

APPENDIX 1

WESTLAW

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United States v. Rivera

United States Court of Appeals, Second Circuit. December 21, 2018 -- Fed.Appx. --- 2018 WL 6720797 (Approx. 6 pages)

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United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,

v.

Jasmin RIVERA, AKA Jasmin Hernandez, AKA Rubi Rivera, AKA Rubi Hernandez, Defendant,

Jason Villaman, AKA Santi, Antonio Rivera, AKA Santos Morales, AKA Antonio Almadamo, AKA Santos Garcia, **John Whaley**, AKA **John Holly**, AKA Johnny, Defendants-Appellants.

17-471(L), 17-1460, 17-1468, 17-1562

December 21, 2018

Synopsis

Background: After jury convicted defendants of sex trafficking, forced labor, and alien harboring and transportation, the United States District Court for the Eastern District of New York, Feuerstein, J., denied their motions to set aside jury verdict and for judgment of acquittal or new trial, 2012 WL 2339318 and 2013 WL 2627184. Defendants appealed. The Court of Appeals, 799 F.3d 180, affirmed in part, vacated in part, and remanded. On remand, the United States District Court for the Eastern District of New York, Feuerstein, J., resentenced defendants, and they appealed.

Holdings: The Court of Appeals held that:

- 1 district court did not abuse its discretion in denying mitigating role reduction;
- 2 district court did not abuse its discretion by sentencing conspiracies' leader to 40 years' imprisonment;
- 3 another defendant's 30-year sentence was substantively reasonable;
- 4 district court did not abuse its discretion in sentencing another defendant to 25 years' imprisonment; and
- 5 mandate rule precluded defendant's challenges to his indictment and convictions on remand.

Affirmed.

West Headnotes (5)

Change View

1 Sentencing and Punishment

District court did not abuse its discretion in denying mitigating role reduction in sentencing defendant for crimes arising from sex trafficking conspiracy, despite defendant's contentions that he was only driver and janitor, did not organize or

fully understand conspiracy's scope and structure, lacked decisionmaking authority, and stood to gain nothing from conspiracy, in light of evidence that defendant was leader's "right-hand man" and "enforcer," and that his involvement in conspiracy included picking up women initially and engaging them to come to leader's bars, knowing what they would be facing, knowing that he was putting them in harm's way. U.S.S.G. § 3B1.1.

2 Sentencing and Punishment 

District court did not abuse its discretion by sentencing defendant convicted of leading sex trafficking conspiracy involving illegal aliens to 40 years' imprisonment, in light of evidence that conspiracy's victims were beaten to point of serious injury, raped, and otherwise sexually assaulted by defendants, who used threats to prevent victims from reporting their crimes to authorities. 18 U.S.C.A. § 1591.

3 Sentencing and Punishment 

Defendant's 30-year sentence for sex trafficking, forced labor, harboring illegal aliens, and transporting illegal aliens, and conspiracies to commit those offenses was not substantively unreasonable, despite evidence that defendant he did not profit from criminal activity, was involved for limited time, did not organize or plan conspiracy, exercised no decisionmaking authority, suffered from developmental delays and emotional problems, and demonstrated post-sentence rehabilitation, and that conspiracy's leader received 33 percent sentence reduction based in part on post-sentence rehabilitation, where sentence was well below revised sentence imposed on leader, and there was evidence that defendant raped multiple victims of conspiracy.

4 Sentencing and Punishment 

District court did not abuse its discretion in sentencing defendant to 25 years' imprisonment for conspiracies to commit sex trafficking, forced labor, harboring illegal aliens, and transporting illegal aliens, and substantive counts of forced labor, harboring illegal aliens, and transporting illegal aliens, despite evidence of extreme difficulty of defendant's childhood, his mental health, lack of serious criminal history, and his good behavior while incarcerated, in light of evidence that defendant knowingly brought victims into harm's way and personally sexually assaulted victims.

5 Criminal Law 

Mandate rule precluded defendant's challenges to his indictment and convictions on remand from Court of Appeals, where defendant's previous appeal challenged his indictment on ground of multiplicity, and his convictions on ground of sufficiency, and Court rejected those arguments and affirmed his convictions.

Appeal from an order of the United States District Court for the Eastern District of New York (Feuerstein, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED
that the order of the district court is **AFFIRMED**.

Attorneys and Law Firms

FOR APPELLEE: Susan Corkery, Assistant United States Attorney (Amy Busa, Assistant United States Attorney, on the brief), for Richard P. Donoghue, United States Attorney for the Eastern District of New York, Brooklyn, NY.

FOR APPELLANT JASON VILLAMAN: Jonathan I. Edelstein, Edelstein & Grossman, New York, NY.

FOR APPELLANT ANTONIO RIVERA: John F. Carman, Garden City, NY (on submission).

FOR APPELLANT JOHN WHALEY: James M. Branden, New York, NY; John Whaley, pro

se, Otisville, NY.

PRESENT: DENNIS JACOBS, RICHARD J. SULLIVAN, Circuit Judges, EDWARD R. KORMAN,* District Judge.

SUMMARY ORDER

*1 Defendants—Appellants Jason Villaman, Antonio Rivera (“Rivera”), and **John Whaley** (the “defendants”) ¹ appeal sentences imposed after a remand by this Court. We assume the parties’ familiarity with the underlying facts, the procedural history, and the issues presented for review.

Rivera owned and operated two bars on Long Island, and recruited undocumented immigrants to work there, ostensibly as waitresses. Villaman worked as a security guard at one of the bars, and **Whaley** assisted Rivera in the bars’ operation. Both of them drove waitresses to and from work.

Waitresses at Rivera’s bars were forced to engage in sexual acts with customers. To ensure that they did so, the defendants physically assaulted waitresses, withheld their pay, and threatened them with deportation. Several were raped or otherwise sexually assaulted by the defendants.

After jury trials, Rivera and Villaman were convicted on substantive counts of sex trafficking, forced labor, harboring illegal aliens, and transporting illegal aliens, as well as conspiracies to commit those offenses. **Whaley** was convicted of conspiracies to commit sex trafficking, forced labor, harboring illegal aliens, and transporting illegal aliens, as well as substantive counts of forced labor, harboring illegal aliens, and transporting illegal aliens.

On the previous appeal, we affirmed the convictions, but remanded for resentencing on the ground of procedural unreasonableness, which included instructing the district court to consider whether the record supported the imposition of certain enhancements, and to explain the reasoning behind its conclusions. On remand, Rivera was sentenced principally to 40 years’ imprisonment on his substantive and conspiracy sex trafficking counts, and ten-year and 20-year terms of imprisonment on his remaining counts, all to run concurrently. Villaman was sentenced principally to 30 years’ imprisonment on his substantive sex trafficking counts, 20 years’ imprisonment on his substantive forced labor counts, and five-year and ten-year terms on his remaining counts, all to run concurrently. **Whaley** was sentenced principally to 25 years’ imprisonment on his sex trafficking conspiracy count, and two terms of ten years’ imprisonment on his remaining counts, all to run concurrently.

On appeal, the defendants argue that their sentences are substantively unreasonable. **Whaley** additionally argues that his sentence is procedurally unreasonable, and in a separate brief submitted *pro se*, raises constitutional and jurisdictional arguments. Rivera and Villaman adopt **Whaley’s** arguments, to the extent they are applicable to them, pursuant to Federal Rule of Appellate Procedure 28(i). We now affirm.

“A district court commits procedural error where it fails to calculate (or improperly calculates) the Sentencing Guidelines range, treats the Sentencing Guidelines as mandatory, fails to consider the [18 U.S.C.] § 3553(a) factors, selects a sentence based on clearly erroneous facts, or fails adequately to explain the chosen sentence.” *United States v. Robinson*, 702 F.3d 22, 38 (2d Cir. 2012) (citing *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)). Our review for reasonableness is akin to a “deferential abuse-of-discretion standard.” *United States v. Caverla*, 550 F.3d 180, 189 (2d Cir. 2008) (in banc) (quoting *Gall*, 552 U.S. at 41, 128 S.Ct. 586). However, “[a] sentencing court’s legal application of the Guidelines is reviewed *de novo*.” *United States v. Desnovers*, 708 F.3d 378, 385 (2d Cir. 2013) (internal quotation marks omitted).

*2 1. **Whaley**, joined by the others, argues that the district court committed procedural error at resentencing by failing to calculate the criminal history category, total offense level, and resulting sentencing range under the United States Sentencing Guidelines (“U.S.S.G.” or “Guidelines”). Because the defendants did not raise this objection at their resentencings, we review for plain error. *United States v. Verkhoglyad*, 516 F.3d 122, 128 (2d Cir. 2008).

In calculating the applicable Guidelines range, the district court must make its own factual findings or expressly adopt the presentence report’s findings at sentencing or in a written statement of reasons. *See United States v. Molina*, 356 F.3d 269, 275 (2d Cir. 2004). As to each defendant the court filed a statement of reasons for the new sentence that expressly

adopted the findings in the defendant's presentence report detailing, *inter alia*, the defendant's conduct and its impact on the Guidelines calculations. Each statement of reasons calculates total offense level, criminal history category, and resulting Guidelines range. Each statement of reasons thus demonstrates that the district court satisfied its obligation to calculate the Guidelines range and adopt factual findings in support. See United States v. Rodriguez, 697 F. App'x 734, 737 (2d Cir. 2017) (summary order).

1 **Whaley** additionally argues that the district court should have made a mitigating role adjustment under Guidelines § 3B1.2, which provides offense-level reductions to defendants who were minimal or minor participants in the criminal activity of which they were convicted. Relying on Application Note 3(c) to § 3B1.1, **Whaley** argues that, as a driver and janitor, he did not organize or fully understand the scope and structure of the conspiracy, lacked decisionmaking authority, and stood to gain nothing from the conspiracy. However, in denying the reduction, the district court considered that **Whaley** was Rivera's "right-hand man" and "enforcer," and that his involvement in the conspiracy included "picking up the women initially and engaging them to come [to Rivera's bars] knowing what they would be facing, knowing that he was putting them in harm's way." **Whaley** App'x at A-176, A-178. We find no abuse of discretion in the district court's denial of a mitigating role reduction.

2. "Substantive reasonableness is also reviewed for abuse of discretion." Desnoyers, 708 F.3d at 385. "In examining the substantive reasonableness of a sentence, we review the length of the sentence imposed to determine whether it cannot be located within the range of permissible decisions." United States v. Matta, 777 F.3d 116, 124 (2d Cir. 2015) (internal quotation marks omitted). We will "set aside a district court's substantive determination only in exceptional cases." Cavera, 550 F.3d at 190.

2 Rivera, Villaman, and **Whaley** argue that their sentences are substantively unreasonable. Rivera principally argues that unlike cases of "literal sexual slavery" punishable under 18 U.S.C. § 1591 (the statutory provision underlying his sex trafficking convictions), the victims in this case were not "truly trapped." But as the court observed at resentencing, the jury found that victims of the conspiracy were beaten to the point of serious injury, raped, and otherwise sexually assaulted by the defendants, who used threats to prevent the victims from reporting their crimes to the authorities. The district court did not abuse its discretion by sentencing Rivera to 40 years' imprisonment.

3 *3 Villaman cites numerous additional factors in support of his claim that his sentence was substantively unreasonable, including that: he did not profit from the criminal activity, was involved for a limited time, did not organize or plan the conspiracy, and exercised no decisionmaking authority. Villaman also cites his personal history and characteristics, including his suffering from developmental delays and emotional problems, his post-sentence rehabilitation, and the letters of support submitted by his family and friends. In particular, Villaman stresses that his sentence was substantively unreasonable since the district court granted Rivera a 33 percent sentence reduction based in part on post-sentence rehabilitation, but refused to do the same for Villaman. However, the district court considered this argument, and the fact that Rivera may have received credit for certain behavior does not warrant the conclusion that Villaman was entitled to receive a similar percentage reduction as well, particularly since Villaman's sentence was still well below the revised sentence imposed on Rivera. The other factors cited by Villaman were considered by the district court at resentencing, as were, for example, his rapes of multiple victims of the conspiracy. We therefore identify no error with the court's conclusion that 30 years' imprisonment was an appropriate sentence.

4 Finally, **Whaley** pleads the extreme difficulty of his childhood, his mental health, the lack of a serious criminal history, and his good behavior while incarcerated. Again, those considerations were expressly raised at resentencing, as were considerations that **Whaley** knowingly brought victims into harm's way and personally sexually assaulted victims. Viewing these factors in totality, the court's decision to sentence **Whaley** to 25 years' imprisonment was not an abuse of discretion.

Accordingly, the defendants' sentences are not substantively unreasonable.

3. In a separate brief filed *pro se*, **Whaley** argues that: (1) the conspiracy and substantive counts relating to the same criminal conduct were multiplicitous in violation of the Fifth Amendment's Double Jeopardy Clause; (2) the charges for forced labor and sex trafficking were multiplicitous in violation of the Double Jeopardy Clause; (3) the conviction violates due

process because the government did not prove an "overt act" beyond a reasonable doubt with respect to his sex trafficking conspiracy charges; (4) the government failed to prove the interstate or foreign commerce element of the sex trafficking charges; and (5) the district court failed to follow this Court's mandate instructing it to clearly state its reasons for applying an aggravated sexual abuse Guidelines enhancement.

5 The mandate rule "forecloses relitigation of issues expressly or *impliedly* decided by the appellate court." *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (emphasis in original). **Whaley's** previous appeal challenged his indictment on the ground of multiplicity, and his conviction on the ground of sufficiency. This Court rejected those arguments and affirmed the defendants' convictions. **Whaley's** present challenges to his indictment and conviction are precluded regardless of whether they are identical to his earlier challenges. *See id.* at 96 ("[A] decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not, becomes the law of the case; the parties are deemed to have waived the right to challenge that decision.").²

The argument that the district court failed to comply with this Court's mandate at resentencing fares no better. As to **Whaley's** resentencing, the district court explicitly found that the aggravated sexual abuse enhancement applied because he sexually assaulted three of the waitresses after they were rendered unconscious by alcohol. As to Rivera's resentencing, the court found that the enhancement applied because of evidence that he raped and sexually assaulted several victims. As to Villaman's resentencing, the court adopted findings in his presentence report that he forcibly sexually assaulted multiple victims, finding that such conduct justified the enhancement. These explanations complied with this Court's instructions on remand to fully state the reasons for applying the enhancement.

*4 We have considered the defendants' remaining arguments and conclude they are without merit. The judgment of the district court is therefore **AFFIRMED**.

All Citations

--- Fed.Appx. ----, 2018 WL 6720797

Footnotes

* Judge Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

1 Rivera's sister Jasmin Rivera, a defendant in the district court, is not an appellant in this case.

2 To the extent that Rivera and Villaman join this argument pursuant to Federal Rule of Appellate Procedure 28(i), they are likewise precluded from challenging their indictments and convictions for the same reasons.

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