

No.

IN THE SUPREME COURT OF THE UNITED STATES

THOMPSON CHRISTOPHER KYLE MANDRELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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September 25, 2018

QUESTION PRESENTED FOR REVIEW

Before determining what sentence to impose on a convicted defendant, federal judges are required by 18 U.S.C. § 3553(a) to consider a set of enumerated factors. A factor in § 3553(a)(6) is “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[.]” At his sentencing, the Petitioner argued that a sentence within the United States Sentencing Guidelines range would create a disparity with other cases where sentences outside the Guidelines range for the same offense were imposed. The district court stated that the other courts were creating disparity, and ultimately ruled that the within-Guideline sentence chosen by the court did not create a disparity. On appeal, the Tenth Circuit Court of Appeals held there was no error. The court concluded that the sentencing court’s viewpoint that other courts were creating disparity did not refuse to recognize a disparity. The appellate court further concluded that the sentencing court’s finding that cases cited by the Petitioner were dissimilar and distinguishable, followed by its ruling that no disparities existed, was not unreasonable.

Question presented: whether the federal sentencing court failed to properly consider and apply § 3553(a)(6), which requires consideration of “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[,]” where the court concluded that a within-Guideline sentence for the Petitioner would not create a disparity with below-Guideline sentences in other cases involving the same offense.

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PREVIOUS OPINIONS AND ORDERS

In *United States v. Mandrell*, No. 17-7072, 2018 U.S. App. LEXIS 18391 (10th Cir. July 6, 2018) (unpublished), the United States Court of Appeals for the Tenth Circuit issued an Order and Judgment denying a direct appeal wherein Thompson Mandrell, the Petitioner herein, was the Appellant/Defendant. *See* Attachment 1 (attached hereto). This Petition seeks issuance of a writ of certiorari to the Tenth Circuit Court of Appeals in regard to the Order and Judgment.

The Order and Judgment affirmed a Judgment in a Criminal Case filed in the United States District Court for the Eastern District of Oklahoma, in *United States v. Thompson Mandrell*, Case No. CR-17-23-RAW. *See* Attachment 2 (attached hereto).

JURISDICTION

The Tenth Circuit reviewed the Judgment in a Criminal Case under the authority of 28 U.S.C. §1291. On July 6, 2018, the Tenth Circuit filed the Order and Judgment now presented for review. Attachment 1 (attached hereto). Neither party requested a rehearing.

Jurisdiction for a writ of certiorari lies in this Court pursuant to 28 U.S.C. §1254(1), applicable to cases in the courts of appeals, which permits a writ of certiorari to be “granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.” Mr. Mandrell was the Appellant in the case now submitted for review.

APPLICABLE LEGAL PROVISION

18 U.S.C. § 3553(a):

Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such

amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.[]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

1. District Court Proceedings

An Indictment filed in the Eastern District of Oklahoma charged Thompson Mandrell with one count of possession of material involving the sexual exploitation of minors, in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2). He entered an unconditional guilty plea and was adjudged guilty.

A Presentence Investigation Report (PSR) calculated a criminal history category of I and a total offense level of 30. This yielded a guideline range of 97-120 months. To reach the offense level, the PSR began with a base offense level of 18 and applied the following adjustments:

USSG § 2G2.2(b)(2) (minor who is prepubescent or under 12) +2

USSG § 2G2.2(b)(3) (distribution) +2

USSG § 2G2.2(b)(4) (material with sadistic/masochistic conduct) +4

USSG § 2G2.2(b)(6) (use of computer/interactive device) +2

USSG § 2G2.2(b)(7)(D) (600 or more images) +5

USSG § 3E1.1 (acceptance of responsibility) -3

Neither party objected to the PSR. Mr. Mandrell filed a Motion for Sentencing Variance which requested an unspecified variance below the guideline range. At the sentencing hearing defense counsel argued in favor of the motion. He began by explaining that many sentencing courts have been “departing” from the child porn guideline, which he characterized as a changing “landscape of the law[.]” Counsel cited several cases involving variances from USSG § 2G2.2:

But to kind of give you some ideas of where these courts, not only district courts, but circuit courts, are coming down on these issues, especially in cases that involve just normal run-of-the-mill possession cases and some of the, you know, images are more or whatever. But *United States vs. Autery*, A-u-t-e-r-y, 555 F.3d. 864, which is out of the Ninth Circuit affirmed a nonguideline sentence of five years of probation and no incarceration. *State [sic] vs. Stall*, S-t-a-l-l, 581 F.3d. 276, also affirming a sentence of one day incarceration with ten years of supervised release. *U.S. v. Prisel*, P-r-i-s-e-l, 316 F. Appendix 377 out of the Sixth Circuit, one day in prison, 18 months home confinement, term of supervised release to follow. *U.S. v. Rowan*, R-o-w-a-n, 530 F.3d. 379, five years probation, no incarceration. *U.S. v. Polito*, five years probation. The list is going on and on.

The filed variance motion cited additional cases in which sentences below the guideline range were imposed for possession of child pornography. *See United States v. D.M.*, 942 F. Supp. 2d 327 (E.D.N.Y. 2013); *United States v. Diaz*, 720 F. Supp. 2d

1039 (E.D. Wisc. 2010); *United States v. Beiermann*, 599 F. Supp. 2d 1087 (N.D. Iowa 2009).

Counsel also specified federal cases in Oklahoma that resulted in below-guideline sentences for child pornography:

Even here in Oklahoma, the courts have started to give departures in these types of cases, most recently in U.S. vs. Jeff Goss, G-o-s-s, which is a Northern District case in front of Judge Eagan recently ordered 18 months incarceration on a possession of child pornography case. U.S. vs. Phillip Smith, also out of Northern District in front of Judge Dowdell, departure down to 60 months of incarceration from 97 to 121.

Judge Payne in this very courthouse not three or four months ago departed six levels on a case involving possession down to 51 months, and that was United States vs. Cody Pax.

Following these citations, the following dialog occurred between defense counsel (Robert Williams) and the sentencing court, giving rise to the issue raised on direct appeal (that the court did not perform its duty to correctly consider the sentencing factor of disparity):

MR. WILLIAMS: So I feel that the landscape of the law is changing in these respects. Now--

THE COURT: I'll be honest with you, I don't feel the landscape changing much up here.

MR. WILLIAMS: Well, I understand that, Your Honor. But the U.S. Federal Sentencing Guidelines are just that, they're federal. They're supposed to keep uniformity, which is why we have the sentencing disparity issue that comes up. You know, obviously, that is within the discretion of the district court, but --

THE COURT: Yeah, and, you know, I might make the observation, with all due respect to my colleagues, that they're causing the disparities, not me.

Defense counsel expanded on more reasons why a variance was appropriate, calling attention to mental health conditions (diagnosed autism, ADHD, and depression), and guideline enhancements, such as use of computer, which apply to conduct that "is inherent in the crime itself[.]"

The court denied the variance motion as follows:

Okay. Thank you. Counsel for the defendant has filed a motion for downward variance wherein he requests an unspecified reduction, though a suggested reduction from the advisory guideline range of the 97 to 120 months down to perhaps 60 months. Counsel requests the downward variance pursuant to various factors cited in 18 United States Code, Section 3553(a), including the nature and circumstances of the offense, and the history and characteristics of the defendant. Counsel contends that the defendant's mental health condition, his youthful appearance, age, timid demeanor, and minimal criminal history warrant a downward departure in this case.

Counsel also cites case law in which various courts have varied downward based upon the circumstances surrounding the offenses, and the nature and circumstances of the offenders in those cases.

The Court has reviewed the defendant's motion, and also taken into consideration the government's position as detailed in their written response and in their rebuttal arguments here in open court.

In establishing an appropriate sentence for this defendant, the Court has considered the totality of the circumstances regarding the offense of conviction, as well as the personal history and characteristics of this defendant.

With regard to the nature and circumstances of the offense in this case, the Court finds the guidelines take into account the crime charged. Furthermore, the cases cited by the defendant are mostly dissimilar and distinguishable from the facts in this case. Therefore, the Court finds that no sentencing disparities exist.

I recognize my authority to vary from the advisory sentencing range called for by application of the guidelines. Taking into consideration the defendant's history and characteristics, and his prior violent conduct, as well as the offense conduct, the need for just punishment, deterrence, and protection of the public, the Court cannot find that the circumstances in this case warrant a variance based on the sentencing factors cited in 18 United States Code, Section 3553(a). Therefore, the defendant's motion for variance is denied.

Having adopted the PSR, the court ordered Mr. Mandrell to serve 97 months in custody, followed by supervised release for ten years. As of the filing of this brief, he is serving the imposed sentence in a federal penitentiary.

2. Direct Appeal

Mr. Mandrell timely appealed the Judgment in a Criminal Case (Attachment 2) to the Tenth Circuit. He argued that the lower court erred by misapplying the sentencing factor in 18 U.S.C. § 3553(a)(6), which requires a sentencing judge to consider the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. His Opening Brief explained that at sentencing, he argued that a sentence within the applicable Sentencing Guideline range would create an unwarranted disparity for purposes of § 3553(a)(6), citing numerous other cases where courts varied downward from the applicable guideline (USSG § 2G2.2). Then, he attacked the sentencing court's response that the courts described by Mr. Mandrell were creating disparity, not the court itself. Mr. Mandrell argued to the panel that the sentencing court's position demonstrated that the court was not correctly applying § 3553(a)(6), which required

the court to recognize disparity and determine if the disparity was unwarranted. The court's position that only the other courts created any disparity signified a failure to recognize that the court would create a disparity from the cases cited by Mr. Mandrell if it adhered to the guideline range. Misapplication of the statutory factor constituted an abuse of discretion, Mr. Mandrell argued, which required that the sentence be reversed and the case be remanded for resentencing.

Unanimously, the deciding panel affirmed the sentence. Upon finding that Mr. Mandrell failed to object to the method used to reach the sentence, the court reviewed the procedural reasonableness issue for plain error. *Mandrell*, 2018 U.S. App. 18391, *5-6. This addressed Mr. Mandrell's claim that the district court's view that other courts were creating a disparity erroneously declined to recognize that a guideline sentence would create a disparity. *Id.* at 7. To the deciding panel, the district court did not refuse to recognize a disparity. Rather, the panel saw the district court as expressing its view regarding who is responsible for the disparity. *Id.* The court held that:

...the record unequivocally demonstrates there was no procedural error because the court "correctly calculated the applicable Guidelines range, allowed [the] parties to present arguments as to what they believed the appropriate sentence should be, considered all of the § 3553(a) factors, and thoroughly documented his reasoning."

Id., quoting *Gall v. United States*, 552 U.S. 38, 53 (2007).

Next the court addressed what it described as an issue of substantive unreasonableness. *Mandrell*, 2018 U.S. App. 18391 at *6. This issue was reviewed for

abuse of discretion. *Id.* at *7-8. The court described Mr. Mandrell as “arguing that § 2G2.2 is flawed, citing several instances where sentencing courts have granted downward variances based on their policy disagreements with the Guideline.” *Id.* at *8. A substantive unreasonableness claim required Mr. Mandrell to show that his guideline sentence “is unreasonable in light of the other sentencing factors laid out in § 3553(a).” *Id.*, quoting *United States v. Kristll*, 437 F.3d 1050, 1055 (10th Cir. 2006). Presuming that Mr. Mandrell’s guideline sentence was reasonable, the court noted that the presumption is intact when a particular guideline “arguably contains serious flaws or otherwise lacks an empirical basis.” *Mandrell*, 2018 U.S. App. 18391 at *8, citing *United States v. Wireman*, 849 F.3d 956, 964 (10th Cir. 2017) (quotation marks omitted). Insofar as USSG § 2G2.2 (the sentencing guideline that was applicable to the offense of conviction) allegedly lacked empirical support, the court observed that any sentence based on the guideline would be presumed reasonable. *Mandrell*, 2018 U.S. App. 18391 at *8.

Returning to § 3553(a)(6), the panel observed that the statutory goal is to eliminate unwarranted disparities among defendants with similar records who are guilty of similar conduct. *Id.* at *8. The panel found that district court did not err by finding that any disparity was justified by the facts of Mr. Mandrell’s case:

The district court compared and contrasted the cases cited by Mr. Mandrell in his motion and at the sentencing hearing. The record establishes that the court had reviewed the cases cited by Mr. Mandrell prior to the hearing, and made notes of the factual differences: “I’ve got my annotated copy [of Mr. Mandrell’s motion] right here.” R., Vol. 2 at

13. In the end, the court found that "the cases cited by the defendant are mostly dissimilar and distinguishable from the facts in this case. Therefore, the Court finds that no sentencing disparities exist." *Id.* at 26.

Mandrell, 2018 U.S. App. 18391 at *8-9.

REASON FOR GRANTING A WRIT

Certiorari is appropriate when "a... United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c). This basis for review is presented here because the issue in this case is an important question of federal law that has not been decided by this Court, but should be.

Pursuant to section 3553(a) of Title 18, a district court is required to settle on a sentence that complies with the purposes of sentencing that are enumerated in that provision. As relevant to the issue at hand, one of the factors is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[.]" 18 U.S.C. § 3553(a)(6). Section 3553(a)(6) requires a district court to take into account nationwide disparities among defendants with similar records and Sentencing Guideline calculations. *United States v. Martinez*, 610 F.3d 1216, 1228 (10th Cir. 2010) (citations omitted).

In his motion requesting a variance from the Sentencing Guideline range, Mr. Mandrell cited § 3553(a)(6) and quoted it verbatim. In the motion and while addressing the court, defense counsel cited numerous cases in which district courts

declined to sentence defendants within the range produced by the child pornography guideline (USSG § 2G2.2) in child porn possession cases. Mr. Mandrell informed the district court that several courts have observed that § 2G2.2, which increases sentences based upon factors that are inherent in the crime and appear in nearly every case, concentrate offenders at or near the statutory maximum and thus fails to meaningfully distinguish more serious offenders from less serious offenders. The citations included *United States v. Dorvee*, 616 F.3d 174 (2nd Cir. 2010). *Dorvee* explained that while most guidelines are the product of empirical study, § 2G2.2 is the product of specific Congressional directives to the Sentencing Commission. *Id.* at 184. For that and other reasons, *Dorvee* characterized § 2G2.2 as “an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results.” *Id.* at 188. In the sentencing hearing, after citing several specific cases where judges varied from § 2G2.2, defense counsel referred to the Sentencing Guidelines’ goal of uniformity, and pointed out that a disparity issue arises.

In response, the district court said: “Yeah, and, you know, I might make the observation, with all due respect to my colleagues, that they’re causing the disparities, not me.” This misconstrued § 3553(a)(6), which is legal error that resulted in failure to correctly consider and apply the factor. By taking the position that other judges created disparities by varying from § 2G2.2, which implied that the sentencing court would not create any disparity by following § 2G2.2, the court effectively refused to

do what § 3553(a)(6) required, which was to avoid unwarranted disparity. In doing so, the court had a duty to consider nationwide disparities among defendants with similar records and Sentencing Guideline calculations. *Martinez*, 610 F.3d at 1228. By characterizing variances in other courts as the disparities, the court closed its eyes to the disparity that it would be creating by following § 2G2.2.

To apply § 3553(a)(6), recognizing that disparity would be created by sentencing Mr. Martinez within the Guidelines was the first step. Determining if the disparity was unwarranted was the second. The court's ultimate ruling--that no disparity existed--only reached the first step. Since this followed from the court's view that any disparity was created by other courts, which misconstrued § 3553(a)(6), the failure to correctly construe and apply the sentencing factor resulted in an ultimate ruling that was flawed as a matter of law.

In its opinion, the Tenth Circuit failed to create a line of reasoning in support of its conclusion that the district court did not misapprehend the law. In regard to the district court's observation that other courts were creating disparities, the court of appeals said: "This is not the refusal to recognize a disparity; instead, it reflects the court's view as to who is responsible for the disparity." 2018 U.S. App. LEXIS 18391 at *7. This was the sum total of the discussion of the district court's observation. And it merely restated what the district court said: the district court said other courts were creating disparity; the appellate court said that meant that the district court thought other courts were responsible for the disparity. This failed to meaningfully analyze the

issue presented on direct appeal--that the sentencing court did not determine whether disparity would result from the sentence to be imposed on Mr. Mandrell.

The Tenth Circuit's discussion of the disparity issue proceeded to say: "More to the point, the record unequivocally demonstrates there was no procedural error because the court 'correctly calculated the applicable Guidelines range, allowed [the] parties to present arguments as to what they believed the appropriate sentence should be, considered all of the § 3553(a) factors, and thoroughly documented his reasoning.'" *Id.*, quoting *Gall*, 552 U.S. at 53. Mr. Mandrell's sole argument in his opening brief on direct appeal was that the sentencing court failed to correctly construe and apply § 3553(a)(6). The court of appeals' focus on such issues as whether the court allowed the parties to present arguments as to the appropriate sentence had nothing to do with the issue presented. At the point where the appellate court addressed the issue presented--finding that the sentencing court considered all of the § 3553(a) factors--the Tenth Circuit erred, because Mr. Mandrell showed that the sentencing court misconstrued, and therefore failed to consider and apply, § 3553(a)(6).

The Tenth Circuit provided the following discussion before holding that the sentence was procedurally and substantively reasonable:

Further, the goal in § 3553(a)(6) is not absolute parity; instead, the statute seeks to eliminate "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* (emphasis added). Indeed, "[d]isparate sentences . . . are permissible when the disparity is explicable by the facts of the particular

case.” *United States v. Alapizco-Valenzuela*, 546 F.3d 1208, 1223 (10th Cir. 2008).

The district court compared and contrasted the cases cited by Mr. Mandrell in his motion and at the sentencing hearing. The record establishes that the court had reviewed the cases cited by Mr. Mandrell prior to the hearing, and made notes of the factual differences: “I’ve got my annotated copy [of Mr. Mandrell’s motion] right here.” R., Vol. 2 at 13. In the end, the court found that “the cases cited by the defendant are mostly dissimilar and distinguishable from the facts in this case. Therefore, the Court finds that no sentencing disparities exist.” *Id.* at 26.

2018 U.S. App. LEXIS 18391 at *9.

The first paragraph’s discussion of what warrants disparity, together with the second paragraph’s display of the district court’s findings, depict the district court as finding that disparity was warranted in Mr. Mandrell’s case. Again, the sentencing court ultimately ruled that “no sentencing disparities exist.” It did not rule that existing disparities were permissible due to dissimilar and distinguishable facts. In other words, it is clear that the district court’s observation that cases cited by Mr. Mandrell were “mostly dissimilar and distinguishable” from Mr. Mandrell’s case directly preceded and led to the conclusion: “[t]herefore, the court finds that no sentencing disparities exist.” The Tenth Circuit’s suggestion in the two paragraphs quoted above that the sentencing court concluded that any disparities were permissible in light of the facts of each case is not supported by the record. While the sentencing court’s conclusion that the cited cases were dissimilar and distinguishable from Mandrell’s case does not reasonably support the ultimate finding that no disparity existed, displaying the court’s failure to correctly apply the sentencing factor, the conclusion

and finding were made by the sentencing court, and the appellate decision should have been based on the record as-is.

Accordingly, Mr. Mandrell's sentencing court procedurally erred in its determination of the sentence. The error presents an important question that merits this Court's attention. This is so because Congress' determined, in establishing § 3553(a)(6), that disparity without justification is to be avoided in federal sentencing. Congress' intent was thwarted in this case when the district court refused to recognize that a sentence within the Guideline range would create disparity with nationwide sentences outside the range. The Tenth Circuit's failure to stop the departure from sentencing protocol in this case signifies tolerance of courts that fail to comply with sentencing statutes, which cannot be tolerated when loss of liberty is at stake.

In its review the Tenth Circuit applied plain error standards. Since it did not find any error, it did not reach plain error standards that come into play after error is found. Since review for plain error stalled at that point, Mr. Mandrell has no basis for claiming that the Tenth Circuit erred in its application of the subsequent plain error standards. He can only claim that the court erred in applying the first plain error query, which is whether there was error. Accordingly, the due remedy is to reverse the Tenth Circuit's determination that there was no error, and remand with instructions to consider the remaining plain error standards.

CONCLUSION

Certiorari review is appropriate reverse the Order and Judgment and remand to the Tenth Circuit with instructions to recognize the sentencing court's legal error and complete appellate review under the remaining plain error standards.

Respectfully submitted,

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ATTACHMENT 1:
Order and Judgment of Tenth Circuit

United States v. Mandrell

United States Court of Appeals for the Tenth Circuit

July 6, 2018, Filed

No. 17-7072

Reporter

2018 U.S. App. LEXIS 18391 *; 2018 WL 3323314

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. THOMPSON CHRISTOPER KYLE MANDRELL, Defendant - Appellant.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [*1] (D.C. No. 6:17-CR-00023-RAW-1). (E.D. Okla.).

Counsel: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Linda A. Epperley, Edward Snow, Office of the United States Attorney, Eastern District of Oklahoma, Muskogee, OK.

For THOMPSON CHRISTOPER KYLE MANDRELL, Defendant - Appellant: Barry L. Derryberry, Office of the Federal Public Defender, Tulsa, OK; Robert Scott Williams, Office of the Federal Public Defender, Muskogee, OK.

Judges: Before BACHARACH, PHILLIPS, and McHUGH, Circuit Judges.

Opinion by: Carolyn B. McHugh

Opinion

ORDER AND JUDGMENT*

Thompson Christopher Kyle Mandrell appeals his 97-month sentence as substantively unreasonable. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Mr. Mandrell was charged with and pleaded guilty to one count of possession of material involving the sexual exploitation of minors in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2). Based on his criminal history and total offense level, the probation department calculated an advisory guideline range of 97-120 months' imprisonment. Neither party objected to the guideline calculation; Mr. Mandrell, however, filed a motion for a sentencing variance seeking a below-guidelines sentence. The government opposed the motion.

At the sentencing hearing, Mr. Mandrell's counsel [*2] noted that some sentencing courts had been departing from the child pornography guideline in U.S.S.G. § 2G2.2:

MR. WILLIAMS: So I feel that the landscape of the law is changing in these respects.

THE COURT: I'll be honest with you, I don't feel the landscape changing much up here.

MR. WILLIAMS: Well, I understand that, Your Honor. But the U.S. Federal Sentencing Guidelines are just that, they're federal. They're supposed to keep uniformity, which is why we have the sentencing disparity issue that comes up. You know, obviously, that is within the discretion of the district court.

THE COURT: Yeah, and, you know, I might make the observation, with all due respect to my colleagues, that they're causing the disparities, not me.

R., Vol. 2 at 12.

Counsel explained the courts that have departed from the Guideline have done so primarily because most of the sentencing enhancements under § 2G2.2 are inherent in the crime itself, and therefore tend to result in advisory imprisonment ranges at or near the statutory maximum for all offenders. He also argued for a variance because the Guideline is a directive from Congress and not based on empirical evidence from the Sentencing Commission. And he further urged a below-guidelines [*3] sentence arguing that Mr. Mandrell would be easy prey in prison because of his mental impairments (ADHA, depression, and autism), youthful appearance, timid demeanor, and poor hygiene.

After hearing the government's argument in opposition, the district court denied Mr. Mandrell's motion for a variance:

Counsel for the defendant has filed a motion for downward variance . . . from the advisory guideline range of the 97 to 120 months down to perhaps 60 months. Counsel requests the . . . variance pursuant to various factors cited in 18 [U.S.C.] [§] 3553(a), including the nature and circumstances of the offense, and the history and characteristics of the defendant. Counsel contends that the defendant's mental health condition, his youthful appearance, age, timid demeanor, and minimal criminal history warrant a downward departure.

Counsel also cites case law in which various courts have varied downward based upon the circumstances surrounding the offenses, and the nature and circumstances of the offenders in those cases.

The Court has reviewed the defendant's motion, and also taken into consideration the government's position as detailed in their written response and in their rebuttal arguments here in [*4] open court.

In establishing an appropriate sentence for this defendant, the Court has considered the totality of the circumstances regarding the offense of conviction, as well as the personal history and characteristics of this defendant.

With regard to the nature and circumstances of the offense in this case, the Court finds the guidelines take into account the crime charged. *Furthermore, the cases cited by the defendant are mostly dissimilar and distinguishable from the facts in this case. Therefore, the Court finds that no sentencing disparities exist.*

I recognize my authority to vary from the advisory sentencing range [but] [t]aking into consideration the defendant's history and characteristics, and his prior violent conduct, as well as the offense conduct, the need for just punishment, deterrence, and protection of the public, the Court cannot find that the circumstances in this case warrant a variance based on the sentencing factors cited in [§] 3553(a).

R., Vol. 2 at 25-26 (emphasis added). The court sentenced Mr. Mandrell to 97 months' imprisonment—the low end of the advisory guideline range.

STANDARD OF REVIEW

"Regardless of whether the sentence imposed is inside or outside the Guidelines [*5] range, [we] must review the sentence under an abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). This review "includes both a procedural component, encompassing the method by which a sentence was calculated, as well as a substantive component, which relates to the length of the resulting sentence." *United States v. Smart*, 518 F.3d 800, 803 (10th Cir. 2008).

In applying the abuse-of-discretion standard, we "must first ensure that the district court committed no significant procedural error," which includes "failing to consider the § 3553(a) factors . . . or failing to adequately explain the chosen sentence." *Gall*, 552 U.S. at 51. As to substantive reasonableness, "the sentence is presumptively reasonable," when "the district court properly considers the relevant Guidelines range and sentences the defendant within that range." *United States v. Kristl*, 437 F.3d 1050, 1055 (10th Cir. 2006). "The defendant may rebut this presumption by demonstrating that the sentence is unreasonable in light of the other sentencing factors laid out in § 3553(a)." *Id.*

But because Mr. Mandrell failed to object to the method by which the sentence was imposed—its procedural reasonableness—we do not apply the abuse-of-discretion standard of review, but review the sentencing decision for plain error:

[E]ven if a district court is fully apprised of a defendant's arguments for a below-Guidelines [*6] sentence, the defendant must still contemporaneously object in the district court to the *method* by which the district court arrived at a sentence, including arguments that the sentencing court failed to explain adequately the sentence imposed, if he . . . hopes to avoid plain error review on appeal of any alleged procedural flaw.

United States v. Wireman, 849 F.3d 956, 961 (10th Cir. 2017) (internal quotation marks omitted). "We will find plain error only when there is "(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 962 (internal quotation marks omitted).

However, even though Mr. Mandrell did not object to the length of the sentence—its substantive reasonableness—"we do not require the defendant to object in order to preserve the issue." *United States v. Martinez-Barragan*, 545 F.3d 894, 905 (10th Cir. 2008) (internal quotation marks omitted). Instead, "we review the length of the sentence for an abuse of discretion." *Id.*

ANALYSIS

According to Mr. Mandrell, the district court erred by failing to consider § 3553(a)(6), which requires the court to consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." We disagree and [*7] conclude that the 97-month sentence is procedurally sound and substantively correct.

As a preliminary matter, Mr. Mandrell appears to raise procedural error by arguing that the court "declin[ed] to . . . recognize that [a guidelines sentence] would . . . create a disparity." Aplt. Opening Br. at 9. As support, he points to the district court's statement: "I might make the observation, with all due respect to my colleagues, that they're causing the disparities, not me." R., Vol. 2 at 12. This is not the refusal to recognize a disparity; instead, it reflects the court's view as to who is responsible for the disparity. More to the point, the record unequivocally demonstrates there was no procedural error because the court "correctly calculated the applicable Guidelines range, allowed [the] parties to present arguments as to what they believed the appropriate sentence should be, considered all of the § 3553(a) factors, and thoroughly documented his reasoning." *Gall*, 552 U.S. at 53.

Mr. Mandrell's true complaint is that the sentence is substantively unreasonable. But this argument fails as well. To establish substantive unreasonableness, Mr. Mandrell must

"demonstrate[e] that the [within-guidelines] sentence is unreasonable [*8] in light of the other sentencing factors laid out in § 3553(a)." *Kristl*, 437 F.3d at 1050. He attempts to do so by arguing that § 2G2.2 is flawed, citing several instances where sentencing courts have granted downward variances based on their policy disagreements with the Guideline. We have rejected this argument: "In our circuit, a within-guideline-range sentence that the district court properly calculated is entitled to a rebuttable presumption of reasonableness on appeal . . . and this presumption of reasonableness holds true *even if* the Guideline at issue arguably contains serious flaws or otherwise lacks an empirical basis." *Wireman*, 849 F.3d at 964 (ellipsis, citation, brackets, and internal quotation marks omitted). "[W]e apply the presumption of reasonableness to sentences based on 2G2.2, regardless of its alleged lack of empirical support." *Id.* (internal quotation marks omitted).

Further, the goal in § 3553(a)(6) is not absolute parity; instead, the statute seeks to eliminate "*unwarranted* sentence disparities among defendants with *similar records* who have been found guilty of *similar conduct*." *Id.* (emphasis added). Indeed, "[d]isparate sentences . . . are permissible when the disparity is explicable by the facts of the particular case." *United States v. Alapizco-Valenzuela*, 546 F.3d 1208, 1223 (10th Cir. 2008).

The district [*9] court compared and contrasted the cases cited by Mr. Mandrell in his motion and at the sentencing hearing. The record establishes that the court had reviewed the cases cited by Mr. Mandrell prior to the hearing, and made notes of the factual differences: "I've got my annotated copy [of Mr. Mandrell's motion] right here." R., Vol. 2 at 13. In the end, the court found that "the cases cited by the defendant are mostly dissimilar and distinguishable from the facts in this case. Therefore, the Court finds that no sentencing disparities exist." *Id.* at 26.

The sentence is procedurally and substantively reasonable. And because there was no plain error or an abuse of discretion, the sentence is affirmed.

Entered for the Court

Carolyn B. McHugh

Circuit Judge

ATTACHMENT 2:
Judgment in a Criminal Case

UNITED STATES DISTRICT COURT

Eastern District of Oklahoma

UNITED STATES OF AMERICA
v.

THOMPSON CHRISTOPHER KYLE MANDRELL

) **JUDGMENT IN A CRIMINAL CASE**
)
)
) Case Number: CR-17-00023-001-Raw
) USM Number: 08168-063
)
) Robert S. Williams, AFPD
) Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 1 of the Indictment

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18:2252(a)(4)(B) & 2252(b)(2)	Possession of Certain Material Involving the Sexual Exploitation of Minors	September 21, 2016	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

October 26, 2017
Date of Imposition of Judgment



Ronald A. White
United States District Judge
Eastern District of Oklahoma

E.O.D. November 3, 2017
Date

DEFENDANT: Thompson Christopher Kyle Mandrell
CASE NUMBER: CR-17-00023-001-Raw

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

97 months on Count 1 of the Indictment

The court makes the following recommendations to the Bureau of Prisons:

That the Bureau of Prisons evaluate the defendant and determine if the defendant is a suitable candidate for the Intensive Drug Treatment Program. Should the defendant be allowed to participate in the program, it is further recommended that the defendant be afforded the benefits prescribed and set out in 18 U.S.C. § 3621(e) and according to Bureau of Prisons' policy.

That the defendant be placed in a federal facility that offers medical treatment as to defendant's physical health and mental health issues to include a sex offender treatment program.

The Court shall be informed in writing as soon as possible if the Bureau of Prisons is unable to follow the Court's recommendations, along with the reasons for not following such recommendations made by the Court.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____.
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Thompson Christopher Kyle Mandrell
CASE NUMBER: CR-17-00023-001-RAW

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:
10 years on Count 1 of the Indictment

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Thompson Christopher Kyle Mandrell
CASE NUMBER: CR-17-00023-001-Raw

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature

Date

DEFENDANT: Thompson Christopher Kyle Mandrell
CASE NUMBER: CR-17-00023-001-Raw

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall register pursuant to the provisions of the Sex Offender Registration and Notification Act, or any applicable state registration law.
2. The defendant shall attend and participate in a mental health treatment program and/or sex offender treatment program as approved and directed by the Probation Officer. The defendant shall abide by all program rules, requirements, and conditions of the sex offender treatment program, including submission to polygraph testing to determine if defendant is in compliance with the conditions of release. The defendant may be required to contribute to the cost of services rendered in an amount to be determined by the probation officer, based on the defendant's ability to pay. Any refusal to submit to assessment or tests as scheduled is a violation of the conditions of supervision.
3. The defendant shall not be at any residence where children under the age of 18 are residing without the prior written permission of the U.S. Probation Office.
4. The defendant shall not be associated with children under the age of 18 except in the presence of a responsible adult who is aware of the defendant's background and current offense, and who has been approved by the United States Probation Officer.
5. The defendant shall submit to a search conducted by a United States Probation Officer of defendant's person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of probation. Failure to submit to a search may be grounds for revocation.
6. The defendant shall consent to the U.S. Probation Officer conducting periodic unannounced examinations, without individual showing of reasonable suspicion, on any computer equipment used by the defendant. The examination may include assistance of other law enforcement agencies. This may include retrieval and copying of all data from the computer and any internal or external peripherals to ensure compliance with conditions and/or removal of such equipment for the purposes of conducting a more thorough inspection, and allow at the direction of the probation officer, installation on the defendant's computer, at the defendant's expense per co-payment policy, any hardware or software systems to monitor the defendant's computer use. The defendant shall comply with a Computer Monitoring and Acceptable Use Contract, which includes a requirement that the defendant use a computer compatible with available monitoring systems. The defendant shall have no expectation of privacy regarding computer use or information stored on the computer. The defendant shall warn any other significant third parties that the computer(s) may be subject to monitoring. Any attempt to circumvent monitoring and examination may be grounds for revocation.
7. Defendant shall support your dependents and meet other family responsibilities.

DEFENDANT: Thompson Christopher Kyle Mandrell
CASE NUMBER: CR-17-00023-001-RAW**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS	Assessment	JVTA Assessment*	Fine	Restitution
	\$ 100.00	\$ 0.00	\$ 0.00	\$ 6,134.92

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
Law Office of Cusack, Gilfillan & O'Day, LLC Attn: Cindy Series/Victim Cindy 415 Hamilton Boulevard Peoria, IL 61602	\$3,958.78	\$3,958.78	
Law Office of Erik L. Bauer Attn: Tanya Hankins in trust for Emily 215 Tacoma Avenue South Tacoma, WA 98402	\$2,176.14	\$2,176.14	

TOTALS	\$ <u>6,134.92</u>	\$ <u>6,134.92</u>
---------------	--------------------	--------------------

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Thompson Christopher Kyle Mandrell
CASE NUMBER: CR-17-00023-001-RAW

SCHEDEULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Said special assessment of \$100 is due immediately. Said restitution of \$6,134.92 is due and payable immediately.

Said special assessment and restitution shall be paid through the United States Court Clerk for the Eastern District of Oklahoma, P.O. Box 607, Muskogee, OK 74402.

If the defendant's financial condition does not allow for immediate payment of the restitution, the defendant shall make monthly installments of not less than \$200 beginning sixty days from the defendant's release from custody. Notwithstanding establishment of a payment schedule, nothing shall prohibit the United States from executing or levying upon non-exempt property of the defendant discovered before or after the date of this judgment. In the event the defendant receives any federal or state income tax refund during the period of supervision, the defendant shall pay 100% of the total refund toward said restitution.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:
Personal property as set forth in the Criminal Forfeiture Allegation contained in the Indictment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.