No. 11-1390

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STEVEN KEITH VANDEBRAKE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

RESPONSE TO PETITION FOR REHEARING OR REHEARING EN BANC

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MISCELLANEOUS

As even a cursory examination of the district court's 59-page sentencing opinion reveals, the sentence imposed on Steven VandeBrake was based on an exhaustive analysis of all of the relevant 18 U.S.C. § 3553(a) factors, and only partly on the court's disagreement with the application of the Antitrust Sentencing Guideline, U.S.S.G. § 2R1.1, in this particular case. *See United States v. VandeBrake*, 771 F. Supp. 2d 961 (N.D. Iowa 2011). The sentence imposed by the district court reflected its view of the particular facts of this case, including the defendant's greed and total lack of remorse, as well as the court's thoroughly explained conclusion that sentencing VandeBrake within the advisory Antitrust Guideline's range would not result in an appropriate sentence. Under these circumstances, this Court correctly affirmed VandeBrake's sentence, and that case-specific result raises no issue appropriate for further review by the Court.

STATEMENT

VandeBrake pled guilty to a three-count Information that charged him with conspiring to fix prices and rig bids in the ready-mix concrete industry in northwest Iowa. When sentencing VandeBrake and one of his co-conspirators, Kent Stewart, the court explained: "I have given . . . the two sentences in this case, more thought than I have any other sentence that I've imposed, over 2,600 sentences." Gov't-App. 15. Although the court expressed dissatisfaction with the Antitrust Guideline when it sentenced Stewart for his single conspiracy, *see* 771 F.

Supp. 2d at 1014-16, after thoroughly evaluating the § 3553(a) factors the court concluded that a sentence at the bottom of Stewart's advisory Antitrust Guideline range of 12-18 months was "sufficient but not greater than necessary" to comply with the purposes set forth in 18 U.S.C. § 3553(a). Gov.-App. 19. When sentencing VandeBrake, however, the court listed several factors supporting its conclusion that a sentence within VandeBrake's advisory Antitrust Guideline range would not result in an appropriate sentence for his multiple crimes. In fact, the court found that virtually all of the § 3553(a) factors supported an upward variance.

The court began by considering the nature of the offense, the kinds of sentences available, and the need for the sentence imposed. *See* § 3553(a)(1)-(4). First, the court concluded that, by engaging in three separate conspiracies, VandeBrake's anticompetitive conduct "effectively created his own concrete cartel" in northwest Iowa that gave local governments "little or no choice" but to accept rigged bids. 771 F. Supp. 2d at 1004. Thus, the Antitrust Guideline's 1-level increase for submitting non-competitive bids, *see* U.S.S.G. § 2R1.1(b)(1), did not correlate to the harm VandeBrake inflicted. The court also noted that VandeBrake's volume of commerce adjustment for all three conspiracies under § 2R1.1(b)(2) – two levels for being more than $1 million but less than $10 million – would be the same if VandeBrake had been convicted only on Count 3, which

had a volume of commerce of $4.98 million. Thus, VandeBrake's advisory Antitrust Guideline sentence was "not increased whatsoever as a result of his involvement in multiple conspiracies." 771 F. Supp. 2d at 1004.

The court further explained that because VandeBrake's price-fixing conspiracies involved setting per cubic yard prices on his annual price lists that did not vary with a given customer's volume, the Guideline's assumption that "on the average, the level of mark up from an antitrust violation may tend to decline with the volume of commerce involved," *see* U.S.S.G. app. C, Amend. 377, did not apply to VandeBrake's price-fixing.[1] 771 F. Supp. 2d at 1005. Finally, the court noted that in estimating the loss caused by VandeBrake at $566,634, the Antitrust Guideline provided a 2-level increase resulting in a range of 21-27 months, but that the Fraud Guideline, § 2B1.1(b)(1)(H), would require a 14-level increase for a comparable amount of loss, resulting in a range of 46-57 months.[2] *Id*. The court concluded that these factors all weighed in favor of an upward variance. 771 F. Supp. 2d at 1005.

The court also gave substantial weight to VandeBrake's history and characteristics. *See* § 3553(a)(1). The court found that VandeBrake was involved

[1] This is the reason the Sentencing Commission gave for its decision to increase an antitrust defendant's offense level less rapidly than a fraud defendant's, given comparable amounts of losses caused. *See* U.S.S.G. app. C, Amend. 377.

[2] The Sentencing Commission estimates that the loss caused by an antitrust violation exceeds 10% of the defendant's volume of commerce in the products or services at issue. *See* U.S.S.G. § 2R1.1 cmt. 3.

in three simultaneous conspiracies, that he initiated two and possibly all three, that he acted purely out of greed, was uniquely remorseless, and had not performed even a single good deed for his community. 771 F. Supp. 2d at 1004-08. It concluded that those factors "warrant[ed] more significant punishment than the advisory guidelines might mete out." *Id*. at 108.

Ultimately, the court concluded that the § 3553(a) factors required an upward variance for VandeBrake's sentence from the Antitrust Guideline's range of 21-27 months, to 48 months. *Id*. at 1012-13. Although the court recognized that its sentence created a disparity with prior sentences for antitrust violations, it concluded that the disparity was not unwarranted given its views concerning the Antitrust Guideline and the specific facts of this case.[3] *Id*. at 1010-11.

This Court affirmed, noting that "the district court not only explained at great length why it was concerned about § 2R1.1 in general, but more importantly, explained how the guideline applied to (or rather, did not adequately account for) VandeBrake's particular offense conduct." Slip op. 14. The majority explained that the court's variance "was based only in part on its general policy disagreement with the antitrust guidelines. More significantly . . . the district court's sentencing decision was primarily based on how the antitrust guideline applied to VandeBrake

[3] The court also found that a variance from the guideline's fine range of 1-5% of VandeBrake's volume of commerce was warranted. 771 F. Supp. at 1012.

in particular, as well as the district court's consideration of individual characteristics of this defendant untethered to the antitrust guideline (i.e., VandeBrake's lack of remorse)." *Id*. at 15. Because "the district court's policy disagreement was based in large part upon case-specific circumstances," and because the "court considered appropriate factors in varying from the guidelines, and adequately explained its sentence," the majority found "no basis for concluding the final sentence is substantively unreasonable." *Id*. at 16.

In contrast to the majority's conclusion that the variance was case-specific, the dissent concluded that the sentencing court had "set . . . aside" the antitrust guideline "in favor of an alternative calculation using . . . the guideline for . . . fraud." Slip op. 18; *accord id*. n.9 (sentencing court "effectively scrapped the antitrust guideline in favor of the fraud guideline," and categorically rejected "§ 2R1.1 as a guideline useable in antitrust sentencing"); 19; 22; 23 ("The sort of categorical policy-based variance applied by the sentencing court in this case stands in stark contrast to a district court's variance based on the *particular* facts of an *individual* case." (emphasis in original)). The dissent then decided that § 2R1.1 was based on the Sentencing Commission's "institutional strengths." Slip op. 24, 29. As such, the dissent concluded, the sentencing court's decision "should all have been reviewed by this court de novo" and should "have been summarily rejected by this court." *Id*. at 22; *accord id*. at 32.

ARGUMENT

1. As the majority correctly observed, the sentencing court's upward variance from the Antitrust Guideline's advisory sentence "was 'based on the *particular* facts of an *individual* case.'" Slip op. 15 (quoting dissent at slip op. 29). Because the district court's decision to vary was not based solely on a policy disagreement, there was no reason for this Court to engage in "closer review" of the sentence. *Kimbrough v. United States*, 552 U.S. 85, 109 (2007). Thus, the majority's decision does not conflict with *Kimbrough* or any decision of this or any other court of appeals. Rehearing en banc is therefore not warranted.

The sentencing court's actions with respect to VandeBrake's co-conspirators makes clear that the court did not "scrap[]" or "set . . . aside" the Antitrust Guideline and use the Fraud Guideline instead, as the dissent erroneously concluded. Slip op. 18 & n.9. While the court expressed dissatisfaction with the Antitrust Guideline when it sentenced Stewart,[4] it nonetheless concluded that, given the facts of Stewart's case, an in-guidelines sentence was appropriate.[5] Similarly, when it later sentenced Chad Van Zee, the court explained that "even if I

[4] *See* 771 F. Supp. 2d at 1014-16 (concluding, as it had with VandeBrake, *see id*. at 980, that "there is no basis in Stewart's case for the base offense level for his antitrust violations to increase less rapidly than the offense level for comparative fraud violations.").

[5] As the district court noted, the sentence for a comparable fraud under § 2B1.1 would have been between 21 and 27 months, not the 12 months Stewart received under § 2R1.1. 771 F. Supp. 2d at 1014, 1016.

disagree with the antitrust guidelines on policy grounds, that's just one of the factors under 3553(a), and the other factors can override that policy disagreement . . . . the other 3553(a) factors which I'm duty bound to consider." Crim. No. 10-4108 (N.D. Iowa June 21, 2011), ECF No. 46 at 101; *accord id*. at 148. Although Van Zee's Guideline range was 6-12 months (*id*. at 147), the court sentenced him to 45 days. *Id*. at 156.

VandeBrake's sentence was the result of a thorough and lengthy § 3553(a) analysis.[6] The sentencing court's disagreement with the Antitrust Guideline, as applied in this particular case, was only one part of that analysis. Slip op. 4, 11-12. As the majority correctly observed, the sentencing court "tied its policy disagreement to the specific facts involved in VandeBrake's case, noting VandeBrake's prices for concrete did not decrease as the volume of sales increased, the primary reason the Sentencing Commission gave for increasing the levels of antitrust violations less drastically than levels of fraud cases" with similar amounts of loss.[7] Slip op. 12.

[6] The dissent did not conclude that any of the court's numerous § 3553(a) findings were either clearly erroneous or incapable of supporting a variance.

[7] VandeBrake wrongly claims that the district court's finding "was mere speculation" due to the lack of "data about volume discounts relative to demand and production costs." Pet. 9 n.6. The court's finding that mark-ups did not vary with volume was based on evidence that VandeBrake either set the discounted price itself, or set a fixed level of discount for its various categories of customers, and those discounted prices or discounts did not vary with the volume of a particular customer. *See* slip op. 12; Gov't Br. 38-39. Thus the district court's

Moreover, the sentencing court made two additional factual findings to support its conclusion that a sentence within the advisory Antitrust Guideline range would not result in an appropriate sentence in this case. The court concluded that the Antitrust Guideline did not adequately address either (1) the totality of VandeBrake's bid-rigging conduct or (2) his perpetration of three simultaneous conspiracies. *See* pp. 2-3, *supra*. The majority correctly concluded, therefore, that the sentencing court "explained how the guideline applied (or rather, did not adequately account for) VandeBrake's particular offense conduct." Slip op. 14. Thus, notwithstanding VandeBrake's hyperbole, nothing in the majority's case-specific opinion "[t]hreatens the [Sentencing] Commission's viability." Pet. 5.

Finally, because the majority correctly noted that the sentencing decision "was primarily based on" case-specific findings (slip op. 15) rather than solely on a "disagree[ment] with a Guideline on policy grounds" (Pet. 10), there is no danger, as VandeBrake claims (*id*.), that the panel's decision will create a "Kimbrough exception" to § 3553(a)(6)'s command to consider "the need to avoid unwarranted sentence disparities." As the majority correctly explained, those case-specific findings, including VandeBrake's greed and total lack of remorse, provide sound reasons supporting the sentencing court's variance. Slip op. 4-7, 11-12. In addition, the Court in *Kimbrough* explained that "our opinion in [*United States v*.]

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finding was not "a policy disagreement meriting closer review." Pet. 9. Rather, it was a finding of fact that the dissent did not claim was erroneous.

Booker[, 543 U.S. 220 (2005),] recognized that some departures from uniformity were a necessary cost of the remedy we adopted." 552 U.S. at 107-08. Thus, any disparity in this case was both warranted and consistent with both *Booker* and *Kimbrough*.

VandeBrake's attempt, Pet. 11, to compare his 48-month sentence to the only other 48-month sentence involving only antitrust violations, *United States v. Baci*, No. 3:08-cr-00350-TJC-TEM (M.D. Fla. 2008), provides no basis for rehearing. Although Baci had a much larger volume of commerce than VandeBrake, Pet. 11, he also was facing a much larger Antitrust Guideline's range of 87-108 months – a potential sentence more than twice VandeBrake's sentence – before the court "granted the government's U.S.S.G. § 5K1.1 motion for a downward departure" and departed more than the government had requested. *See* slip op. 33 n.19. Given the freedom that *Booker* and *Kimbrough* give to sentencing judges to impose sentences that reflect the particular facts of each case, simply comparing sentences imposed on different defendants in different cases without comparing the underlying facts of each case, cannot establish "unwarranted sentence disparity among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

2. VandeBrake's claim that the majority "did not acknowledge or rule on Mr. VandeBrake's procedural challenge," Pet. 14, elevates form over substance.

"The line between what is procedural and what is substantive is famously fuzzy at the margins . . . . The critic will charge that procedural error is nothing more than substantive review cloaked in disguise." *United States v. Kane*, 639 F.3d 1121, 1136 (8th Cir. 2011). Indeed, the government previously noted that "VandeBrake's claim of substantive unreasonableness is largely a rehash of his claims of procedural error." Gov't Br. 49. In fact, VandeBrake's claims of procedural error were that the district court erred by categorically rejecting the antitrust guideline on policy grounds, and by creating unwarranted disparity. *See* Opening Br. 24-52. The panel majority fully addressed those claims and, as noted above, correctly rejected them when it rejected VandeBrake's virtually identical substantive unreasonableness claim. *See id*. at 54 ("Because Mr. VandeBrake addresses many of the § 3553(a) factors [in his procedural challenge] above, the [substantive] discussion here can be kept brief."). There was no reason for the Court to address essentially the same arguments twice.

CONCLUSION

For the foregoing reasons, VandeBrake's petition for rehearing or rehearing en banc should be denied.

Respectfully submitted.

/s/ John P. Fonte

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CERTIFICATE OF SERVICE

I, John P. Fonte, hereby certify that on this 22th day of June, 2012, I electronically filed the foregoing Response To Petition For Rehearing Or Rehearing En Banc with the Clerk of the Court of the United States Court of Appeals for the Eighth Circuit by using the CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

June 22, 2012

/s/ John P. Fonte
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