Appendix A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
September 7, 2018
Lyle W. Cayce
Clerk

No. 17-40842

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

JUAN GERARDO RODRIGUEZ-MANTOS, also known as Gera,

Defendant – Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:15-CR-1266-6

Before KING, ELROD, and HAYNES, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Juan Gerardo Rodriguez-Mantos, who pleaded guilty to several harboring-related offenses, contends that the district court's sentence erred both procedurally and substantively. Because the record demonstrates that the district court considered the factors listed in 18 U.S.C. § 3553(a) in its departure and variance from the Sentencing Guidelines and relied on evidence with sufficient indicia of reliability, we hold that it did not

* Pursuant to Fifth Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Fifth Circuit Rule 47.5.4.

err procedurally. Because the record demonstrates that the district court considered the 18 U.S.C. § 3553(a) factors, did not overemphasize an improper factor, and did not make an error in judgment, we hold that it did not err substantively. Accordingly, we AFFIRM.

I.

Defendant Juan Gerardo Rodriguez-Mantos was involved in running a stash house in Laredo, Texas, where he harbored several illegal aliens. He pleaded guilty to eight counts related to conspiring to transport illegal aliens, aiding and abetting their transportation, and harboring and shielding them from detection. In making its calculation under the Sentencing Guidelines, the district court applied four sentencing enhancements for: (1) the number of aliens involved; (2) Rodriguez-Mantos's brandishing of a dangerous weapon; (3) his reckless creation of a substantial risk of death or serious bodily injury; and (4) a victim who sustained serious bodily injury. It also applied a reduction for his acceptance of responsibility. The end result scored Rodriguez-Mantos at level 25 with a criminal history category of I, yielding a Guidelines range of 57 to 71 months of imprisonment.

The district court held three hearings before imposing the sentence. Over the course of the hearings, it notified the parties that it was considering an "upward variance and departure" based on the facts in the presentence report (PSR), and also heard testimony from the victims. One woman testified that Rodriguez-Mantos and a co-conspirator forcefully removed her clothes and sexually assaulted her. She said, "[the assault] has affected me greatly. I am always fearful; I'm fearful of going out. I'm fearful that someone may do something to me." Another woman testified that Rodriguez-Mantos forced her to take drugs so that "everything they would do to [her would] hurt less." This victim said, "I am not the same person I used to be. I cannot talk to anyone about this because of the shame. No woman should have to go through what I

went through in that house." Another testified that Rodriguez-Mantos ran around threatening the victims with a baseball bat and demanding that they hand over their belongings. Another reported that "there was also a weapon." Based on this "absolutely extraordinary" testimony, the district court directed the parties to brief whether the court could impose consecutive sentences for individual counts. The district court also gave Rodriguez-Mantos nine months to produce evidence to rebut the victims' testimony.

At the third hearing, Rodriguez-Mantos declined to present rebuttal evidence, and the district court proceeded to sentence him. The court upwardly departed from the advisory Guidelines range to 84 months and upwardly varied to run the counts consecutively based in part on Rodriguez-Mantos's sexual assaults and use of weapons in trafficking the aliens. The district court imposed a sentence of 84 months on each of the three substantive harboring counts, to run consecutive to each other and concurrent with the other counts. *Id.* The total sentence was 252 months, or 84 times three. Rodriguez-Mantos appealed, challenging the departure and variance on both procedural and substantive grounds.

II.

A two-step review applies to a district court's sentencing decision. *United States v. Robinson*, 741 F.3d 588, 598 (5th Cir. 2014). First, we determine whether the district court made a significant procedural error. *Gall v. United States*, 552 U.S. 38, 51 (2007). If the sentence is procedurally sound or its error is harmless, then we "consider the substantive reasonableness of the sentence imposed." *Robinson*, 741 F.3d at 598.

We review the reasonableness of a sentence for abuse of discretion. *United States v. Hernandez*, 633 F.3d 370, 375 (5th Cir. 2011). But plain error review applies to any objection that the defendant failed to preserve. *Stanford*, 823 F.3d at 843. To preserve an objection, the defendant must raise his

objection with enough specificity to alert the district court to the nature of the alleged error and to provide opportunity for correction. *United States v. Chavez-Hernandez*, 671 F.3d 494, 499 (5th Cir. 2012); *United States v. Mondragon-Santiago*, 564 F.3d 357, 361 (5th Cir. 2009). To obtain relief under plain error review, an appellant must show: (1) that there is "an error that has not been intentionally relinquished or abandoned"; (2) that the error is clear or obvious; (3) that the error affected the appellant's substantial rights, such that "but for the error, the outcome of the proceeding would have been different"; and (4) that "the court of appeals should exercise its discretion to correct the forfeited error because it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Rosales-Mirales v. United States*, 138 S. Ct. 1897, 1904–05 (2018).

III.

A.

For a sentence that varies or departs from the Guidelines to be procedurally sound, the district court must consider all of the 18 U.S.C. § 3553(a) factors and provide an adequate explanation for the sentence. *See Gall*, 552 U.S. at 49–50. Rodriguez-Mantos asserts that the district court failed to consider one of them: "the applicable guidelines or policy statements." 18 U.S.C. § 3553(a)(4)(B). Specifically, he alleges that the Guidelines already accounted for the harms in the case. Because he made this argument in his sentencing brief, we review this procedural argument for abuse of discretion.

Rodriguez-Mantos contends that the district court ignored the Guidelines in multiple ways. First, he asserts that the district court "double counted," using victim impact as the basis of a variance even though the Guidelines' enhancements already took this into account. But "double counting is prohibited only if the particular Guidelines at issue forbid it." *United States v. Jones*, 145 F.3d 736, 737 (5th Cir. 1998); *see also United States*

v. Brantley, 537 F.3d 347, 350 (5th Cir. 2008). Rodriguez-Mantos offers no indication that the applicable Guidelines forbid double counting.

Rodriguez-Mantos also alleges that the district court ignored the Guidelines by using his "lack of remorse" to support an upward variance even though the Guidelines *reduced* his sentence for "acceptance of responsibility." But we have held that "'lack of remorse' and 'acceptance of responsibility' can be separate factors and that a district court may consider each independently of the other." *See United States v. Douglas*, 569 F.3d 523, 527 (5th Cir. 2009).

Rodriguez-Mantos also contends that the district court failed to consider his low criminal history category of I under the Guidelines by giving him a sentence far too high for a defendant in that category. But the district court explained that his criminal history was underrepresented: he had prior unprosecuted and still-pending charges.[1] A district court may depart from the Guidelines based on the lack of deterrence provided by a prior lenient sentence, or by the lack of any sentence. *See United States v. Lee*, 358 F.3d 315, 328–29 (5th Cir. 2004). As a result, the district court did not abuse its discretion in considering Rodriguez-Mantos's underrepresented criminal history.

Last, Rodriguez-Mantos contends that even if the district court did consider the Guidelines, its explanation of the sentence was conclusory and therefore inadequate. *See Gall*, 552 U.S. at 50 ("[the sentencing judge] must adequately explain the chosen sentence"). However, the district court made its findings after having three different hearings with extensive testimony, giving both parties an opportunity to brief the sentencing issues, and discussing the

[1] In sentencing, a district court may not rely on a "bare arrest record": a record that refers to the "mere fact of an arrest—*i.e.*[,] the date, charge, jurisdiction and disposition—without corresponding information about the underlying facts or circumstances regarding the defendant's conduct that led to the arrest." *United States v. Windless*, 719 F.3d 415, 420 (5th Cir. 2013). In the instant case, however, the PSR provided a sufficient "factual recitation of the defendant's conduct that gave rise to [ ] prior unadjudicated arrest[s]." *Id.*

relevant § 3553 factors. The court also gave Rodriguez-Mantos ample opportunity to prepare and produce his own evidence. It provided a detailed explanation for the departure and variance: Rodriguez-Mantos's part in an "extensive conspiracy" in which he "victimize[ed] no less than four victims," forced his victims "to consume drugs," threatened "several aliens with a gun," and sexually assaulted some of them. Moreover, Rodriguez-Mantos "showed no remorse for his victims." *Id.* This explanation is sufficiently detailed, so we hold that the district court did not abuse its discretion by failing to consider the § 3553 factors.

B.

Rodriguez-Mantos also asserts that the district court relied on clearly erroneous facts in the PSR: allegations that he sexually assaulted the victims at the stash house. In sentencing, a district court may consider any evidence that "bears sufficient indicia of reliability," and presentence reports generally meet that requirement. *United States v. Hawkins*, 866 F.3d 344, 347 (5th Cir. 2017). Courts may rely on evidence in a PSR unless the defendant "present[s] evidence to the contrary." *Id.* Despite having nine months between the second and third sentencing hearings to produce rebuttal evidence, Rodriguez-Mantos offered only blanket denials to the evidence in the PSR and in victim testimony. On this record, Rodriguez-Mantos does not establish that the district court committed clear error in its fact finding.

IV.

Turning to the substantive reasonableness of the district court's variance from the Guidelines, we consider the totality of the circumstances, including the extent of the variance, to determine if the § 3553(a) factors support the sentence. *Gall*, 552 U.S. at 50. "[A] major departure [from the Guidelines] should be supported by a more significant justification than a minor one." *Id.* "Review for substantive reasonableness is highly deferential, because the

sentencing court is in a better position to find facts and judge their import under § 3553(a) factors with respect to a particular defendant." *United States v. Diehl*, 775 F.3d 714, 724 (5th Cir. 2015) (internal quotation marks omitted). A substantial upward variance from the Guidelines will be upheld when it "is commensurate with the individualized case-specific reasons provided by the district court." *Id.* "A non-Guideline sentence unreasonably fails to reflect the statutory sentencing factors where it (1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors." *United States v. Smith*, 440 F.3d 704, 708 (5th Cir. 2006).

The government argues that review is for plain error because Rodriguez-Mantos's objections were insufficiently particular, while Rodriguez-Mantos insists that review is for abuse of discretion. We assume, without holding, that the review of the sentence's substantive reasonableness is for abuse of discretion, because we affirm the sentence under either standard of review.

Rodriguez-Mantos contends first that his sentence is substantively unreasonable because it fails to take the Guidelines into account, as required by § 3553(a). This argument mirrors his procedural argument for "double counting," and we reject the substantive argument for similar reasons. The district court "properly calculated the applicable Guideline range." *Smith*, 440 F.3d at 710. It then determined that the sentence did not adequately serve the objectives of § 3553(a) and provided a sufficient statement of reasons explaining how the § 3553(a) factors supported its variance. The sentencing court is in a better position to find facts and judge their import, *Diehl*, 775 F.3d at 724, and double counting is not a sufficient basis to withhold the high deference we owe them in this inquiry. *Brantley*, 537 F.3d at 350.

Rodriguez-Mantos also cites *United States v. Garcia-Gonzalez*, 714 F.3d 306 (5th Cir. 2013), in which we affirmed a within-Guidelines sentence for a defendant who, while harboring minor female illegal aliens, coerced them into prostitution. *Id.* at 311. Because the *Garcia-Gonzalez* defendant received a within-Guidelines sentence for what Rodriguez-Mantos asserts is more egregious conduct, he claims that we must reverse. But the sentence in *Garcia-Gonzalez*, while within the Guidelines, was for 360 months of imprisonment, more than eight years longer than the sentence in the instant case. *Id.* Under our highly deferential review for substantive reasonableness, we cannot say that the district court in the instant case, in its case-specific departure and variance from the Guidelines, was bound by the sentence in *Garcia-Gonzalez* when the Guidelines in that case already supplied a far greater prison term.

Rodriguez-Mantos also contends that the district court placed too much emphasis on an improper factor: his alleged sexual assault. He claims that the district court's consideration of this factor violates principles of federalism, imposing a sentence for a crime it has no jurisdiction to determine was violated. Texas alone, he claims, can define and enforce its own criminal laws. But the district court did not improperly step into the domain of Texas criminal law enforcement because it did not find him guilty of this crime. By contrast, the district court considered the allegations of sexual assault as part of the "the nature and circumstances of [the harboring-related] offense[s]" to which he pleaded guilty. 18 U.S.C. § 3553(a)(1). A district court may do this so long as the evidence on which it relies "bears sufficient indicia of reliability." *Hawkins*, 866 F.3d at 347. Despite having nine months to prepare and provide rebuttal evidence, Rodriguez-Mantos never did so. Thus, the district court did not abuse its discretion in considering this factor.

Last, Rodriguez-Mantos asserts that the district court made a clear error of judgment. But, just as in *Diehl*, 755 F.3d at 724, the sentence in the instant

case is "well-supported by the facts and by the district court's consideration and explanation of the § 3553(a) factors." This court has consistently upheld even larger variances when the sentence was justified by the sentencing factors. *See United States v. Hebert*, 813 F.3d 551, 562–63 (5th Cir. 2015) (holding that a variance from 6–7 years to 92 years was substantively reasonable); *Diehl*, 775 F.3d at 726 (affirming a sentence of incarceration 253 percent higher than the upper limit of the Guidelines range); *United States v. Smith*, 417 F.3d 483, 492–93 (5th Cir. 2005) (affirming a sentence of incarceration nearly 300 percent higher than the upper limit of the Guidelines range); *United States v. Saldana*, 427 F.3d 298, 312 (5th Cir. 2005) (affirming a sentence that quadrupled the maximum sentence allowable under the Guidelines).

For these reasons, we AFFIRM.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40842

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JUAN GERARDO RODRIGUEZ-MANTOS, also known as Gera,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 09/07/2018, 5 Cir., _____, _____ F.3d _____)

Before KING, ELROD, and HAYNES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court

having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

Appendix C

Case No. 17-40842

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

JUAN GERARDO RODRIGUEZ-MANTOS, also known as Gera,

Defendant – Appellant

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal from the United States District Court
for the Southern District of Texas

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CERTIFICATE OF INTERESTED PERSONS

United States v. Juan Gerardo Rodriguez-Mantos
No. 17-40842

The undersigned counsel of record certifies that the persons having an interest in the outcome of this case are those listed below:

1. **Juan Gerardo Rodriguez-Mantos,** Defendant-Appellant;

2. **Carmen Castillo Mitchell,** U.S. Attorney;

3. **Jose Homero Ramirez,** Assistant U.S. Attorney, who represented Plaintiff-Appellee in the district court;

4. **Jesus M. Dominguez,** Court-Appointed Counsel who represented Defendant-Appellant in the district court; and

6. **Derly J. Uribe,** Court-Appointed Counsel who represents Defendant-Appellant in this Court.

This certificate is made so that the judges of this Court may evaluate possible disqualification or recusal.

s/Derly J. Uribe

REQUEST FOR ORAL ARGUMENT

Defendant-Appellant, Juan Gerardo Rodriguez Mantos requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a) and Fifth Circuit Rule 34.2.

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STATEMENT OF JURISDICTION

1. **Subject Matter Jurisdiction in the District Court.** This case arose from the prosecution of an alleged offense against the laws of the United States. The district court exercised jurisdiction under 18 U.S.C. § 3231.

2. **Jurisdiction in the Court of Appeals.** This is a direct appeal from a final decision of the United States District Court for the Southern District of Texas, entering judgment of criminal conviction. This Court has jurisdiction of the appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Under Federal Rule of Appellate Procedure 4(b), a criminal defendant who wishes to appeal a district court judgment must file notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or a notice of appeal by the Government. Under Federal Rule of Appellate Procedure 4(b), a criminal defendant who wishes to appeal a district court judgment must file notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or a notice of appeal by the Government. In this case, sentence was announced on July 25, 2017, and the written judgment was signed on July 29, 2017. Mantos filed his notice of appeal on August 8, 2017.

STATEMENT OF THE ISSUE

Whether the district court's 252 month sentence, which upwardly departs 355% from the upper end of the applicable imprisonment range, is an unreasonable sentence.

STATEMENT OF THE CASE[1]

A. Proceedings Below.

On November 24, 2015, Mr. Mantos was charged with eight counts in a sealed superseding indictment with re-entry of a deported alien in violation of 8 U.S.C. § 1326(a); conspiracy to transport an undocumented alien; conspiracy to conceal harbor, and shield from detection an undocumented alien; aiding and abetting the transportation of an undocumented alien, and four counts of aiding and abetting to conceal, harbor, and shield from detection undocumented aliens in violation of 8 U.S.C. § 1324. ROA. 7, 17-20, 107-08.

On February 17, 2016, Mr. Mantos plead guilty to the indictment before United States Magistrate Diana Song Quiroga without a plea agreement. ROA. 160, 220, 247-48. On November 16, 2016 the district court held a hearing to consider Mr. Mantos' sentencing. ROA. 316. The district court did not sentence Mr. Mantos on said date and ordered his trial counsel and the Government to submit briefs with respect to whether it would be appropriate to impose consecutive sentences on Mr. Mantos. ROA. 434-35. On July 25, 2017 the district court, in addition to other rulings, imposed the following consecutive sentence on Mr. Mantos to serve in the

[1] The record on appeal for the trial is cited as "ROA. [page]." Paragraphs in the he Pre-Sentence Investigation Report are referred to as "PSR ¶ ____.

custody of the Federal Bureau of Prisons: an eighty-four (84) month term for Counts 1, 2, 3, and 7, along with Counts 4, 5, and 6 to be served consecutively with each other and concurrently with Counts 1, 2, 3, 7, and 9–for a total custodial sentence of two hundred fifty-two (252) months. ROA. 109 [judgment]; ROA. 501-02 [transcript of oral pronouncement of sentence]. On August 8, 2017, Mr. Mantos timely filed his notice of appeal. ROA. 123. This appeal followed.

B. Statement of the Facts.

When Mr. Mantos plead guilty, the court explained to him: the sentencing table; that an advisory level range of punishment would be determined by the probation office in a report for the sentencing judge to consider; and that his attorney can object to the law and facts stated in the report. ROA. 222-23. Mr. Mantos was also generally advised that his guilty plea cannot be changed if: his attorney's estimate of what his sentencing range would be is wrong; if the sentencing judge believes what the material witnesses say he did; or if the sentencing judge decides to depart from the applicable sentencing range and impose a longer term of imprisonment. ROA. 222-23, 260-61. However, neither Mr. Mantos' attorney nor the court specifically admonished him that as a consequence of pleading guilty, he was subject to receiving a sentence that is more than three times and a half the high end of the sentencing range the probation office determined was applicable. ROA. 161-

266.

The PSR's total offense level of 27 with a range of 70 to 87 months essentially reinforced the sentencing range that Mr. Mantos reasonably expected to receive as a consequence of his guilty plea. ROA. 552. The government concurred: "The presentence investigation report is correctly scored at an offense level of 27, a criminal history category of I, resulting in an advisory custodial guideline range of 70 to 87 months." ROA. 511. At sentencing, the Government recommended that Mr. Mantos be sentenced to a 100 month term. ROA. 363. The Government's assertion that the PSR correctly scored Mr. Mantos at Level 27 coupled with its recommendation that he be sentenced to serve 100 months in prison confirms the sentencing range that Mr. Mantos reasonably expected to receive when he decided to give up his right to a jury trial and plead guilty.

In calculating Mr. Mantos' sentencing range, the probation office began with a base offense level of twelve (12) PSR ¶ 93. The probation office then applied the following five sentencing level enhancements: (1) a six level enhancement for the involvement of 25-99 unlawful aliens pursuant to U.S.S.G. § 2L1.1(b)(2)(B); (2) a four level enhancement for brandishing a dangerous weapon pursuant to U.S.S.G. § 2L1.1(b)(5)(B); (3) a two level enhancement for intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person pursuant to

U.S.S.G. § 2L1.1(b)(6); (4) a four level enhancement for a person sustaining serious bodily injury pursuant to U.S.S.G. § 2L1.1(b)((7)(B); and (5) a two level enhancement for knowing or should knowing that a victim of the offense was a vulnerable victim pursuant to U.S.S.G. § 3A1.1(b)(1). PSR ¶ 94-99.

Defense counsel objected to all of the sentencing level enhancements except the six level enhancement for the involvement of 25-99 unlawful aliens pursuant to U.S.S.G. § 2L1.1(b)(2)(B). ROA. 514-17. At the first sentencing hearing, the district court over-ruled all of defense counsel's objections, except the objection to the vulnerable victim enhancement, which it sustained. ROA. 332, 337, 345, 347. The probation office further applied a three (3) level sentencing level reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a)(b). PSR ¶ 103-104. The district court sustained Mr. Mantos' objection to the two level vulnerable victim enhancement and determined that Mr. Mantos' total offense level is correctly scored at Level 25, with an imprisonment range of 57 to 71 months, two levels below what the PSR determined to be the total offense level. ROA. 347, 552; PSR ¶ 133.

At the first sentencing hearing, the district court did not sentence Mr. Mantos and ordered his trial counsel and the Government to submit briefs with respect to whether it would be appropriate to impose consecutive sentences on Mr. Mantos. ROA. 316, 434-35. Defense counsel complied with the district court's order and

timely submitted a brief. ROA. 81-86. The record does not indicate the Government complied with the district court's order by submitting any such brief. Mr. Mantos' defense counsel essentially argued that since the district court granted most of the sentencing level enhancements and thereby already considered the numerous factors the district court considered in granting three consecutive sentences, a sentence beyond the sentencing range recommended by the PSR and the Government is unreasonable. ROA. 81-86. At the second sentencing hearing, the district court imposed a sentence of two-hundred and fifty-two (252) months, a three hundred fifty-five percent (355%) increase of the high end of the imprisonment range the district court determined to be applicable, to wit, Level 25, with an imprisonment range of 57 to 71 months.

SUMMARY OF THE ARGUMENT

The district court sentenced Mr. Mantos to 252 months imprisonment, more than three and a half times the upper end of the applicable Level 25 guideline range of 57 to 71 months the district court determined to be applicable and more than two and half month times the 100 month imprisonment sentence the Government recommended. In imposing a sentence so much longer than the applicable guideline range and what the Government recommended, the district court unreasonably and unnecessarily penalized Mr. Mantos for factors the sentencing level enhancements

already took into consideration and effectively sentenced him for the unindicted state crime of sexual assault. The district court's sentence is unreasonable because it is significantly greater than necessary to achieve the sentencing goals set out in 18 U.S.C. § 3553(a). The district court's sentence is also an abuse of power because it essentially sentences Mr. Mantos for committing a Texas crime he was not charged with or plead guilty to committing in violation of his Constitutional rights to due process and a jury trial to determine beyond a reasonable doubt.

ARGUMENT

A. Standard of Review

A district court's sentence is reviewed for reasonableness. *United States v. Booker*, 543 U.S. 220, 261-62 (2005). This means that "[r]egardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse of discretion standard." *Gall v. United States*, 552 U.S. 38, 51 (2007). Reasonableness review has both a procedural component and a substantive component. *See Gall*, 552 U.S. at 51. In conducting such review, the appellate court

> must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen

> sentence—including an explanation for any deviation from the Guidelines range.

Id. If the sentence is procedurally sound," then the appellate court reviews the substantive reasonableness of the sentence for abuse of discretion. *Id.*

"In reviewing a non-Guidelines sentence for substantive unreasonableness, the court will consider the totality of the circumstances, including the extent of any variance from the Guidelines range, to determine whether, as a matter of substance, the sentencing factors in § 3553(a) support the sentence." *United States v. Gerezano-Rosales*, 692 F.3d 393, 400-01 (5th Cir. 2012)(citations and quotation marks omitted); quoting *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006)); *see also Gall*, 552 U.S. at 51. This Court examines "for abuse of discretion both the district court's decision to depart upwardly from the guidelines and the extent of its departure." *United States v. Hernandez*, 633 F.3d 370, 375 (5th Cir. 2011).

The record clearly indicates that Mr. Mantos objected to the district court's significant upward departure sentence from the applicable guideline range. ROA. 81-86; 450-51, 453-54, 484, 493-94, 514-17. Therefore, the plain error standard of review, which applies when no objection is lodged, is not and should not be applicable. *See Puckett v. United States*, 129 S.Ct. 1423, 1429 (2009).

B. The sentence is procedurally unreasonable.

A sentencing court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall*, 552 U.S. at 50 (citing *Rita v. United States*, 551 U.S. 338, 356-57 (2007)). In the same vein, this Court has held that, when the district court elects to give a non-Guidelines sentence, the court should carefully articulate fact-specific reasons why the sentence selected meets the "sufficient, but not greater than necessary" standard of 18 U.S.C. § 3553(a). *See, e.g., United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005). The district court must also consider seven factors to determine the sentence that achieves these statutory purposes: "(1) offense and offender characteristics; (2) the need for the sentence to reflect the basic aims of sentencing ...; (3) the sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution." *Rita v. United States*, 551 U.S. 338, 347-348 (2007).

Where a judge, furthermore, "decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50. And, "a major departure [from the Guidelines] should be supported by a more significant justification than a minor one." *Id.* "[F]ailing to adequately

explain the chosen sentence - including an explanation for any deviation from the Guidelines range" is a "significant procedural error" that taints the sentence. *Id.* at 51.

Procedural error includes the following which Mr. Mantos avers the district court committed: failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Gall v. United States*, 522 U.S. 38, 51 (2007).

1. The district court failed to consider the § 3553 factors.

The district court failed to consider the following § 3553(a) factor: the applicable guidelines and policy statements "in effect on the date the defendant is sentenced." 18 U.S.C. §§ 3553(a)(4) and (a)(5). It also failed to adequately explain why it granted such a significant departure from the guidelines range. The applicable guideline range the district court determined to be applicable is 57 to 71 months. The district court's imposition of a 252 month sentence, a 355% increase from the upper end of the applicable range, did not sufficiently consider the applicable guideline range in its determination that a guidelines sentence would not accomplish the sentencing goals of 18 U.S.C. § 3553(a). The district court did not select the sentence imposed based on the guidelines in effect on the date of sentencing. Rather, it selected the sentence imposed because, in its view, Mr. Mantos' conduct is "not fully

accounted for in the advisory range." ROA. 500-01.

The district court committed a procedural error in not granting a guidelines sentence because the reasons it articulated for not doing so are accounted for in the applicable level enhancements. The district court articulated its reasons for upwardly varying and departing from the applicable Guidelines range as follows:

> I think that the type of victimization that you engaged in, the fear that you inculcated in all of them, and you know, the threats really do take this case outside of the heartland and you know, I guess I want to mention that the fact that you're in total denial here today doesn't help the situation at all. You've shown absolutely no remorse for anything. In fact, you've completely tried to distance yourself from the entire situation going as far as saying I would show up at the house from time to time, but that's pretty much all I did. You know, I don't know what else I could say about that, but again I don't think that guideline sentence and concurrent sentences as to all counts is appropriate here because this case is in fact unusual. I don't think everything is fully accounted for in the advisory range and again it's all based on the conduct that you yourself chose to engage in, forcing them to take drugs, violating them sexually, it's just not fully accounted for in this advisory range which we have and so I am upwardly varying and departing ... to 84 months [which] is going to run consecutive on Counts Four, Five, and Six, but concurrent as to Counts One, Two, Three, and Seven, and as to Count Nine the maximum is 24 months, and I will run that concurrent as well.

ROA. 500-01. The Statement of Reasons form the district court entered in support of its 355% upward departure sentence of 252 months added an additional reason not expressed at the sentencing hearing—which is "criminal history inadequacy." ROA. 578. The § 3553(a) factors the district court marked in the form mirror the reasons

the district court articulated at the sentencing hearing for its significant upward departure which include: victim impact; lack of remorse; to reflect the seriousness of the offense, promote respect for the law, just punishment for the offense; adequate deterrence; and protect the public from further crimes. ROA. 579.

The district court's basis and statement of reasons it provided is filled with conclusory statements and does not express a sufficient explanation that should satisfy a reviewing court that a guidelines sentence would not sufficiently accomplish the sentencing goals of 18 U.S.C. § 3553(a). "[T]he Guidelines reflect Congress' determination of potential punishments, as set forth in statutes, and Congress' on-going approval of Guidelines sentencing, through oversight of the Guidelines revision process." *United States v. Goff*, 501 F.3d 250, 257 (7th Cir. 2007) citing 28 U.S.C. § 994(p). The sentencing guidelines reflect the "collected wisdom of various institutions" and "have been produced at Congress' direction. *United States v. Goff*, 501 F.3d at 257, citing *Rita v. United States*, 551 U.S. 338, 350 (2007). Because the guidelines are the product of the Sentencing Commission's expertise and empirical study, "[i]t is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives." *Rita v. United States*, 551 U.S. 350.

Mr. Mantos' PSR contains an entire section that addresses and factors his

criminal history into the sentencing table. ROA. 547-40; PSR ¶ 106-115. Mr. Mantos' criminal history involves minor, misdemeanor offenses such as criminal mischief, marijuana possession, DWI, and being an undocumented alien. His criminal history is so minor that it yielded a category I criminal history. ROA. 547-40; PSR ¶ 106-115. Citing Mr. Mantos' unremarkable criminal history as a factor justifying its 355% upward departure without providing any explanation other than to essentially mention it does not and should not serve as a sufficient basis to support the district court's conclusion that a guidelines sentence would not accomplish the 18 U.S.C. §3553(a) sentencing goals. To the extent Mr. Mantos' criminal history warranted any sentencing consequence, a sentence on the middle or upper end of an applicable guideline is a more reasonable and proportional reaction. A 355% departure, which is what the district court elected to do, is an unreasonable sentence in light of Mr. Mantos' unremarkable, category 1 criminal history.

The two main factors the district court noted at the sentencing hearing that prompted its decision to grant a 252 month upward departure sentence are: (1) the impact on the victims; and (2) a lack of remorse. ROA. 500-01. However, the following Guideline sentencing level adjustments (which the district court granted with the exception of the vulnerable victim enhancement) already addressed and accounted for the impact Mr. Mantos' relevant conduct had on the victims: a six level

enhancement for the involvement of 25-99 unlawful aliens pursuant to U.S.S.G. § 2L1.1(b)(2)(B); a four level enhancement for brandishing a dangerous weapon pursuant to U.S.S.G. § 2L1.1(b)(5)(B); a two level enhancement for intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person pursuant to U.S.S.G. § 2L1.1(b)(6); a four level enhancement for a person sustaining serious bodily injury pursuant to U.S.S.G. § 2L1.1(b)(7)(B); and a two level enhancement for knowing or should knowing that a victim of the offense was a vulnerable victim pursuant to U.S.S.G. § 3A1.1(b)(1). ROA. 544-46; PSR ¶ 94-99.

The serious bodily injury enhancement in particular is noteworthy, which specifically takes into account the following: "If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

Death or Degree of Injury	Increase in Level
(A) Bodily Injury	add 2 levels
(B) Serious Bodily Injury	*add 4 levels*
(C) Permanent or Life-Threatening Bodily Injury	add 6 levels
(D) Death	add 10 levels"

U.S.S.G. § 2L1.1(b)(7). (Emphasis added). The substantial four level enhancement the probation office recommended and the district court granted specifically takes into account the harm the district court determined occurred. The district court's

explanation in support of its 355% upward departure sentence does not sufficiently explain why the Guidelines and its enhancements do not adequately take into account Mr. Mantos' relevant conduct. Consequently, the district court committed procedural error because it did not sufficiently consider the § 3553(a) factor of the applicable guidelines and policy statements.

Furthermore, in light of the district court's judgment that Mr. Mantos expressed a lack of remorse, it could and should have elected to deny the three level sentencing reductions for acceptance of responsibility–as opposed to what it did—granting the three level acceptance of responsibility reduction (ROA. 390) contrary to its determination that Mr. Mantos lacked remorse and using that as a basis to grant a 355% upward departure. ROA. 500. *See United States v. Thomas*, 12 F.3d 1350, 1372 (5th Cir. 1994) (It is not reversible error to deny a defendant who does not show "sincere contrition" an acceptance of responsibility adjustment). Incidentally, the fact that the district court made contradictory findings[2] further bolsters Mr. Mantos' argument that the district court's sentence is not proportional or reasonable.

The district court's stated reasons for imposing a 252 month sentence do not

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[2] The district court declined to grant the two level enhancement the probation office recommended on the basis that the victims were vulnerable. ROA. 347, 546; PSR ¶ 99. The district court's finding that the victims were not vulnerable further reinforces Mr. Mantos contention on appeal that granting a 355% departure sentence on the basis of the impact of the victims is not proportional or reasonable. ROA. 500.

provide much beyond conclusory statements that the applicable guideline range does not adequately take Mr. Mantos' conduct into account. The law is clear that when the district court elects to give a non-Guidelines sentence, the court should carefully articulate fact-specific reasons why the sentence selected meets the "sufficient, but not greater than necessary" standard of 18 U.S.C. § 3553(a). *See e.g. United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005). Furthermore, where a judge "decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50. And, "a major departure [such as a 355% departure the case at bar presents,] should be supported by a more significant justification than a minor one." *Id.*

Moreover, "[f]ailing to adequately explain the chosen sentence–including an explanation for any deviation from the Guidelines range" is a "significant procedural error" that taints the sentence. *Id.* at 51. Since the district court clearly did not adequately explain why a Guidelines sentence would not meet the sentencing goals of 18 U.S.C. § 3553(a), the district court committed a significant procedural error. In the absence of the district court furnishing a detailed explanation why granting all the sentencing level enhancements the probation office recommended and selecting an imprisonment range in the middle or upper end of the applicable range would not

accomplish the 18 U.S.C. § 3553(a) goals, the district court's election to impose a 355% departure sentence constitutes procedural error.

2. The district court largely based its upward departure sentence on clearly erroneous facts.

The district court committed procedural error because its 355% upward departure sentence was largely based on clearly erroneous facts. The relevant facts the district court focused on involved the time when the undocumented aliens were at stash houses waiting to be transported, and it relied on the reported statements in the PSR and testimony of several material witnesses, including Jennifer Leonor Torres Zelaya, Gladis Navarette Aviles, Aristides Ismael Lopez-Ramirez, and Norma Yaritza Lara Campos.

According to the PSR, Jennifer Leonor Torres Zelaya[3] reported that Mr. Mantos would hit the floor with a baseball bat and would make threatening statements to the undocumented aliens. ROA. 533 ¶ 45-46. She further reported that another man, named Don Jose gave her a choice to either have sex with Don Jose or Mantos. She further reported that Don Jose and not Mantos: threatened to shoot her, forced her to smoke crack cocaine, and sexually assaulted her and another female named Lucy.

[3] The transcript identifies a material witness by the name of Jennifer Torres Salaga Ramos. Because that name is similar to Jennifer Leonor Torres Zelaya , it is unclear if the person identified under these two names are the same person. ROA. 19, 370, 533.

ROA. 533; PSR ¶ 45-46. Assuming Jennifer Torres Salaga Ramos is the same person identified as Jennifer Lenor Torres Zelaya in the PSR, she testified at the sentencing hearing that Mantos had a weapon in addition to a bat, and that she was forced to take drugs, although she did not specifically identify Mantos in court nor state he was involved with the ones that forced her to take drugs ROA. 371. A fair review of Jennifer Leonor Torres Zelaya's PSR statements and testimony does not in any way serve as a factual basis even under a preponderance of the evidence standard that Mr. Mantos forced anyone to ingest drugs or engaged in any sexual assaults.

According to the PSR, Gladis Navarette Aviles reported that Mantos and another man identified as "Guero" "would take turns caring for the aliens at a residence ... in Laredo, Texas." ROA. 536; PSR ¶ 58. She further reported that a man other than Mantos referred to as "El Negro" sexually assaulted her. PSR ¶ 60. Ms. Navarette's testimony made no mention whatsoever of Mantos doing anything to her. ROA. 374-76. It further bears mentioning that Ms. Navarette statements in the PSR and her testimony concern events that occurred on or about October 9, 2014, a time period that significantly predates the dates in the charges Mr. Mantos plead guilty to which range from April 13, 2015 through June 2, 2015. ROA. 17-20, 536: PSR ¶ 57. Accordingly, a fair review of Ms. Navarette's PSR statements and testimony does not in any way serve as a factual basis, even under a preponderance of the evidence

standard, that Mr. Mantos engaged in any improper conduct, including any sexual assault.

According to the PSR, Aristides Ismael Lopez Ramirez reported that both Mantos and Don Jose "would take female undocumented aliens to another room and sexually assault them." (hereinafter "Mr. Lopez's Statement") ROA. 532: PSR ¶ 39. Although the PSR makes no mention of this, Mr. Lopez testified that he was hit by a bat three times, but did not identify Mantos in Court nor state that Mantos was the one who struck or was involved in striking him with a bat. ROA. 373-74. Mr. Lopez further did not testify with respect to Mr. Lopez's Statement. ROA. 373-74.

Neither the PSR nor Mr. Lopez's testimony establishes that Mr. Lopez's Statement is not speculation. There is no evidence whatsoever that Mr. Lopez actually witnessed anything that occurred in the other room. And there is no evidence whatsoever that anyone else including any females who were taken to the other room informed him that Mantos or anyone else assaulted them. Accordingly, since Mr. Lopez's Statement is inherently a speculative statement, it cannot serve as a factual basis, even under a preponderance of the evidence standard, that Mr. Mantos sexually assaulted anybody or was involved in any sexual assault. *See United States v. Hagman*, 740 F.3d 1044, 1052 (5th Cir. 2013) (If the "evidence appears to be equally

balanced," the government has not met its burden).[4]

The PSR states that Norma Yaritza Lara-Campos reported the following:

> Norma Yaritza Lara Campos disclosed that while at a residence ... in Laredo, Texas, a male known as "Juan" (later identified as ... Mantos), who was intoxicated, instructed her to go to an empty room where he told her he wanted to have sexual relations with her before taking off her shirt. Lara-Campos stated that ... Mantos also took her pants off, started kissing her breasts and touched her between her legs and told her that he wanted to have sex with her, to which she replied that she was on her menstrual cycle. Mantos then penetrated her with his finger to see if she was lying about being on her menstrual cycle. After Mantos ensured she was on her period, he instructed her to go back to the room where she was being harbored.

ROA. 533: PSR ¶ 44. Ms. Lara-Campos testified and essentially recounted what the PSR states she reported; however, she did not specifically state that she was digitally penetrated although that was implied: "And then they realized that I was on my menstrual period. So, ... this is when they found that I was on my menstrual period, so it is like I said, they took off my clothes, and they took it off to verify that I was on my menstrual period. ROA. 368. The undersigned does not intend to minimize what Ms. Lara-Campos reported and testified occurred to her, but the argument Mr. Mantos presents on appeal is that the Guidelines sufficiently take into account the

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[4] The PSR further mentions another material witness who is unidentified, who makes the same exact statement–that Mantos and Don Jose "would take female undocumented aliens to another room and sexually assault them." ROA. 532: PSR ¶ 39. The same argument that such a statement is inherently speculative, and as such, is not evidence, applies to this statement as well.

harm Ms. Lara-Campos reported and testified to, and there is no other evidence that the district court could rely upon that sufficiently justifies a 355% departure sentence.

C. The sentence is substantively unreasonable.

Given the significant procedural errors previously established, Mr. Mantos' 252 month sentence is also substantively unreasonable. *See United States v. Levinson*, 543 F.3d 190, 195 (3d Cir. 2008)("Obviously, procedural problems may lead to substantive problems, so there are times when a discussion of procedural error will necessarily raise questions about the substantive reasonableness of a sentence."). When reviewing a variance from the guidelines for substantive reasonableness, this Court considers the totality of the circumstances, including the extent of the variance to determine if the § 3553(a) factors support the sentence.

A sentence fails to reflect the statutory sentencing factors set forth in § 3553(a) and is substantively unreasonable where it "does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing sentencing factors." *United States v. Diehl*, 775 F.3d 714, 724 (5th Cir. 2015); *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009). (Citation omitted). Since the case at bar presents an above-guideline sentence, it is not entitled to a presumption of reasonableness that a guideline sentence does. *See Rita*, 551 U.S. at 347-48.

1. The district court failed to take the Guidelines into account.

The district court's reasons for an upward departure in this case unreasonably minimized the sentencing guidelines. The sentencing guidelines and its policy statements in effect on the date of sentencing are one factor the court must consider when imposing sentence. *See* 18 U.S.C. § 3553(a)(4) and (a)(5); *United States v. Goff*, 501 F.3d 250 n. 16 (7th Cir. 2007). Because the guidelines are based on the Sentencing Commission's expertise and empirical study, they provide a rough approximation of a sentence that achieves the goals of sentencing. *Rita v. United States*, 551 U.S. 338, 350 (2007). The district court's sentence represented a 355% upward departure from the sentence the sentencing guidelines approximated would accomplish the statutory sentencing goals.

The district court cited the following in support of its 355% upward departure sentence: impact of the victims, lack of remorse, and in the statement of reasons form, Mr. Mantos' category 1 criminal history. As stated previously, the sentencing level enhancements such as reckless endangerment and occurrence of and substantial risk of death or serious bodily injury already factored and took into account the district court's cited reasons. Moreover, as also previously stated, the sentencing guidelines also provide a sentencing level adjustment if a defendant expresses a lack of remorse with the denial of the three level reduction which generally gets applied when a

defendant pleads guilty. Mr. Mantos' unremarkable criminal history, correctly scored at category 1, was also considered and correctly factored into the sentencing table.

The district court did not provide much beyond conclusory statements that the Guidlines do not adequately address or factor Mr. Mantos' conduct or that his criminal history is under-represented. Nowhere in the record can a reviewing court understand how and why the Guidelines do not adequately address or factor Mr. Mantos' conduct nor how and why Mr. Mantos' criminal history is under-represented. And in the case at bar which provides a 355% upward departure from the upper end of the calculated guideline range, 71, the law is clear that "a major departure [from the Guidelines] should be supported by a more significant justification than a minor one." *Gall*, 552 U.S. at 50. The district court erred because it was required to "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing. *Id.* Accordingly, in the absence of the record showing a sufficient explanation justifying a sentence that is 355% greater than the upper end of the applicable guideline range, the district court failed to sufficiently account for the sentencing guidelines, and in doing so, imposed a substantively unreasonable sentence.

U.S.S.G. § 2L1.1(b)(7) specifically provides the levels to be increased depending on the seriousness of the injury, including death, a result that is undeniably

worse than the relevant conduct in the case at bar but nonetheless is accounted for in the Guidelines. *See United States v. DeJesus Ojeda*, 515 F.3d 434 (5th Cir. 2008). (Defendant involved in alien smuggling that resulted in the death of an alien received a guidelines sentence). The substantial four level enhancement the probation office recommended (ROA. 544: PSR ¶ 95) and the district court granted specifically takes into account the harm the district court determined occurred. The district court's explanation in support of its 355% upward departure sentence does not sufficiently explain why the Guidelines and its enhancements do not adequately take into account Mr. Mantos' relevant conduct. Consequently, the district court committed substantive error because it failed to take the Guidelines into account.

The following case further demonstrates a similar enough fact pattern which supports Mr. Mantos' argument on appeal that the district court erred in imposing a non-Guidelines sentence: *United States v. Garcia-Gonzalez*, 714 F.3d 306, 314 (5th Cir. 2013). In *Garcia-Gonzalez*, the defendant was found guilty of conspiring to harbor illegal aliens, harboring illegal aliens, and other charges. *Id.* at 311. In that case, the defendant coerced minor female illegal aliens in their teens to engage in prostitution. *Id.* The defendant received a Guidelines sentence, and his sentencing level was enhanced on the basis that the defendant's conduct of coercing minor female illegal aliens created a substantial risk of serious bodily injury. *Id.* at 314-15.

Mr. Mantos contends that his relevant conduct is not as egregious as coercing minor female illegal aliens to engage in prostitution, and since that conduct was deemed by this Court as being within the "heartland" of the existing guidelines, so should his. A guidelines sentence sufficiently accounts for his relevant conduct. Therefore, the district court's 355% upward departure sentence is unreasonable and should be set aside.

2. The district court gave significant weight to an improper factor.

By sentencing Mr. Mantos to serve 252 months in prison for pleading guilty to alien smuggling crimes, the district court essentially sentenced him as if he plead guilty to the non-federal crime of sexual assault, a crime he was not charged with committing. By focusing almost entirely on the contested sentencing allegations that Mr. Mantos sexually assaulted a female alien and was involved in others to justify its massive upward departure, the district court improperly gave too much weight to an improper factor–a disputed, non-federal crime he was not charged with nor plead guilty to committing. It bears emphasizing that Mr. Mantos plead guilty to alien smuggling crimes he was charged with committing. He was not charged with and did not plead guilty to the non-federal crime of sexual assault, which is essentially the crime that the district court sentenced Mr. Mantos for committing.

When Mr. Mantos plead guilty to the alien smuggling crimes he was charged

with, the court explained to him: the sentencing table; that an advisory level range of punishment would be determined by the probation office in a report for the sentencing judge to consider; and that his attorney can object to the law and facts stated in the report. ROA. 222-23. Mr. Mantos was also generally advised that his guilty plea cannot be changed if: his attorney's estimate of what his sentencing range would be is wrong; if the sentencing judge believes what the material witnesses say he did; or if the sentencing judge decides to depart from the applicable sentencing range and impose a longer term of imprisonment. ROA. 222-23, 260-61. However, neither Mr. Mantos' attorney[5] nor the court[6] specifically admonished him that as a consequence of pleading guilty, he was subject to receiving a sentence that is greater than three times and a half the high end of the sentencing range the probation office determined was applicable. ROA. 161-266.

The PSR's total offense level of 27 with a range of 70 to 87 months essentially confirms the sentencing range that Mr. Mantos reasonably expected to receive as a consequence of his guilty plea. ROA. 552. The government concurred: "The presentence investigation report is correctly scored at an offense level of 27, a

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[5] Mr. Mantos' attorney stated on the record that he did not admonish Mr. Mantos that he would be subject to receiving a consecutive sentence as a consequence of pleading guilty. ROA. 484

[6] Despite the district court's statement on the record that Judge Song admonished Mr. Mantos that he was subject to receiving a consecutive sentence (ROA. 484), a review of the rearraignment hearing transcript does not support that such an admonishment was made.

criminal history category of I, resulting in an advisory custodial guideline range of 70 to 87 months." ROA. 511. At sentencing, the Government recommended that Mr. Mantos be sentenced to a 100 month term. ROA. 363. The Government's assertion that the PSR correctly scored Mr. Mantos at Level 27 coupled with its recommendation that he be sentenced to serve 100 months in prison further reinforces the sentencing range that Mr. Mantos reasonably expected when he decided to give up his right to a jury trial and plead guilty.

The unfairness of essentially getting sentenced for a crime Mr. Mantos was not even charged with is further reinforced by the fact that the lesser standard of proof of preponderance of the evidence applied to the determinations the district court made in granting a 355% upward departure sentence. ROA. 451. Mr. Mantos was further denied his Sixth Amendment right for a jury of his peers to determine whether the material witnesses correctly identified him as being the one who committed and/or was involved in the sexual assaults the district court determined by a preponderance of the evidence he committed or was involved in to justify its major 355% departure sentence.

The district court's act of essentially sentencing Mr. Mantos for the Texas crime of sexual assault constitutes an abuse of power. It is so because aside from the due process and Sixth Amendment jury trial rights it implicates, it also implicates

basic notions of federalism by infringing on the right of the state of Texas to exclusively prosecute those who violate its criminal laws. Under Texas law, the crime of sexual assault is a second degree felony which carries a sentence between two and twenty years imprisonment. Tex. Pen. Code §§ 22.011 and 12.33. Indeed, the district court's sentence is unreasonable because it more closely resembles a sentence for the Texas crime of sexual assault, a crime he was not charged with and did not plead guilty to committing. It further bears mentioning that the evidence showed that a person was digitally penetrated. The fact that Mr. Mantos received a sentence commensurate with someone who is found guilty under Texas law for forcibly raping someone further shows that the sentence imposed is unreasonable and does not warrant a 355% upward departure.

The following basic principles of federalism are applicable:

> In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good—what we have often called a 'police power.' The Federal Government, by contrast, has no such authority and 'can exercise only the powers granted to it,' including the power to make 'all Laws which shall be necessary and proper for carrying into Execution' the enumerated powers. For nearly two centuries it has been 'clear' that, lacking a police power, 'Congress cannot punish felonies generally.'

Bond v. United States, 134 S.Ct. 2077, 2086 (2014). (Citations omitted). By focusing its sentence almost exclusively on punishing Mr. Mantos for committing the Texas

crime of sexual assault, clearly an improper factor, the district court abused its power by effectively imposing a sentence for a crime it has no jurisdiction to determine was violated. The district court over-stepped its authority because it infringed on the State of Texas' right to define and enforce its own criminal laws. *See Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) ("States possess primary authority for defining and enforcing criminal laws."). (Citations omitted).

3. The district court exercised a clear error of judgment.

When a sentence focuses more and punishes for conduct that constitutes an uncharged crime as opposed to the crimes a defendant actually plead guilty to committing, which is what the case at bar presents, a clear error of judgment exists. A review of Mr. Mantos' sentencing clearly shows that the district court punished him–not for the alien smuggling crimes he plead guilty to–but for the Texas crime of sexual assault, a crime that the district court did not have jurisdiction to preside over, and a crime that Mr. Mantos: was not charged with; did not plead guilty to; and did not have a jury of his peers determine he is guilty of beyond a reasonable doubt in violation of his Sixth Amendment right to a jury trial.

The law is further clear that the more a district court departs from a defendant's calculated Guidelines sentencing range, the greater a district court is required to explain why the Guidelines do not sufficiently account for a defendant's relevant

conduct. Since the district court did not provide much explanation or justification to support its 355% upward departure sentence beyond conclusory statements that Mr. Mantos' conduct is not "adequately accounted for in the guidelines" (ROA. 500) or that his criminal history is "under-represented," (ROA. 578), the district court's sentence represents a clear error of judgment in balancing the sentencing factors as well and gives too much weight and focus on punishing for conduct that is not a federal crime, an improper factor. For these reasons, the district court's sentence is substantively unreasonable and should be reversed.

D. The district court's sentence constitutes plain error.

In the event this Court determines that the applicable standard of review is plain error, the sentence should still be vacated because the district court plainly erred. Under the plain error standard of review, the appellate court will only reverse if there is: (1) an error (2) that is plain and (3) affects the defendant's substantial rights. *Puckett v. United States*, 129 S.Ct. 1423, 1429 (2009). If these three requirements are met, then the appellate court may, in its discretion, correct the error if failure to do so would seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

The district court's errors articulated above in imposing a sentence that upwardly departs 355% from the upper end of the applicable sentencing range

constitutes plain error. It constitutes plain error because the Guidelines and its sentencing level adjustments sufficiently take into account the reasons the district court articulated for its upward departure sentence–the impact of the victims and a lack of remorse. It further constitutes plain error because the district court failed to sufficiently justify its 355% upward departure sentence. Moreover, Mr. Maltos' relevant conduct did not rise to a level that warranted a 355% upward departure from the applicable upper guideline range that properly accounted for and considered his relevant conduct.

But for the district court's error, Mr. Mantos' would be facing a 71 month guidelines sentence as opposed to the 252 month departure sentence the district court imposed. Accordingly, the district court's error affected Mr. Mantos' substantial rights, and seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *See United State v. Price*, 516 F.3d 285, 289-90 (5th Cir. 2008). It further bears mentioning that in receiving a sentence as if he plead or was found guilty of committing a forcible sexual assault beyond a reasonable doubt by a jury of his peers, a crime he clearly did not plead guilty to, it could accurately be stated that Mr. Maltos was found guilty of and was sentenced for committing such a crime in violation of his Sixth Amendment right to a jury trial and his Fifth Amendment right to be tried on charges presented by a grand jury. The district court's sentencing errors

clearly affected Mr. Mantos' substantial rights, and seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

CONCLUSION

FOR THESE REASONS, this Court should vacate Mr. Mantos' sentence and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was served on the U.S. Attorney's Office via ECM electronic mail on November 20, 2017, to those attorneys receiving service via ECM automatically. I further hereby certify that a copy of the above and foregoing document was served to the below named defendant at the below stated address via certified mail, 7012 2210 0001 2398 2217, return receipt requested:

Juan Gerardo Rodriguez-Mantos, #97983-379
GEO - Joe Corley Detention Facility
500 Hilbig Street
Conroe, TX 77301

s/ Derly J. Uribe
Derly J. Uribe

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 7,614 number of words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Corel WordPerfect Office X5 in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

s/Derly J. Uribe
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Dated: November 20, 2017