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 REPLY BRIEF

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INTRODUCTION

Mr. VandeBrake pleaded guilty to three local, mine-run Sherman Act violations. He pleaded in the first instance pursuant to a plea agreement containing a stipulated sentence under Fed. R. Crim. P. 11(c)(1)(C). Explaining that it was unwilling to "cede [its] discretion to the executive branch of government," the district court rejected the plea agreement. Add. 31. The decision was chiefly based on its "judicial philosophy," *id.*, and to a lesser extent on improper case-specific facts. After Mr. VandeBrake persisted in his guilty plea, the district court denied the government's recommendation for a within-Guidelines sentence, varying upward to impose the longest pure antitrust sentence in history. That decision was driven largely by the court's policy rejection of the antitrust Guideline, U.S.S.G § 2R1.1, which it saw as overly lenient in comparison to the fraud Guideline, U.S.S.G. § 2B1.1.

On appeal, Mr. VandeBrake raises three principal issues: (i) the district court abused its discretion when it rejected the Rule 11(c)(1)(C) agreement, (ii) the prison sentence was pervaded by both procedural and substantive error, much of it deriving from the court's improper rejection of § 2R1.1, and (iii) the district court failed to consider the 18 U.S.C. § 3553(a) factors when it imposed a criminal fine far exceeding the fine called for by the Guidelines.

With very few exceptions, the government does not challenge Mr. VandeBrake's legal positions before this Court. Instead, it seeks to recast the district court's rulings in lawful form. Thus, rather than defend the district court's authority to reject the Rule 11(c)(1)(C) agreement on categorical grounds, the government contends that it rejected the agreement for other reasons. Likewise, ignoring the court's own explanation, the government claims that the court did not rely on its policy disagreement with § 2R1.1 when it imposed the prison sentence. As is explained below, these revisionist accounts, and others like them, cannot survive first contact with the record.

The district court made no secret of the reasons for its decisions in this case. Because those decisions, and the reasons underlying them, were erroneous, Mr. VandeBrake asks that this Court vacate the judgment and remand for further proceedings.

ARGUMENT

I. THE DISTRICT COURT'S REJECTION OF THE RULE 11(c)(1)(C) PLEA AGREEMENT WAS AN ABUSE OF DISCRETION.

In his opening brief, Mr. VandeBrake argued that the district court abused its discretion when it rejected the plea agreement he reached with the government pursuant to Fed. R. Crim. P. 11(c)(1)(C). Specifically, Mr. VandeBrake argued that the district court impermissibly rejected the agreement based chiefly on its

"judicial philosophy" of retaining sentencing discretion, rather than the specific facts of his case. To the extent that the district court did consider case-specific facts, Mr. VandeBrake contended, they were either inappropriate – as in the district court's perception of the lead prosecutor's experience – or outside the record – as with the still-unsourced allegation that Mr. VandeBrake coerced another company to join an antitrust conspiracy. The government's response is two-fold. First, the government claims that Mr. VandeBrake waived this argument. Second, it argues that the district court properly rejected the plea agreement based on case-specific facts. Neither argument withstands scrutiny.

A. Mr. VandeBrake Has Not Waived His Challenge to the Rejection of the Rule 11(c)(1)(C) Agreement.

The government first argues that Mr. VandeBrake waived the Rule 11(c)(1)(C) issue. In support, the government cites three facts: (i) that "VandeBrake knew the court could reject the 'C' agreement," (ii) that he "never objected when the court indicated that it would likely do so," and (iii) that he "entered into a new 'B' agreement that was presented to and accepted by the court." Appellee's Br. 23. None supports the government's waiver argument.

First, it is irrelevant that Mr. VandeBrake knew of the district court's authority to reject the plea agreement. Mr. VandeBrake did not know – because it is not true – that that the district court could reject the plea agreement based on a

philosophical disagreement with Rule 11(c)(1)(C) in price-fixing cases. Nor did Mr. VandeBrake know that the court could rely on extra-record allegations or its perception that the prosecutor was too inexperienced to credibly recommend a sentence. In any event, Mr. VandeBrake's knowledge of the court's authority to reject a Rule 11(c)(1)(C) plea agreement is a response only to a challenge to the voluntariness of the plea that is not raised in this appeal.

Second, Mr. VandeBrake's non-objection when the court announced its intention to reject the plea agreement is a red herring. Objections not raised below are waived on appeal (or reviewed for plain error) in order to give the district court "an opportunity to correct errors." *Moore v. Am. Fam. Mut. Ins. Co.*, 576 F.3d 781, 786 (8th Cir. 2009); *see also United States v. Williams*, 590 F.3d 616, 619 (8th Cir. 2010). Immediately before the district court announced its intention to reject the plea agreement, Add. 31-32, Mr. VandeBrake's counsel and the government's counsel engaged in colloquies with the district court spanning twenty-five transcript pages. Add. 5-30. Both asked the district court to accept the plea agreement. Given this extensive record, there can be no doubt that the district court understood Mr. VandeBrake's position and that it had the "opportunity to correct [its] errors." *Moore*, 576 F.3d at 786. Neither law nor common sense

required Mr. VandeBrake to recite "I object" redundantly after the district court announced its decision.

Finally, the government contends that Mr. VandeBrake cannot complain about the district court's rejection of his Rule 11(c)(1)(C) agreement because, following that rejection, he entered into a Rule 11(c)(1)(B) agreement and persisted in his guilty plea. For support, the government cites this Court's non-precedential opinion in *United States v. Rivera*, 209 F. App'x 618 (8th Cir. 2006) (per curiam). In *Rivera*, a district judge rejected a Rule 11(c)(1)(C) agreement because, after reviewing the presentence report, it found no "justifiable reason" for a below-Guidelines sentence. The parties then entered into a new plea agreement, which the district court accepted. This Court held that the defendant's entry into the second agreement "cured any prejudice possible from the first proceeding." *Id.* at 621.

Mr. VandeBrake's case differs materially from *Rivera*. Unlike *Rivera*, where the district judge rejected the first plea agreement based on the particular facts of the case, the district court here rejected Mr. VandeBrake's plea chiefly for categorical reasons that would have applied to *any* Rule 11(c)(1)(C) plea agreement. In such circumstances – as Mr. VandeBrake pointed out in his opening brief without response from the government – meaningful appellate review of the

district court's decision to reject the plea is possible only when judgment is entered on some basis *other than* a Rule 11(c)(1)(C) plea agreement. Appellant's Br. 22 n.6. The unstated implication of the government's position is that a defendant wishing to appeal a district court's rejection of his Rule 11(c)(1)(C) agreement must either plead without an agreement or subject the court, the government, and twelve jurors to a trial. Such a rule serves no function. To the extent that *Rivera* represents the law in this Circuit, the Court should recognize an exception where the district court rejects a Rule 11(c)(1)(C) agreement on categorical grounds.

B. The District Court's Rejection of the Rule 11(c)(1)(C) Plea Agreement Was Not Based on Permissible Case-Specific Factors.

The government also responds substantively to Mr. VandeBrake's argument that the district court abused its discretion by rejecting the Rule 11(c)(1)(C) agreement. It maintains that the court relied on appropriate case-specific facts and concluded that the plea agreement was too lenient. The legal premise of the government's argument – that district courts may reject plea agreements that are too lenient – is correct. The factual premise – that the district court here rejected the plea agreement "based on its assessment of the offense conduct statement," Appellee's Br. 26 – is not. To the contrary, as explained below, the government's argument ignores the district court's own explanations of its decision, both at the

May 26 status conference and at the unrelated sentencing hearing for Charlene Pickhinke.[1]

To support its characterization of the plea rejection, the government points to three statements by the district court at the May 26 status conference: (i) that it had read the government's offense conduct statement, Appellee's Br. 24; (ii) that it had a "lengthy discussion" with the probation officer about the case, Appellee's Br. 24-25; and (iii) that it concluded that it had "a very, very strong belief that the sentence should be substantially different," Appellee's Br. 25 (quoting Add. 34). Even on their own – i.e., without considering the district court's direct explanation for its decision – these statements do not support the inference the government asks this Court to draw. The first two show only that the court had access to rudimentary facts about the case, which it discussed with a member of court staff. In no way do they suggest that these facts formed the basis for its decision.

The final statement *might* support the government's inference, except that it is taken out of context. Contrary to the government's assertion, the district court

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[1] Notably, the government does not argue that the district court had discretion to reject the Rule 11(c)(1)(C) agreement on categorical grounds. Nor does the government contend that the district court could permissibly rely on its perception of the lead prosecutor's experience or extra-record allegations of coercion. The parties' dispute, therefore, goes solely to identifying the true grounds for the district court's decision.

did not "conclude[]" that Mr. VandeBrake's sentence "should be substantially different." Appellee's Br. 25. Rather, in describing its ordinary process for considering Rule 11(c)(1)(C) agreements, the court remarked that it "ha[s] to have a very, very strong belief that the sentence should be substantially different than what the parties propose" before it will reject a plea agreement. Add. 34. The court offered no "conclusion" about the sentence in Mr. VandeBrake's plea agreement.

Of course, this Court is not limited to the statements cherry-picked by the government. Rather, this Court can consider the district court's *direct explanation* for its decision. In no uncertain terms, the court declared 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.[2] The district court's categorical language speaks for itself. As Mr. VandeBrake pointed out in his opening brief, moreover, it bears a striking resemblance to the language the Ninth Circuit rejected in *In re Morgan*, 506 F.3d 705 (9th Cir. 2007), a case that the government concedes is consistent with the law in this Circuit. The government ignores the district court's explanation for its decision.

To the extent that the district court did consider case-specific facts, moreover, it considered improper ones. The court's statements indicate that it relied on an incorrect and inappropriate perception of the lead prosecutor's lack of experience and a coercion allegation that appears nowhere in the record of this case. The government argues that neither factor was a basis for the district court's decision. The record shows otherwise.

In his opening brief, Mr. VandeBrake quoted extensively from the district court's colloquy with the government's counsel at the May 26 status conference,

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[2] While it is clear that the court's reasoning was categorical, the extent of its categorical judgment is not established. Because, as the government points out, the district court stated at the status conference that it accepts Rule 11(c)(1)(C) agreements in drug cases, the policy apparently does not apply universally. Add. 23. The court stated, however, that: "I don't know of a single reason why I'd want to accept an 11(c)(1)(C) agreement in a white-collar price-fixing case. I just can't think of a single reason why I'd want to do it." Add 24. Thus, the categorical rejection policy extends at least to "white-collar price-fixing" cases.

during which the court made clear that it was unwilling to "defer" to the sentence recommended by a prosecutor with "zilch, nada, none, virtually no real-world experience." Add. 11. Mr. VandeBrake also quoted the district court's description of the prosecutor at the Pickhinke sentencing as a "27-year-old snot-nosed Justice Department lawyer," and its statement that deferring to his recommended sentence would be tantamount to conducting a lottery. App. 23. These remarks manifest that in deciding to reject the plea agreement, the court gave weight to its perception of the prosecutor's inexperience.

In response, the government points to the court's statement to the prosecutor that it was "open to the possibility that despite your lack of experience that you and your office are specialists and have far greater knowledge about price-fixing cases around the country than I would have." Appellee's Br. 26 (quoting Add. 23). The court's "openness" to a "possibility," however, shows nothing. Nor, for that matter, does the court's (correct) statement that the prosecutor is "an excellent lawyer." Appellee's Br. 27 (quoting Add. 31). It was not the court's overall assessment of the prosecutor that led it to reject the plea agreement, but its perception of his lack of experience in criminal sentencing. The court's compliment does not speak to that issue. The government thus fails to call into doubt the evidence presented in Mr. VandeBrake's opening brief.

The same is true of the district court's extra-record allegation that Mr. VandeBrake coerced others to join antitrust conspiracies. The government contends that "there is nothing to support the conclusion that the [coercion] allegation caused the court to reject VandeBrake's (c)(1)(C) agreement." Appellee's Br. 28. It is mistaken. At the Pickhinke sentencing, the district court asserted that it rejected Mr. VandeBrake's plea agreement because it saw "the conduct in the VandeBrake case [as] much more egregious than the conduct in this [Pichkinke] case." App. 21. But what made Mr. VandeBrake's case much more egregious? The court explained that it was the allegation of coercion:

> So [VandeBrake] 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 (emphasis added). The court thus drew a straight line from the coercion allegation to its decision to reject the plea agreement. Because no coercion allegation appears anywhere in the record of this case – a point never disputed by the government – the district court abused its discretion when it relied on one to reject the Rule 11(c)(1)(C) plea agreement.

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

Both procedural and substantive errors pervade the 48-month prison sentence imposed by the district court. This Court should therefore vacate the sentence.[3]

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

The district court committed two procedural errors in sentencing Mr. VandeBrake. First, it improperly rejected the antitrust Guideline, U.S.S.G. § 2R1.1, as a matter of sentencing policy in this mine-run case. Second, it failed to meaningfully consider the massive unwarranted disparity created by its sentence.

1. The District Court's Categorical Rejection of U.S.S.G. § 2R1.1 Was Procedural Error.

As Mr. VandeBrake acknowledged in his opening brief, *Kimbrough v. United States*, 552 U.S. 85 (2007), gave sentencing courts limited authority to reject Sentencing Guidelines on policy grounds. Recognizing the Sentencing

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[3] Contemporaneously with this Reply Brief, Mr. VandeBrake submits a Motion to Enforce the Plea Agreement asking the Court to strike Parts II, III, and IV of the argument section of the government's brief as a remedy for the government's breach of the Rule 11(c)(1)(B) plea agreement. Mr. VandeBrake presents the issue in the form of a motion, rather than brief it here, because he seeks an "order or other relief" from this Court. *See* Fed. R. App. P. 27(a).

Commission's "important institutional role," however, the Court called for "closer review" of a sentence when three elements are satisfied: (i) the district court imposed that sentence based on a policy disagreement with the Guidelines, (ii) the case is "mine-run," and (iii) the Guideline at issue exemplifies the Commission's "characteristic institutional role." *Id.* at 109-10. In his opening brief, Mr. VandeBrake argued that each of these elements is satisfied here. He further argued that the district court's rejection of § 2R1.1 fails closer review; that is, the district court lacked the "sufficiently compelling reasons" needed to substitute its own policy judgment in place of the Sentencing Commission's. *United States v. Merced*, 603 F.3d 203, 221 (3rd Cir. 2010).

The government's response is limited. It does not contend that the district court's policy disagreement can survive closer review. Nor does it argue for any appellate standard other than "closer review." Instead, it argues only that some of the elements that require closer review are not present here. Specifically, the government asserts that the district court did not impose a sentence based on its policy disagreement with § 2R1.1. The government also appears to argue that § 2R1.1 does not exemplify the Sentencing Commission's characteristic institutional role. The government is wrong on both fronts. Because it is, closer

review applies; because the government does not dispute that this sentence fails closer review, procedural error is established.

a. The Court's Policy Disagreement With § 2R1.1 Drove Its Sentencing Decision.

Contrary to the government's claim that "the court varied primarily on circumstances specific to VandeBrake's case," Appellee's Br. 34, the district court's policy disagreement with § 2R1.1 dominated its decision to impose a 48-month sentence. The court was not bashful about that fact. In the Memorandum Opinion and Order Regarding Sentencing ("Sentencing Memorandum"), the court spent three pages developing the legal proposition that sentencing courts may reject Guidelines on policy grounds. Add. 94-97. Then the court devoted the first several pages of its § 3553(a) analysis to a history of criminal Sherman Act enforcement, leading to its conclusion that "the antitrust guideline § 2R1.1 is deserving of less deference" than § 2B1.1. Add. 117-23. Later, in even more direct terms, the sentencing judge declared that he "appear[ed] to be the first federal judge to consider varying upward from the Sentencing Guidelines *based on my policy disagreements* with the Sentencing Guideline's relatively lenient treatment of antitrust violations when compared to fraud sentences." Add. 140 (emphasis added).

Those remarks should dispel any doubt as to the court's thinking. If they do not, however, clarification comes from a subsequent opinion by the same judge, citing the Sentencing Memorandum in this case as "rejecting, on policy grounds, the relatively lenient treatment of antitrust violators in the Sentencing Guidelines, as compared to defendants sentenced for fraud." *United States v. Williams*, --- F. Supp.2d ----, 2011 WL 1336666, at *38 (N.D. Iowa Apr. 7, 2011) (Bennett, J.). The district judge, it seems, disagrees with the government's characterization of his ruling.

Ignoring the district court's clear explanations of its ruling, the government offers a revisionist characterization of that ruling. At least when contesting the *Kimbrough* error asserted by Mr. VandeBrake, the government interprets the district court's ruling as being case-specific and not reliant on a policy disagreement. Appellee's Br. 33, 34-44. Yet in responding to Mr. VandeBrake's concerns about sentencing disparities, the government startlingly contradicts itself, rationalizing Mr. VandeBrake's sentencing disparity because his "sentence was based in part on a *policy disagreement with the antitrust guideline*." Appellee's Br. 33 (emphasis added).

The government got it right the second time: Mr. VandeBrake's sentence was plainly and strongly driven by the district court's fundamental disagreement

with § 2R1.1. The government's ten pages of attempts to spin the district court's ruling otherwise are unavailing.

The government firsts suggests that the district court must not generically disagree with § 2R1.1 because co-defendant Stewart received a within-Guidelines sentence. Appellee's Br. 34-35. In fact, Stewart's sentence is entirely consistent with the district court's rejection of § 2R1.1 in favor of a fraud-based sentencing calculation. Indeed, for Stewart, just as for VandeBrake, the district court calculated an alternative, higher, fraud-based Guideline range. VandeBrake was sentenced within the fraud-based range, while Stewart was sentenced below it. *Compare* Add. 136, 143 *with* Add. 149, 152. The district court based Stewart's sentence on grounds that typically support downward variances: Mr. Stewart's conduct, in the district court's view, had the unusual feature of not being motivated by greed, Mr. Stewart had strong family support and a modest, unassuming lifestyle, and he had a negligible criminal history. Add. 86, 148, 151.

In substance, therefore, the district court determined that, as a general matter, antitrust defendants should be sentenced under the more severe fraud standards rather than under the antitrust Guideline. Having made that determination, however, the district court simply discerned reasons in Stewart's

case to vary downward from a fraud-based sentencing range. That downward variance placed Stewart within the range dictated by § 2R1.1.[4]

The government next defends the district court's claim that § 2R1.1 is flawed as-applied because it contains an "assumption" not supported by the record, namely that the size of antitrust mark-ups decline as a conspiracy's amount of commerce increases. The court found the Guideline's "assumption" does not apply to Mr. VandeBrake's offense because "GCC's price list was based on a per cubic yard price," so the "price for its concrete did not decrease with volume." Add. 126. Mr. VandeBrake pointed out in his opening brief that the district court's analysis incorrectly assumes that substantial concrete sales were made from the price lists without discounts, a proposition disproved by the record evidence. The government seeks to rehabilitate the district court's analysis by pointing to evidence that discounts were also fixed.

The government's response proves nothing. The fact that two sellers in the marketplace coordinated not only their undiscounted price sheets but their discounts as well does not say anything about the magnitude of the discounts

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[4] The government notes another defendant in this investigation was recently sentenced to 45 days' imprisonment. Appellee's Br. 35 n. 34. No written decision explaining that sentence has been issued, however.

relative to the quantity of concrete purchased. Nothing cited by the government is inconsistent with the typical economic behavior that merchants increase the size of their discounts with the quantity that is purchased.

The government also invokes four "unusual circumstances" of Mr. VandeBrake's case: (i) that concrete is a necessity product, (ii) that Mr. VandeBrake rigged the bids for public projects, (iii) that the conspiracies involved most of the sellers in the relevant markets, and (iv) that Mr. VandeBrake "double-crossed" a co-conspirator. Appellee's Br. 34-40. Mr. VandeBrake showed in his opening brief that these circumstances are routine in criminal antitrust cases. Appellant's Br. 37-40. The government contends that Mr. VandeBrake missed the district court's point. According to the government, the district court invoked the "unusual circumstances" to "support[] its conclusion that the antitrust guideline's 1-level increase for engaging in bid-rigging . . . was not commensurate with the truly serious nature of VandeBrake's bid-rigging." Appellee's Br. 40. But once it is conceded that the circumstances of Mr. VandeBrake's offense are ordinary – and the government never disputes that they are – the sufficiency of a 1-level adjustment for bid rigging is necessarily a matter of sentencing philosophy. The district court's conclusion that the 1-level adjustment is insufficient is thus a policy disagreement with – and rejection of – § 2R1.1. Put differently, the mundane

circumstances of Mr. VandeBrake's offense cannot support the government's argument that the district court's upward variance was based on case-specific facts.

Next, the government points to the district court's conclusion that § 2R1.1 is flawed as applied to Mr. VandeBrake because his Guidelines range was not impacted by the existence of Counts I and II. Appellee's Br. 41-42. Mr. VandeBrake identified in his opening brief that his range *was* impacted by those counts, as they exposed him to the one-point bid-rigging adjustment. Appellant's Br. 40. The government contends that Mr. VandeBrake again missed the court's point, which is that "the guideline did not, in the court's view, adequately address 'VandeBrake's perpetration of these three conspiracies, which inflicted harm across northwest Iowa.'" Appellee's Br. 42 (quoting Add. 125-26). But the government's logic, like the district court's, has nothing to do with the particular facts of Mr. VandeBrake's case.[5] It is, to the contrary, addressed to a question of

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[5] The government claims that Mr. VandeBrake's "multiple conspiracies" allowed him to "cartelize northwest Iowa." Appellee's Br. 42. But it is not clear why such "cartelization" is better accomplished through multiple small conspiracies than a single large one. Although the government speculates that multiple conspiracies might be harder to detect, it identifies no evidence or logic to support that view. More importantly, on these facts a single large conspiracy would have been *worse* for concrete purchasers than three smaller conspiracies. In the single conspiracy scenario, every purchaser from any conspirator would have paid marked-up prices. In the case of multiple conspirators scheming with Mr. VandeBrake but ignorant of each other, by contrast, markups would only occur in

sentencing policy. Thus, it does not support the government's argument that the district court sentenced Mr. VandeBrake based on case-specific facts, rather than its policy disagreement with § 2R1.1.[6]

Mr. VandeBrake received the longest pure antitrust sentence in history. The government cannot explain that fact by elevating the prosaic details of this typical case to some higher level of significance. This sentence is quite simply the product of a policy disagreement with the guidelines. It must be reviewed as such.

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the geographic area served by Mr. VandeBrake's company – a smaller zone than the footprint of all four companies. The government's argument, moreover, like district court's ruling, defies elementary sentencing law: When a Guidelines range depends on a "quantity" of something, multiple offenses are always calculated by aggregating the quantity across the offenses. U.S.S.G. § 3D1.3(b).

[6] The government also contends that the district court did not impose sentence based on its policy disagreement with § 2R1.1 because it actually sentenced Mr. VandeBrake because of his history and characteristics. Appellee's Br. 43. It is clear from the Sentencing Memorandum that the district court's analysis of Mr. VandeBrake's history and characteristics played a role in the sentencing decision. It is equally clear, however, that it did not displace the most critical factor at sentencing: the court's policy disagreement with § 2R1.1. Thus the history and characteristics portion of the Sentencing Memorandum takes up two paragraphs and a long footnote, with *substantially* more attention paid to matters of policy. *Compare* Add. 128-35 & n.41 *with id.* at 94-97, 117-23, 135-136, 140.

b. U.S.S.G. § 2R1.1 Exemplifies the Sentencing Commission's Characteristic Institutional Role.

It is unclear whether the government believes that § 2R1.1 does not exemplify the Sentencing Commission's "characteristic institutional role." *Kimbrough*, 552 U.S. at 109. Although the government never makes such an argument explicitly, it hints at it when it contends that § 2R1.1 is built on "nothing more than an assumption." Appellee's Br. 37. To the extent that the government is understood as arguing that § 2R1.1 is not grounded in the Commission's traditional role, and thus that closer review does not apply, it is mistaken.

In *Kimbrough*, the Supreme Court ruled that the crack/powder Guidelines do not merit deference because the Sentencing Commission did not ground them in "empirical data and national experience, guided by a professional staff with appropriate expertise." 552 U.S. at 108-9 (quotation omitted). Instead, the Court explained, the Commission merely "looked to the mandatory minimum sentences set" by Congress. *Id.* at 109. Mr. VandeBrake explained in his opening brief that § 2R1.1 was based on an assessment of past antitrust sentencing practices and thus embodies the Commission's characteristic institutional role. Appellant's Br. 27 (citing Mark A. Cohen and David T. Sheffman, *The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?*, 27 Am. Crim. L. Rev. 331, 336-38 (1989)).

The government does not dispute that the Commission used its traditional institutional tools in establishing § 2R1.1's overall framework. Instead it shifts the focus to a particular facet of that framework – the rate at which larger volumes of commerce produce higher sentences. The government claims that the district court's disagreement with § 2R1.1 is limited to that issue, specifically the fact that antitrust violations increase less rapidly than fraud offenses.[7] And, the government maintains, this feature of § 2R1.1 lacks empirical support. Thus the government says that it is "aware of no 'empirical data' or 'national experience,'" Appellee's Br. 37, corroborating the Commission's justification that the fraud/antitrust divergence exists "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." U.S.S.G. App. C, Amend. 377.

There are two problems with the government's argument. First, it misstates the district court's policy concern with § 2R1.1. The district court was not "mostly

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[7] The government claims that the Commission has said that antitrust and fraud sentences should be "comparable" or "proportionate." Appellee's Br. 36 n.36. The government misquotes the Commission, which said that its amendments to § 2R1.1 were designed to make fraud and antitrust penalties "*more* comparable" and "*more* proportionate." U.S.S.G. Manual App. C, Amends. 377 and 678 (emphasis added). While the Commission narrowed the gap between fraud and antitrust since the Guidelines' first iteration, it rejected full parity. *See* Appellant's Br. 27.

focused on the Commission's stated reason for increasing the offense level for antitrust violation less rapidly than for fraud."[8] Appellee's Br. 36. Rather, the court objected to the overall lenience shown antitrust violators as compared to fraud violators. The court made this point explicitly:

> After all, fraud schemes target only discreet [sic] segments of the general population while antitrust violations go to the heart of our economic free enterprise system because they have the possibility of negatively affecting the entire economy. Yet the penalties for Sherman Act violations are disproportionately lower than those for mail and wire fraud. Accordingly, the court concludes that the antitrust guideline § 2R1.1 is deserving of less deference.

Add. 123. The district court concluded that the Commission was wrong to treat fraud more harshly than antitrust. Because the government does not dispute that the Commission's decision on *that* issue exemplified its characteristic institutional role, the "closer review" called for in *Kimbrough* must apply.

The second problem with the government's attack on the Commission's volume of commerce table is that it misconstrues *Kimbrough*. The government suggests that § 2R1.1 does not merit judicial deference because no empirical evidence supports its justification for the volume of commerce table. True enough, the Sentencing Commission did not identify the source of its view that "on the

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[8] The district court did focus on the Commission's statement *as it applied to Mr. VandeBrake*. The court's "as applied" concern is discussed *supra* at 17-18.

average, the level of mark-up from an antitrust violation may tend to decline with the volume of commerce involved." But unlike math students, the Commission is not required to show its work. *Kimbrough* provides that when the Commission does not utilize expertise in establishing Guidelines – i.e., when it bases Guidelines on political concerns – those Guidelines are not entitled to deference. Here, the Commission determined that antitrust mark-ups may diminish as conspiracies grow. That was by no means a political determination. If the government believes it was wrong, it can ask the Commission to revisit the issue. *See* 28 U.S.C. § 991(a). The federal courts, however, are not an appropriate forum for second-guessing the Commission's work.

2. The District Court Failed to Consider the Unwarranted Disparity Created by Its Sentence.

In his opening brief, Mr. VandeBrake demonstrated that the district court committed procedural error by failing to meaningfully consider the unwarranted sentencing disparity created by its 48-month sentence. Mr. VandeBrake presented extensive statistical evidence showing that his sentence – tied for the longest in antitrust history – vastly exceeds national antitrust sentencing trends. He also offered examples of particular cases where more egregious conduct resulted in dramatically less harsh sentences.

The government does not contend that Mr. VandeBrake's sentence is in line with the sentences imposed on similarly situated antitrust offenders. Nor could it, given the evidence Mr. VandeBrake presented.[9] Instead, the government asserts that, under *Kimbrough*, the district court could dispense with unwarranted disparity analysis based on its finding that "the antitrust guideline did not fit VandeBrake's offensive conduct in this case." Appellee's Br. 45.

The government's conclusion does not follow from its premise. *Kimbrough* concerns a district court's policy disagreement with a Guideline in a mine-run case. 552 U.S. at 109-10. To the extent that it permits otherwise forbidden sentencing disparities, as discussed below, the disparities must arise from the diverging policy views of sentencing judges. The government, however, argues that *Kimbrough* permitted the district court here to dispense with disparity analysis based on its

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[9] The government does argue, in a footnote, that Mr. VandeBrake's evidence of national sentencing disparities is useless. Pointing to the supposed "great weight" the district court assigned to various facts in the case, the government asserts that it is "virtually impossible to compare VandeBrake to any of the vast statistics VandeBrake provides in his brief." Appellee's Br. 46 n.42. The government's position would render appellate review of sentencing disparities impossible. Every criminal case has facts varying in myriad ways from other cases, but that cannot prevent appellate courts from considering aggregate sentencing statistics. In any event, in addition to statistical evidence, Mr. VandeBrake pointed to particular cases with which his sentence is disproportionate, including the only other 48-month sentence in antitrust history. The government ignores those cases.

"conclusion" that § 2R1.1 does *not* "fit VandeBrake's offensive conduct," i.e., that VandeBrake's was *not* a mine-run case. Appellee's Br. 45. The argument is a non-sequitur. To the extent the government argues the district court's sentence was *not* based on policy disagreement, Appellee's Br. 34, the government cannot logically rely on *Kimbrough*, a case about policy disagreements, for anything.

As the government elsewhere concedes, at least in part, Appellee's Br. 33, the district court *did* sentence Mr. VandeBrake based on its policy disagreement with § 2R1.1. To the extent it makes that concession, the government's position appears to be that *Kimbrough* authorized the district court to dispense with disparity analysis *because* the court overrode § 2R1.1 as a matter of policy. That was essentially the district court's position. Add. 140.

Kimbrough rejects such an argument. *Kimbrough* recognized that sentencing courts are free – in appropriate circumstances – to determine that as a matter of sentencing policy, particular Guidelines do not reflect the sentencing factors in 18 U.S.C. § 3553(a). The Court further recognized that this freedom will inevitably lead to disparities based on the identity of sentencing judges. But, in language that the government ignores, the Court made abundantly clear that district court must ensure that, notwithstanding their policy views, sentences do not create unwarranted disparities:

> Section 3553(a)(6) directs *district courts* to consider the need to avoid unwarranted disparities – along with other § 3553(a) factors – when imposing sentences. Under this instruction, district courts must take account of sentencing practices in other courts and the "cliffs" resulting from the statutory mandatory minimum sentences. To reach an appropriate sentence, these disparities must be weighed against the other § 3553(a) factors and any unwarranted disparity created by the crack/powder ratio itself.

552 U.S. at 108 (citation omitted) (emphasis in original). Any claim that *Kimbrough's* policy prerogative trumps § 3553(a)(6) simply cannot be reconciled with *Kimbrough*.

The district court made no effort to ensure that its sentence was in step with similarly situated antitrust offenders. Indeed, the court openly refused to undertake such an endeavor, flouting both 18 U.S.C. § 3553(a)(6) and *Kimbrough*. As a result, Mr. VandeBrake's sentence is procedurally flawed.[10]

B. The District Court's 48-Month Sentence Is Substantively Unreasonable.

Mr. VandeBrake argued in his opening brief that, in addition to being pervaded by procedural error, the district court's 48-month sentence is

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[10] In a footnote, the government suggests that Mr. VandeBrake did not preserve an objection based on unwarranted sentencing disparities. Appellee's Br. 45 n.41. In fact, the issue was preserved. *See, e.g.*, Def.'s Supplemental Sentencing Mem. (Clerk's No. 43) at 7-8. Because it was, Mr. VandeBrake may present additional support for his argument on appeal. *See Sexton v. Martin*, 210 F.3d 905, 914 n.8 (8th Cir. 2000).

substantively unreasonable. In response, the government asserts this is a "rehash" of Mr. VandeBrake's procedural error argument. Appellee's Br. 49. The government is mistaken.

While they overlap, substantive review of a sentence's reasonableness differs from procedural review. As pertinent here, procedural review focuses on whether the district court adequately considered the § 3553(a) factors, while substantive review inquires whether it balanced them properly. *See United States v. Tabor*, 531 F.3d 688, 691-92 (8th Cir. 2008).

Mr. VandeBrake contended in his opening brief that the district court misbalanced the sentencing factors in the following ways:

- The court overweighed its philosophical views on antitrust enforcement. Appellant's Br. 54.
- The court underweighed the fact that Mr. VandeBrake's offenses were local in scope and limited in commerce affected. Appellant's Br. 55.
- The court gave no weight to Mr. VandeBrake's mitigating history and characteristics. Appellant's Br. 55-56.
- The court gave no weight to the evidence that Mr. VandeBrake took responsibility for his offenses. Appellant's Br. 56.
- The court underweighed the immensity of the sentencing disparity created by its sentence. Appellant's Br. 57.

The government ignores Mr. VandeBrake's argument that the district court misbalanced the sentencing factors and evidence. It also ignores that the district court gave the longest antitrust sentence *in history* for a small-scale, local offense. The government's conspicuous failure to address that fact confirms the sentence's substantive indefensibility.

C. The District Court's Alternative Imposition of Consecutive Sentences Does Not Impact This Appeal.

The district court imposed "alternative" consecutive sentences of 15 months on Count I, 6 months on Count II, and 27 months on Count III. Add. 143. 18 U.S.C. § 3584 authorized the district court to impose consecutive sentences only if they were warranted by the § 3553(a) sentencing factors. Because the district court expressly incorporated its earlier § 3553(a) analysis when it imposed the "alternative" sentence, Mr. VandeBrake explained in his opening brief that the consecutive sentences create no additional issues for this appeal.

It is unclear whether the government disagrees. The government asserts that "VandeBrake is wrong" to argue that the district court's § 3553(a) analysis cannot support consecutive sentences. Appellee's Br. 50. The government's reasoning, however, duplicates its argument in support of the primary 48-month sentence. If the government believes that the alternative sentence can be affirmed even if the

primary sentence is not, it identifies no evidence or legal argument to support its position.

III. THE DISTRICT COURT'S IMPOSITION OF THE CRIMINAL FINE CONSTITUTED PROCEDURAL ERROR.

The district court was required to consider the § 3553(a) sentencing factors in setting Mr. VandeBrake's fine. Mr. VandeBrake argued in his opening brief that it did not. The government acknowledges that the portion of the Sentencing Memorandum addressing the fine does not cite § 3553(a). Nonetheless, the government maintains that it is "clear from the record" that the district court considered the required factors. Appellee's Br. 53. The record does not support the government's view.

The government relies principally on the fact that the portion of the Sentencing Memorandum addressing the fine is a subsection ("F.2.g. Fine.") under 9 heading for § 3553(a) ("F. Do § 3553(a) Considerations Justify a Variance?"). There are two problems with the government's position. First, it ignores the structure of heading "F." The first five subsections of heading "F.2" address the § 3553(a) factors in turn, focusing *exclusively* (with the exception of the inapposite restitution factor) on determining Mr. VandeBrake's prison sentence. Only when this § 3553(a) analysis was *complete* – i.e., only when the court was done with § 3553(a) – did the court turn to the fine.

The second problem with the government's position is that it ignores the content of F.2.g. The court never considered *whether* the § 3553(a) factors support an upward variance from the Guidelines fine or, if they did, *what size* of variance they warranted. *See Gall v. United States*, 552 U.S. 38, 50 (2007) (noting that appellate court must require a "sufficiently compelling" justification to support the "*degree* of [a] variance" (emphasis added)). And when the district court identified the factors on which it based the fine, all were derived from 18 U.S.C. § 3572(a). Because it is thus "clear from the record" that the district court *did not* consider the § 3553(a) factors when it imposed Mr. VandeBrake's fine, it committed procedural error.[11] *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc).

CONCLUSION

For the foregoing reasons and those set forth in Mr. VandeBrake's opening brief, this Court should vacate the judgment and remand the case for further

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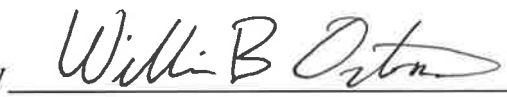
[11] The government also cites the court's conclusory statement that: "In light of its analysis of the § 3553(a) factors above, the court finds that a sentence of 48 months of imprisonment and a fine of $829,715.85 is appropriate and, therefore, is sufficient, but not greater than necessary, to accomplish the goals of sentencing." Add. 143. This is far from an adequate explanation of the fine. *See United States v. Klups*, 514 F.3d 532, 537 (6th Cir. 2008) ("[W]hen the judge makes only a 'conclusory reference' to the § 3553(a) factors . . . this court will find the sentence unreasonable.").

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 

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CERTIFICATE OF TYPE-VOLUME COMPLIANCE

I hereby certify that this Appellant's Reply Brief, which was prepared using Microsoft Word 2007, contains 6,982 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 July 22, 2011, I filed the foregoing through the Eighth Circuit Court of Appeals CM/ECF filing system.

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