel held that the "crux" of the district court's policy disagreement stemmed from its determination that § 2R1.1 contains an assumption – that "the level of mark-up from an antitrust violation may tend to decline with the volume of

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[3] Alternatively, to ensure that its policy decisions carry weight, the Commission could elect to ignore the views of the people's representatives in Washington. That, as the Sixth Circuit explained in *Bistline*, would be at odds with our constitutional structure. *Bistline,* 665 F.3d at 764.

commerce involved" – inapplicable to Mr. VandeBrake. Slip Op. at 14.[4] The district court's disagreement with the assumption of declining mark-ups, however, was not an individualized finding worthy of deference. A core premise of § 2R1.1 is that the harm caused by an antitrust violation (which principally depends on the size of anticompetitive mark-ups) cannot reliably be determined from the abbreviated records used in criminal sentencing.[5] The Commission therefore used "volume of commerce" (rather than loss) in antitrust cases to achieve its policy goal of preventing speculative damages analysis. When the district court rejected that policy choice by making a "finding" about Mr. VandeBrake's mark-ups anyway,[6] it expressed a policy disagreement meriting closer review, not a case-specific finding warranting absolute deference.

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[4] This holding seriously mischaracterizes the district court's opinion. The district court spent one paragraph on the declining mark-up "flaw" in § 2R1.1 and *pages* on its general view that antitrust sentencing is too lenient. *VandeBrake*, 771 F.Supp.2d at 1000-03, 1008-09. The "flaw" was a coda to that discussion, not the "crux" of it.

[5] The Commission explained: "The offense levels are not based directly on the damage caused or profit made by the defendant because damages are difficult and time consuming to establish." U.S.S.G. § 2R1.1 cmt. background (2010).

[6] The district court's mark-ups discussion shows the wisdom of the Commission's policy. The district court believed that Mr. VandeBrake's mark-ups did not decrease with volume because he sold concrete from price lists. To determine the marginal effect of rising volume on mark-ups, however, one needs data about volume discounts relative to demand and production costs. Because those data are not in the record, the district court's "finding" was mere speculation.

In *Spears v. United States*, the Supreme Court noted the danger of district courts "masking their categorical policy disagreements as 'individualized determinations.'" 555 U.S. 261, 266 (2009) (per curiam). Falling into the trap described in *Spears*, the panel permitted the district court to avoid closer review by camouflaging its policy disagreement as a case-specific finding. That error is as calamitous to the Sentencing Commission's policymaking role – and thus as contrary to *Kimbrough* – as the panel's misapplication of the "characteristic institutional role" exemption. The en banc Court should correct it.

II. THE PANEL CREATED A "*KIMBROUGH* EXCEPTION" TO 18 U.S.C. § 3553(a)(6) THAT CONFLICTS WITH *KIMBROUGH* AND DECISIONS OF OTHER CIRCUITS.

The panel's decision does violence to sentencing law and procedure in a second, more basic, way. 18 U.S.C. § 3553(a)(6) commands a sentencing court to consider and give weight to "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The panel's opinion reads this statutory requirement out of existence, however, in any case where a sentencing court, under *Kimbrough*, disagrees with a Guideline on policy grounds.

The district court recognized that Mr. VandeBrake's sentence would yield sentencing disparities. 771 F.Supp.2d at 1010-11. It could hardly have done otherwise; the sentence is an eye-popping outlier, unique in the history of antitrust

enforcement. Between 2006 and 2010, the median sentence for antitrust offenders without significant criminal histories ranged from five to fourteen-and-one-half months. Mr. VandeBrake's sentence – the only upward variance from § 2R1.1 in at least fifteen years and 278 sentences– thus exceeds the median by a factor between three and nine. Moreover, the only pure antitrust offender *ever* to receive a sentence as long as Mr. VandeBrake's affected more than $1 billion of commerce, about two-hundred times more than Mr. VandeBrake. *See* Slip Op. at 32-34 (Beam, J., dissenting) (describing these, and other, indicators of gross disparity).

Even if *Kimbrough* had empowered the district court to reject § 2R1.1 on policy grounds, that court was still obligated to follow the dictates of § 3553(a)(6) quoted above. It did not. To the contrary, the district court openly refused to give weight to the wide disparity it created, explaining that because it was the first court to vary upward from § 2R1.1 based on policy disagreement, the sentence "will understandably result in a sentencing disparity between the defendants here and those sentenced previously." *VandeBrake*, 771 F.Supp.2d at 1011. The district court thus reasoned that sentencing judges using the discretion afforded by *Kimbrough* may ignore sentencing disparities.

Instead of reviewing the district court's failure to perform its duty under § 3553(a)(6), the panel joined the district court in uncritically embracing the disparity: "Because the district court varied from the Guidelines, VandeBrake's

sentence will necessarily differ when compared to a within-the-guidelines' sentence. That mere fact does not *ipso facto* make the sentence substantively unreasonable." Slip Op. at 11-12. The panel was otherwise silent on disparity. Thus, its sole logic for affirmance is that disparity is inevitable – and hence unobjectionable – when district courts disagree with a Guideline on policy grounds under *Kimbrough*.

There is no basis for this wholesale nullification of a congressional command. This "*Kimbrough* exception," moreover, is contrary to *Kimbrough* itself, which made clear that § 3553(a) applies in policy disagreement cases: "Section 3553(a)(6) directs *district courts* to consider the need to avoid unwarranted disparities – along with other § 3553(a) factors – when imposing sentences." 552 U.S. at 108 (emphasis in original). And post-*Kimbrough* decisions confirm that even where a sentencing court permissibly disagrees with the Commission's policy choices, it still must consider and balance sentencing disparities. *See, e.g.*, *Henderson*, 649 F.3d at 964 (affirming district court's policy disagreement and noting that "courts must also continue to consider all of the § 3553(a) factors in deciding upon the sentence"); *Merced*, 603 F.3d at 225 (remanding in part because the district court "[f]ailed to analyze a highly relevant sentencing factor, § 3553(a)(6)").

There is thus no legal support for a "*Kimbrough* exception" to § 3553(a)(6). The exception is also deeply troubling; hewing to Congress's express requirement that sentencing judges consider and give weight to "the need to avoid unwarranted sentencing disparities" is a critical step in ensuring that *Kimbrough* delegated legitimate policy discretion and not arbitrary power. *See United States v. Cavera*, 550 F.3d 180, 220 (2d Cir. 2008) (en banc) (Sotomayor, J., concurring in part and dissenting in part) ("[A]rbitrary and subjective considerations, such as a judge's feelings about a particular type of crime, should not form the basis of a sentence."). Rehearing en banc is warranted to correct the panel's erroneous creation of a "*Kimbrough* exception" to § 3553(a)(6).

III. THE PANEL SHOULD GRANT REHEARING BECAUSE IT MISAPPREHENDED THREE POINTS OF LAW OR FACT.

Panel rehearing is warranted when a panel misapprehends a point of law or fact. Fed. R. App. P. 40. Three such misapprehensions appear here.

A. Chief Judge Riley's Finding of Procedural Error.

Chief Judge Riley disassociated himself from the district court's comments about "economic success and status, race, heritage, and religion." Slip Op. at 17 (Riley, C.J., concurring). Those considerations, the Chief Judge found, were "inappropriate and not a proper reason for supporting any sentence." *Id.* This determination that race or heritage adversely affected Mr. VandeBrake's sentence, however, implies procedural error below. *Pepper v. United States*, 131 S. Ct. 1229,

1240 n.8 (2011) ("A defendant's race or nationality may play no adverse role in the administration of justice, including at sentencing." (quoting *United States v. Leung*, 40 F.3d 577, 586 (2d Cir. 1994)); *United States v. Figueroa*, 622 F.3d 739, 743 (7th Cir. 2010) (remanding based on procedural error where "[t]he sentencing transcript reveals an odd focus on nation-states and national characteristics"). Because a majority of the panel thus found that the district court committed procedural error, Mr. VandeBrake respectfully requests that the panel grant rehearing and remand this case for resentencing.

B. Mr. VandeBrake's Procedural Challenge to the Sentence.

The panel's opinion states that Mr. VandeBrake challenged the substantive reasonableness of the forty-eight month sentence. *See* Slip Op. at 2; *id.* at 9-10. Although Mr. VandeBrake did challenge the substantive reasonableness of the sentence, he spent a much larger portion of his appellate briefing – forty-two pages between his two briefs – arguing that it was procedurally flawed. The panel did not acknowledge or rule on Mr. VandeBrake's procedural challenge. (It addressed procedural error only briefly to respond to an argument advanced by the dissent. Slip Op. at 15.) As a result, readers of the panel's opinion – including other members of this Court and jurists on a higher court – cannot know without consulting the briefing that procedural error was the main focus of Mr.

VandeBrake's appellate argument. Mr. VandeBrake respectfully requests that the panel rule on his procedural challenge to the sentence.[7]

C. Mr. VandeBrake's Procedural Challenge to the Fine.

The panel concluded that it could "find no basis for concluding the amount of the fine is substantively unreasonable." Slip Op. at 17. It appears the panel misapprehended the basis of Mr. VandeBrake's challenge. Mr. VandeBrake argued that the fine was procedurally flawed because the district court did not, in setting the amount, address the factors set forth in 18 U.S.C. § 3553(a). *See United States v. Elfgeeh*, 515 F.3d 100, 136 (2d Cir. 2008). He did not argue that the fine was substantively unreasonable. Mr. VandeBrake respectfully requests that the panel rule on his procedural challenge to the fine.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing by the panel or en banc.

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[7] Notably, this omission results in a split with the Sixth Circuit. *See United States v. Herrera-Zuniga*, 571 F.3d 568, 583 & n.8 (6th Cir. 2009) ("[P]olicy-based disagreement . . . is more properly construed as a procedural challenge.").

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