No. 04-414

In the Supreme Court of the United States

ELIZABETH R. ROACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Fifth or Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

2. Whether, when a court of appeals concludes that a party failed to meet its burden of proving its entitlement to an adjustment or departure under the Sentencing Guidelines, the party may present supplemental evidence after the case has been remanded for resentencing.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 372 F.3d 907.[1] The opinion of the district court (Pet. App. C1-C9) is not published in the *Federal Supplement*, but is *available at* 2003 WL 21183997. An earlier opinion of the court of appeals (Pet. App. D1-D16) is reported at 296 F.3d 565.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 2004. The petition for a writ of certiorari was filed on September 22, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The appendix to the petition includes the opinion of the court of appeals (Pet. App. A1-A6) but omits a portion of it (compare *id.* at A2 with 372 F.3d at 908).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Illinois, petitioner was convicted of wire fraud, in violation of 18 U.S.C. 1343. The district court sentenced her to five years of probation and a fine of $30,000, and ordered her to pay $241,061.08 in restitution. The court of appeals reversed. On remand, the district court sentenced petitioner to a year and a day of imprisonment, to be followed by two years of supervised release, and a fine of $10,000, and again ordered her to pay $241,061.08 in restitution. The court of appeals affirmed. App., *infra*, 1a-7a.

1. Petitioner suffered from chronic depression. For most of her adult life, she coped with the ailment by engaging in unnecessary, excessive, and compulsive shopping. Her shopping binges put a severe strain on her marriage, and she tried to hide her behavior from her husband by having credit-card statements sent to the homes of friends and manipulating entries in the couple's checkbook. When her husband tried to prevent her from using their credit cards, she got new ones. Although the couple had a combined annual income of more than $300,000, as well as significant equity in a condominium in Chicago, petitioner carried tens of thousands of dollars in credit-card debt from purchases of clothing and jewelry at stores like Neiman Marcus and Barneys New York. Petitioner once charged $10,000 on a credit card on the same day she obtained it. Pet. App. D2.

Petitioner's criminal conduct began soon after she was hired by Andersen Consulting (Andersen) as a manager. (She later became an associate partner with an annual salary of $150,000.) After paying the regis-

tration fees for a conference with a personal credit card, petitioner decided that she could not attend the conference, and the registration fees were refunded. By then, however, Andersen had processed her expense request and reimbursed her for the fees. Petitioner was aware that she should return the money to her employer, but she kept it, realizing that she could use it to pay some of her debt. After that incident, and for three years until she was fired, petitioner fraudulently obtained more than $240,000 from Andersen by submitting reports with hundreds of falsified expenses. Pet. App. D2-D3.

2. Petitioner pleaded guilty to one count of wire fraud, in violation of 18 U.S.C. 1343. After increases in her offense level based on the amount of the loss and the fact that the offense involved more than minimal planning, petitioner's total offense level was 13 and her Sentencing Guidelines range was 12 to 18 months of imprisonment. Contending that she suffered from diminished capacity, petitioner moved for a downward departure under Sentencing Guidelines § 5K2.13. The district court granted the motion, finding that petitioner's offense was caused by her compulsive shopping and depression and that she had a significantly impaired ability to control her behavior. The court sentenced petitioner to five years of probation, including six weeks of work release and six months of home confinement. Pet. App. D4-D5.

3. The government appealed, and the court of appeals vacated the sentence and remanded for resentencing. Pet. App. D1-D16. The court held that a departure on the basis of diminished capacity must rest on an assessment of the defendant's mental capacity at the time of the offense, which in this case was the time at which petitioner submitted the false expense reports.

Id. at D10-D12. The court concluded that, if the district court's departure was not based on such an assessment, it constituted an incorrect application of the Guidelines. *Id.* at D12. The court of appeals also concluded that, if the departure *was* based on such an assessment, it was unsupported by the evidence. *Id.* at D12-D15. In either event, the court held, the departure was an abuse of discretion. *Id.* at D16.

4. On remand, petitioner sought leave to file a renewed motion for a downward departure and offered to introduce additional information about her inability to control her conduct at the time she submitted the false expense reports. Pet. App. C2. Over the government's objection, the district court allowed petitioner to renew her motion. *Ibid.* The government then moved for reconsideration. *Id.* at C5-C6. It relied (see *ibid.*) on the Seventh Circuit's then-recent decision in *United States* v. *Sumner*, 325 F.3d 884, cert. denied, 540 U.S. 897 (2003), which interpreted the Seventh Circuit's earlier decision in *United States* v. *Wyss*, 147 F.3d 631 (1998).

The district court granted the government's motion for reconsideration and denied petitioner's renewed motion for a downward departure. Pet. App. C1-C9. Relying on what *Sumner* called the "*Wyss* rule," *id.* at C7-C8, the district court held that, if "a sentencing factor or departure motion is fully litigated in the district court" and "the district court's ruling is reversed due to insufficiency of the evidence supporting the ruling," then "the party bearing the burden of proof is not entitled to an opportunity to correct the defect on remand, absent a showing of special circumstances," *id.* at C8. Applying that principle, the district court concluded that the court of appeals had found the evidence supporting the downward departure insufficient and

that petitioner was not entitled on remand "to attempt to plug the gap" in the record. *Id.* at C9. The district court also concluded that petitioner had identified no "special circumstances" that justified an exception to the "*Wyss* rule." *Id.* at C8. The court subsequently sentenced petitioner to a prison term of a year and a day. App., *infra*, 4a.

5. Petitioner appealed the sentence, and the court of appeals affirmed. App., *infra*, 1a-7a.

The court rejected petitioner's contention that its remand order had established a "clean slate" that authorized a rehearing on her request for a downward departure. App., *infra*, 4a-5a. Citing its decision in *Wyss*, where it "precluded the government from presenting additional evidence on an enhancement during the resentencing hearing," the court said that the concept of a "clean slate" allows a district court to effectuate its original sentencing intent, but does not permit a court to reopen issues that have been fully heard. *Id.* at 5a (citing 147 F.3d at 633). The court of appeals went on to say, however, that "this limit is not absolute." *Ibid.* Quoting *Sumner*, the court explained that, if an issue "received no attention" at the initial sentencing hearing and was "reviewed on appeal under the plain error standard," it may be appropriate to admit additional evidence. *Ibid.* (quoting 325 F.3d at 888). The court contrasted that situation with one in which "an issue has been fully explored," and in which "the party bearing the burden of proof" is therefore "precluded from presenting additional evidence." *Ibid.* The court observed that the "*Wyss* rule" applies equally to defendants and the government, such that, "[w]hen either party fails to meet the burden to prove a guidelines' sentencing departure or enhancement, it cannot

use the opportunity of a remand to supplement the record in its favor." *Id.* at 6a.

Applying these principles, the court of appeals concluded that the issue of petitioner's mental capacity had been "fully explored" at the initial sentencing, and that she "was not entitled to a second bite at the apple on remand." App., *infra*, 5a-6a. The court noted that petitioner had submitted "three doctors' statements," and had detailed her "binge shopping history" and "the activities surrounding those binges," in support of her contention that "she was significantly impaired at the time she committed the offense" and therefore qualified for a departure. *Id.* at 6a.

DISCUSSION

1. Petitioner first contends (Pet. 10-14) that her sentence was imposed in violation of the rule announced in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). In *United States* v. *Booker*, No. 04-104 (Jan. 12, 2005), and *United States* v. *Fanfan*, No. 04-105 (Jan. 12, 2005), this Court held that *Blakely* applies to the United States Sentencing Guidelines. *United States* v. *Booker*, No. 04-104 (Jan. 12, 2005), slip op. 5-20 (Stevens, J., for the Court). In answering the remedial question in those cases, the Court then applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Id.* at 2-26 (Breyer, J., for the Court). With respect to question one in the petition, therefore, the appropriate disposition is to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Booker* and *Fanfan*. The court of appeals can then decide what effect, if any, those decisions have on petitioner's sentence, taking into account any applicable

doctrines of waiver, forfeiture, and harmless error. See *id.* at 25-26.

2. Petitioner next contends (Pet. 15-20) that a party must be permitted to present supplemental evidence in district court after a court of appeals has remanded the case for resentencing. In rejecting that contention, the court of appeals held that, "if an issue has been fully explored" at the initial sentencing, "the party bearing the burden of proof" is "precluded from presenting additional evidence" on the issue at resentencing. App., *infra*, 5a. The court of appeals' holding is correct, and further review on that question is unwarranted.

a. Petitioner contends (Pet. 15-19) that the court of appeals' decision conflicts with other decisions of the Seventh Circuit; with decisions of other courts of appeals; with a decision of this Court; with a federal statute; and with the Constitution. Each of these contentions is without merit.

i. Petitioner is mistaken in her suggestion (Pet. 15-16) that the decision below conflicts with the Seventh Circuit's prior decisions in *United States* v. *Polland*, 56 F.3d 776 (1995), and *United States* v. *Parker*, 101 F.3d 527 (1996), because those cases addressed a different question. Unlike this case, which presents the question whether, when the court of appeals finds error with respect to a particular issue and remands for resentencing, the district court may consider new evidence on that issue, *Polland* and *Parker* addressed the question whether, when the court of appeals remands for resentencing on one issue, the district court may consider *other* issues. (Both cases hold that it may not. See *Polland*, 56 F.3d at 777-779; *Parker*, 101 F.3d at 528.) In any event, review would be unwarranted even if the decision below *were* inconsistent with *Polland* and *Parker*, because this Court does not grant certi-

orari to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

ii. Petitioner is also mistaken in her contention (Pet. 16-17 & n.3) that the decision below conflicts with decisions of other courts of appeals. None of the five decisions on which petitioner relies held that, after a court of appeals finds error with respect to an issue and remands for resentencing, the party with the burden of proof has a right to offer additional evidence even when the issue was "fully explored" (App., *infra*, 5a) at the initial sentencing.

In one of the cases on which petitioner relies, *United States* v. *Behler*, 100 F.3d 632 (1996), cert. denied, 522 U.S. 855 (1997), the Eighth Circuit addressed the same question that the Seventh Circuit addressed in *Polland* and *Parker*: whether, when the remand is limited to particular issues, a party may litigate other issues at resentencing. (Like the Seventh Circuit in those cases, the Eighth Circuit answered that question no. See *id.* at 635-636.) Three other decisions cited by petitioner did not involve a party's attempt to offer new evidence at resentencing at all.[2] And while the case on which

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[2] See *United States* v. *Rodgers*, 278 F.3d 599, 601-603 (6th Cir.) (in reaching same result at resentencing, district court relied on evidence that was before court at initial sentencing), cert. denied, 535 U.S. 946 (2002); *United States* v. *Stinson*, 97 F.3d 466, 467-470 (11th Cir. 1996) (per curiam) (after district court denied upward departure at initial sentencing and court of appeals issued decision that reduced defendant's Guidelines range, district court granted upward departure at resentencing and imposed same sentence it initially imposed), cert. denied, 519 U.S. 1137 (1997); *United States* v. *Moreno-Hernandez*, 48 F.3d 1112, 1114, 1117 (9th Cir.) (after district court imposed concurrent sentences on four counts totaling 125 months and court of appeals held that maximum sentence on count four was 60 months, district court imposed consecutive sentences totaling 120 months), cert. denied, 515 U.S. 1151 (1995).

petitioner places principal reliance, *United States* v. *Matthews*, 278 F.3d 880 (9th Cir.) (en banc), cert. denied, 535 U.S. 1120 (2002), did hold that, as a general matter, the court will remand for resentencing without any limits on the evidence the district court may receive, *id.* at 885, it also made clear that the court takes a different approach "where there was a failure of proof after a full inquiry into the factual question at issue," *id.* at 886. The court thus remanded without limits on the development of the record because, as a result of an "erroneous legal determination," the district court "did *not* fully consider the relevant factual issue" at the initial sentencing. *Id.* at 888 (emphasis added). The holding of the Ninth Circuit in *Matthews* is therefore consistent with the holding of the court below.

iii. Petitioner also suggests (Pet. 18) that the decision below conflicts with this Court's statement in *United States* v. *Shotwell Manufacturing Co.*, 355 U.S. 233 (1957), that, "upon appellate reversal of a conviction[,] the Government is not limited at a new trial to the evidence presented at the first trial, but is free to strengthen its case in any way it can by the introduction of new evidence." *Id.* at 243. Since this statement addresses retrial after reversal of a conviction, not resentencing after vacatur of a sentence, the decision below does not conflict with *Shotwell*. Petitioner argues that vacatur of a sentence "should [not] be treated differently" (Pet. 18), but the vacatur of a sentence for failure of proof *is* different from a reversal of a conviction for trial error. "[W]hen either party fails to meet its burden to prove a guidelines' sentencing departure or enhancement, it cannot use the opportunity of a remand to supplement the record in its favor," App., *infra*, 6a, or resentencing could go on

forever. In contrast, when retrial is required because of trial error—for example, an incorrect jury instruction—it makes sense to allow the parties to present whatever admissible evidence they have. That is not giving a party a "second bite at the apple," *ibid.*, but is simply ensuring one fair hearing of a case.

iv. Petitioner is also mistaken in her contention (Pet. 18) that the court of appeals' decision conflicts with 18 U.S.C. 3661, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Section 3661 is a rule of evidence, not a rule of procedure. It expresses the principle that, "[i]n determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial." Sentencing Guidelines § 6A1.3, comment. (citing 18 U.S.C. 3661). See also *Booker*, slip op. 8 (Breyer, J., for the Court) (18 U.S.C. 3661 furthers "real conduct" sentencing). Section 3661 says nothing about whether a party may be barred from offering information admissible under the statute if the party had an opportunity to offer the information earlier but failed to do so. Like any other rule of evidence, Section 3661 is subject to procedural rules, including the doctrines of waiver, forfeiture, and estoppel.

v. Petitioner's final contention is that her position is supported by "due process considerations." Pet. 19. She argues that the parties "did not have [the] benefit" of the court of appeals' interpretation of Sentencing Guidelines § 5K2.13 at the initial sentencing, and that "simple fairness dictates that [she should have been] afforded an opportunity to satisfy the standard articu-

lated by the court on appeal." Pet. 19. That contention is likewise without merit.

As an initial matter, the premise of petitioner's "due process" argument—that the legal standard applied by the district court at resentencing was different from the one applied at the initial sentencing—is mistaken. In the first appeal, the court of appeals held that Section 5K2.13 "requires an assessment of the defendant's mental capacity at the time of the offense." Pet. App. D11-D12. The court said that, if the district court did *not* apply that principle at the initial sentencing, its departure was an incorrect application of the Guidelines, and that, if it did apply that principle, the departure was unsupported by the evidence. *Id.* at D12-D15. If, on remand, the district court was of the view that it had not applied the correct legal principle at the initial sentencing, the court might have appropriately received additional evidence at the resentencing. The district court itself so recognized. *Id.* at C8-C9. But the district court was not of that view. Its conclusion that "the *Wyss* rule" applied (*id.* at C9), and that petitioner was "not entitled on remand to attempt to plug the gap * * * in the original record" (*ibid.*), presupposed that the district court applied the correct legal standard at the initial sentencing but found the relevant facts on the basis of insufficient evidence. Under these circumstances, there was nothing unfair about precluding petitioner from offering additional evidence at her resentencing.

Even if the district court *had* applied a different legal standard at the initial sentencing, petitioner had ample notice that the standard was incorrect. In its decision vacating the initial sentence, the court of appeals relied (Pet. App. D10) on its conclusion in *United States* v. *Frazier*, 979 F.2d 1227, 1230 (7th Cir. 1992), that

"Section 5K2.13 focuses the inquiry on the defendant's mental capacity *when she committed the offense*." Because *Frazier* was decided more than eight years before petitioner was initially sentenced (see Pet. App. C1), it was hardly unfair to require her to offer evidence that satisfied that standard.

b. Even if the second question in the petition otherwise warranted review by this Court, it would be premature to grant certiorari given the decisions in *Booker* and *Fanfan*. As a consequence of those decisions, the Guidelines are advisory rather than mandatory. See *Booker*, slip op. 2-26 (Breyer, J., for the Court). Federal sentences are now reviewable under that system for reasonableness. See *ibid.* It is not yet known whether the rule at issue here will continue to be applied, and if so, how. The lower courts should be given an opportunity to decide what bearing, if any, *Booker* and *Fanfan* have on the second question in the petition before this Court does so.

CONCLUSION

On the first question presented, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *Booker* and *Fanfan*. On the second question presented, the petition should be denied.

Respectfully submitted.

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JANUARY 2005

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-3078

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ELIZABETH R. ROACH, DEFENDANT-APPELLANT

Submitted: Jan. 9, 2004*
Decided: June 24, 2004

Before: POSNER, EVANS, and WILLIAMS, Circuit Judges.

WILLIAMS, Circuit Judge.

In this successive appeal we consider for the second time the propriety of Elizabeth R. Roach's sentence for her conviction for wire fraud. Roach contends that our remand order vacating the district court's sentence permitted the court to consider additional evidence regarding the vacated downward departure for diminished capacity. Therefore, she reasons, the district court erred at the resentencing hearing when it did not allow expert testimony regarding her state of mind at

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* We have concluded, after an examination of the briefs and the record, that oral argument is unnecessary. The appeal is, therefore, submitted on the briefs and the record. *See* Fed. R. App. P. 34(a)(2).

the time she committed the charged offense. We disagree. For the reasons stated below, we affirm.

I. BACKGROUND

We assume familiarity with the general facts of this case as set forth in *United States v. Roach*, 296 F.3d 565 (7th Cir. 2002) (*Roach I*). We will repeat only those facts pertinent to this appeal. Roach pled guilty to wire fraud in violation of 18 U.S.C. § 1343, for knowingly executing a scheme to defraud her employer of more than $240,000. The scheme involved padding her expenses, submitting false expense reports, requesting reimbursement for conferences that she registered for but did not attend, resubmitting expense reports that were already paid, and falsely labeling personal expenses as business expenses. She used the embezzled funds to repay credit card debts that she accrued from excessive purchases of jewelry and clothes.

In *Roach I*, the district court concluded, and we agreed, that Roach suffers from chronic depression and turned to what her doctors described as compulsive shopping to relieve that depression. Her actions caused enormous strain on her marriage as she consistently engaged in behavior to hide her shopping binges from her husband. For years, she underwent psychiatric therapy for her depression and shopping disorder.

A. The Original Sentence and First Appeal

At Roach's original sentencing hearing, the district court granted her motion for a downward departure based on diminished capacity pursuant to U.S.S.G. § 5K2.13.[1] As explained in detail in *Roach I*, absent the

[1] Section 5K2.13 provides in pertinent part: "A sentence below the applicable guideline range may be warranted if (1) the defen-

downward departure, Roach would have been required to serve a minimum of 12 months in prison. *See Roach I*, 296 F.3d at 567. The court sentenced Roach to five years of probation, six weeks of work release at the Salvation Army Center, six weeks of home confinement with weekend electronic monitoring, and prohibited her from obtaining credit cards without the court's prior permission.

On appeal in *Roach I*, 296 F.3d at 571, we held that the record lacked sufficient evidence to conclude that Roach suffered from a significantly impaired mental capacity when she committed the offense. Accordingly, we found that the district court abused its discretion in granting the downward departure and we remanded her case for resentencing consistent with our ruling. *Id.* at 573.

B. The Resentencing

The district court, over the government's objections, granted Roach's motion for leave to file a renewed motion for downward departure. Roach intended to use expert witnesses to prove that her mental capacity was significantly impaired at the time she committed the offense. Prior to the admission of any evidence, the government filed a motion to reconsider based on supplemental authority, in light of *United States v. Sumner*, 325 F.3d 884 (7th Cir. 2003). In granting the government's motion, Judge Kennelly opined that under *Sumner:*

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dant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense."

> if a sentencing factor or departure motion is fully litigated in the district court, and the district court's ruling is reversed due to insufficiency of the evidence supporting the ruling, then the party bearing the burden of proof is not entitled to an opportunity to correct the defect on remand, absent a showing of special circumstances justifying such an opportunity.

Mem. Op. & Order at 7. After granting the government's motion, the district court sentenced Roach, without the downward departure, to 12 months and one day of imprisonment. Roach appeals, arguing that the district court should have allowed her to supplement the record with additional evidence regarding her mental capacity.

II. DISCUSSION

Roach's contention that the district court erred in not fully revisiting the issue of her mental capacity at the time she committed her offense is a question of law that we review de novo. *United States v. Husband*, 312 F.3d 247, 251 (7th Cir. 2002).

Roach's insistence that our remand order subjected her resentencing to a "clean slate," and, therefore, a rehearing on her request for a downward departure, is incorrect. The "clean slate" analogy, like the parallel "unbundling of the sentencing package" analogy, refers to a district court's ability to restructure sentences after part or all of the sentence is severed or vacated. *See United States v. Polland*, 56 F.3d 776, 778-79 (7th Cir. 1995) (vacating a sentence results in a "clean slate" for the district court to resentence); *United States v. Noble*, 299 F.3d 907, 910 (7th Cir. 2002) (*Noble I*) ("[I]t is settled that after the appellate court vacates the

sentence on a particular count, the district court on remand may adjust the entire sentencing 'package.'"). These concepts allow a district court to effectuate its original sentencing intent, *see United States v. Binford*, 108 F.3d 723, 728-29 (7th Cir. 1997), but they do not permit the district court to reopen fully heard issues anew. We articulated this limit in *United States v. Wyss*, 147 F.3d 631 (7th Cir. 1998), where we precluded the government from presenting additional evidence on an enhancement during the resentencing hearing, stating: "The government was entitled to only one opportunity to present evidence on the issue." *Id.* at 633; *see also United States v. Noble*, 367 F.3d 681, 682 (7th Cir. 2004) (*Noble III*) (holding that "the government is not permitted on remand to try again and submit new evidence in a belated effort to carry its burden."); *United States v. Leonzo*, 50 F.3d 1086, 1088 (D.C. Cir. 1995) (holding that the government should not get a "second bite at the apple" after remand, as the government bore the burdens of production and persuasion). *But see United States v. Matthews*, 278 F.3d 880, 889 (9th Cir. 2002) (en banc) (holding that a district court can generally consider additional evidence for remanded sentencing guidelines issues). We clarified in *Sumner*, 325 F.3d at 888, however, that this limit is not absolute, as there is a "difference between an issue that was fully explored at the initial sentencing hearing and one that received no attention, but was nonetheless reviewed on appeal under the plain error standard." In the latter case it may be appropriate to admit additional evidence, whereas if an issue has been fully explored, the party bearing the burden of proof should be precluded from presenting additional evidence. *See id.* at 889.

Here, the district court rightly declined to allow Roach to supplement the record at her resentencing, as Roach's mental capacity was fully explored at her initial sentencing hearing. In fact, the record demonstrates both that the government objected to the application of the downward departure and that Roach presented evidence in support of her contention that she was significantly impaired at the time she committed the offense. Indeed, Roach submitted three doctors' statements, her binge shopping history, and the activities surrounding those binges in her attempt to persuade the court that she qualified for the downward departure. In *Wyss* and *Noble III*, we held that the government fully explored the sentencing enhancement issue after submitting testimony to prove drug quantity. *Wyss*, 147 F.3d at 633 (presenting defendant's testimony); *Noble III*, 367 F.3d 681, 682 (presenting government witness's testimony). And, just as in those cases, we find that Roach was not entitled to a second bite at the apple on remand.

Although this is our first application of the *Wyss* rule to defendants, Roach, correctly, does not argue that the rule should apply to the government but not to defendants. Just as the government has the burden when seeking a sentence enhancement, *United States v. Sienkowski*, 359 F.3d 463, 466 (7th Cir. 2004), Roach had the burden of establishing that she was entitled to a downward departure. *See United States v. Chavez-Chavez*, 213 F.3d 420, 422 (7th Cir. 2000) (noting that the defendant bears the burden when seeking a downward departure). When either party fails to meet its burden to prove a guidelines' sentencing departure or enhancement, it cannot use the opportunity of a remand to supplement the record in its favor.

III. CONCLUSION

For the reasons stated above, the judgment of the district court is AFFIRMED.