No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DUANE ALLEN SIKES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

James T. Skuthan
Acting Federal Defender

Rosemary Cakmis
Senior Litigator, Chief, Appellate Division

Stephen J. Langs, Counsel of Record
Research and Writing Attorney
Florida Bar 0137227; S. Ct. Bar 242621
Federal Defender's Office
201 South Orange Avenue, Suite 300
Orlando, Florida 32801
Phone (407) 648-6338; Fax (407) 648-6095
email stephen_langs@fd.org

QUESTION PRESENTED

The question presented by this case is whether the Fifth and Sixth Amendments preclude a district court from increasing a defendant's sentence based on conduct, *uncharged* and *unrelated* to the offense of conviction, found by the court under a preponderance of the evidence at sentencing?[1]

In this case, Mr. Sikes pled guilty (per a plea agreement) in the district court to several theft-related charges. His calculated Sentencing Guidelines score included an advisory prison range between 51 to 63 months (or 4 years, 3 months to 5 years, 3 months (so, roughly, 4-5 years' imprisonment)). At sentencing, the government argued, above and beyond the fraud for which he accepted responsibility, Mr. Sikes had also engaged in inappropriate sexual conduct with underage boys – conduct that Mr. Sikes had never before been formally charged. The government argued that the sentencing court was allowed to consider these other criminal allegations (which were unrelated to the offenses of conviction) in determining a sentence because the law allowed it to consider any information relating to the background and character of Mr. Sikes, including "uncharged conduct." Consequently (and over the objection of Mr. Sikes), the district court

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[1] In another matter pending before this Court which has been distributed for conference on November 20, 2020, the question presented is: "Whether the Fifth and Sixth Amendments prohibit a federal court from increasing a criminal defendant's sentence for conduct underlying a count on which the jury acquitted." *Michael Ludwikowski v. United States*, No. 19-1293, Petition for Cert. (May 4, 2020), page *i*.

found by a preponderance of evidence that in addition to the fraud Mr. Sikes had pled guilty, he also had committed the uncharged sexual conduct and relied on that finding to impose a 10-year (or 120-month) prison sentence, an upward variance from the otherwise recommended guidelines range of 4 to 5 years.

This case, then, asks whether the Fifth and Sixth Amendments preclude a sentencing court from basing or grounding a criminal defendant's sentence on conduct for which the defendant had never been charged – that is, whether a district court violates a defendant's Fifth and Sixth Amendment rights by considering "uncharged conduct" that it finds by a preponderance of evidence, but that the defendant had never been formally charged with or had previously been convicted.[2] *See generally, e.g., Asaro v. United States*, 140 S. Ct. 1104 (2020) (No. 19-107); *Martinez v. United States*, 140 S. Ct. 1128 (2020) (No. 19-5346); *Baxter v. United States*, No. 19-6647 (April 20, 2020)

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[2] By way of comparison, the question framed in the matter of *Vincent Asaro v. United States*, No. 19-107: "Whether the Fifth and Sixth Amendments prohibit a federal court from basing a criminal defendant's sentence on conduct underlying a charge for which the defendant was acquitted by a jury." Petition for Cert., No. 19-107 (July 22, 2019), at page *i*. The Court denied certiorari on February 24, 2020. Though Mr. Asaro was ostensibly challenging the use of "acquitted conduct" at the time of sentencing, here, Mr. Sikes is challenging the broader use of "uncharged conduct" at the time of sentencing. *See generally United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (discussing a "district court's power to find facts at sentencing").

List of Parties

Petitioner, Duane Allen Sikes, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

Related Cases

United States v. Duane Allen Sikes, Case No. 3:18-cr-150(S1)-J-39JRK, Middle District of Florida (Jacksonville Division). Judgment entered on November 6, 2019.

United States v. Duane Allen Sikes, Appeal No. 19-14591, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered August 20, 2020 (unpublished). Mandate issued September 18, 2020.

TABLE OF CONTENTS

TABLE OF CONTENTS – *cont'd*

Table of Authorities

Federal Cases **Page(s)**

Table of Authorities – *cont'd*

Federal Cases **Page(s)**

Table of Authorities – *cont'd*

Table of Authorities – *cont'd*

Other **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Duane Allen Sikes, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's decision and opinion, which was not published, is provided in the Appendix. It can also be found at *United States v. Duane Allen Sikes*, -- F. App'x --, 2020 WL 4877442 (11th Cir. Aug. 20, 2020) (unpublished). Mr. Sikes *did not* petition the appellate court for panel rehearing or rehearing *en banc*. The judgment was issued on August 20, 2020, with the mandate having been issued on September 18, 2020. *See* Appendix.

JURISDICTION

The Eleventh Circuit issued its unpublished panel opinion on August 20, 2020. *See* Appendix. The court's mandate was issued on September 18, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

INTRODUCTION

Whether a district court violates a defendant's Fifth and Sixth Amendment rights by considering unrelated, "uncharged conduct" that it finds by a preponderance of evidence at sentencing, but for which the defendant had never been formally charged or convicted.

Mr. Sikes pled guilty, pursuant to the terms and conditions of a written plea agreement with the government, to theft charges – he was stealing from his employer. His Sentencing Guidelines suggested, roughly, 4 to 5 years in prison. However, at his sentencing hearing, the government adduced evidence and testimony in support of allegations that Mr. Sikes, unrelated to his embezzlement charges, was having inappropriate sexual relationships with teenage boys. The district court accepted those matters and found them true, by a preponderance of evidence without the aid of a jury or the consent of Mr. Sikes. The court then sentenced Mr. Sikes to 10 years in prison, because, as it said, it considered the uncharged sexual conduct as part of its sentencing calculus under 18 U.S.C. § 3553(a) and this Court's decisions and opinions in *United States v. Watts*, 519 U.S. 148 (1997). This kind of sentencing construct, Mr. Sikes respectfully submits, violates both the Fifth and Sixth Amendments, and his case presents an ideal vehicle by which this Court may address and answer this well-defined question that federal sentencing courts face on a daily and nationwide basis.

The question presented by Mr. Sikes was discussed by Justice Scalia more than six years ago. He said, "In *Rita v. United States*, we dismissed the possibility of Sixth Amendment violations [as well as Fifth Amendment concerns] resulting from substantive reasonableness review as hypothetical and not presented by the facts of the case. We thus left for another day the question whether the Sixth Amendment [and Fifth Amendment] [are] violated when courts impose sentences that, but for a judge-found fact, would be reversed for substantive unreasonableness." *Jones v. United States*, 135 S. Ct. 8, 8-9 (2014) (Scalia, J., dissenting from denial of certiorari) (citations omitted). Justice Scalia observed, however, that "the Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range."[3] *Id.* at 9 (citations omitted) (emphasis in original); *see also United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanugh, J., concurring in denial of rehearing *en banc*) (discussing a sentencing court's authority to impose punishment within governing statutory range ("[g]iven the Supreme Court's case law, it likely will take some combination of Congress and the Sentencing

[3] For example, Mr. Sikes was exposed to a maximum penalty of 63 years for his three counts of conviction in this case. His advisory guidelines range roughly suggested a prison sentence between 4 to 5 years. But, because of the uncharged conduct at dispute in his case, the district court sentenced Mr. Sikes to 10 years' imprisonment in light of those other unrelated criminal accusations.

Commission to *systematically* change federal sentencing to preclude use of acquitted or uncharged conduct") (emphasis in original)).

In 2014, Justice Scalia declared, "This has gone on long enough." *Jones*, 135 S. Ct. at 9. Indeed, "The present petition," Mr. Sikes's petition, "presents the nonhypothetical case the Court claimed to have been waiting for." *Id.*

In any given sentencing process, there are, really, two questions the district judge must answer. First, what is it that the defendant did wrong? And then, two, what are we going to do about it? Intrinsic within this second question is how we go about finding the answer.

Here, Mr. Sikes accepted responsibility for his wrongdoing – he was taking money from his employer unlawfully and subsequently lying about his theft. We know what Mr. Sikes did wrong. He pled guilty to three counts; he pled guilty to mail fraud, embezzlement, and subscribing to a false tax return. By doing so, Mr. Sikes exposed himself to maximum penalties of up to 30 years' imprisonment for mail fraud, another 30 years for the embezzlement, and 3 years for filing a false tax return. His calculated Sentencing Guidelines included a recommended prison range between 51 and 63 months (or 4 years, 3 months to 5 years, 3 months).

When answering the second question as to what should be done, the district court doubled the guidelines range and sentenced Mr. Sikes to 120 months' imprisonment (or 10 years) because it found (without the aid of a jury or the

consent of the defendant) by a preponderance of evidence at the sentencing hearing that Mr. Sikes, outside of his fraud, was also having inappropriate sexual relationships with teenage boys. In light of these unrelated and uncharged criminal accusations, the district court said that it was justified in rendering an upward variance from the governing guidelines score because Mr. Sikes had committed sex offenses against neighborhood teenagers.

The Eleventh Circuit Court of Appeals said this was permissible and okay; it said, "The Supreme Court explained in *United States v. Watts*, 519 U.S. 148 (1997), that a sentencing court may rely on uncharged conduct and acquitted conduct that has been proven by a preponderance of evidence, noting that the consideration of such conduct is consistent with the Double Jeopardy and Due Process Clauses." *United States v. Sikes*, 824 F. App'x 805 (11th Cir. 2020). To be sure, the court below stated, "The Supreme Court has held that a sentencing court can consider uncharged conduct that has been established by a preponderance of evidence; furthermore, we have held that a sentencing court does not violate the Constitution when it considers uncharged conduct, so long as the defendant's ultimate sentence does not exceed the applicable statutory maximum." *Id.* (citations omitted). In short, the Eleventh Circuit held that "the district court did not violate the Fifth and Sixth Amendments when it imposed an above-guideline sentence based on [Mr.] Sikes's uncharged sexual misconduct." *Id.*

The Eleventh Circuit found exactly that which Justice Scalia warned against. In *Jones v. United States*, Justice Scalia said, "We should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment [as well as the Fifth Amendment] – or to eliminate the Sixth Amendment [and Fifth Amendment] difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable." *Jones*, 135 S. Ct. at 9 (Scalia, J. dissenting).

Similarly, Justice Kavanaugh framed and answer the question while sitting as a Judge with the D.C. Circuit Court of Appeals:

> Here's the issue: Based on a defendant's conduct apart from the conduct encompassed by the offense of conviction – in other words, based on a defendant's uncharged or acquitted conduct – a judge may impose a sentence higher than the sentence the judge would have imposed absent consideration of that uncharged or acquitted conduct. The judge may do so as long as the factual finding regarding that conduct does not increase the statutory sentencing range for the offense of conviction alone. The Sixth Amendment's Jury Trial Clause is deemed satisfied because the judge's factual finding does not increase the statutory sentencing range established by the jury's finding of guilt on the offense of conviction. And the Fifth Amendment's Due Process Clause is deemed satisfied because a judge finds the relevant conduct in a traditional adversarial procedure.

United States v. Bell, 808 F.3d 926, 927 (D.C. Cir. 2015) (Kavanaugh, J. concurring in denial of rehearing *en banc*) (citations omitted).

Justice Kavanaugh expressed his concerns "about the use of acquitted conduct at sentencing," *Bell*, 808 F.3d at 927, but, he recognized that, quite possibly, "resolving that concern as a constitutional matter would likely require a significant revamp of criminal sentencing jurisprudence . . . ." *Id.* Nonetheless, "[a]t least as a matter of policy, if not also a matter of constitutional law," he wrote, "I would have little problem with a new federal sentencing regime along those lines." *Id.* at 928. Justice Kavanaugh emphasized, "Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." *Id.*

In short, this petition as presented by Mr. Sikes challenges "the district court's power to find facts at sentencing" when deciding what to do with a defendant who comes before it after pleading guilty to a crime (or, for that matter, after having been convicted by a jury). *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014).[4] Mr. Sikes came to the sentencing court in this matter for having admitted to stealing from his employer – he was sentenced, however, on

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[4] In *Sabillon-Umana*, Justice Gorsuch noted, too, while a Judge with the Tenth Circuit of Appeals, when we "assume[ ] that a district court judge may either decrease or increase a defendant's sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or [a] defendant's consent," we should do so while recognizing and acknowledging that "[i]t is far from certain whether the Constitution allows at least the second half of that equation." 772 F.3d at 1331 (citing *Jones v. United States*, 135 S. Ct. 8 (2014) (Scalia, J., dissenting from denial of certiorari)).

the basis of unrelated sex allegations, accusations for which he had never before been charged or convicted. So, just as was raised and argued from last term, *see Vincent Asaro v. United States*, No. 19-107, Petition for Writ of Certiorari (July 22, 2019), pages 2-3, Mr. Sikes humbly asks of this Court's study and review on whether the Fifth and Sixth Amendments protect a defendant from punishment based and grounded on uncharged conduct. *See* Zainey, Kathryn M., Comment, *The Constitutional Infirmity of the Current Federal Sentencing System: How the Use of Uncharged and Acquitted Conduct to Enhance a Defendant's Sentence Violates Due Process*, 56 Loy. L. Rev. 375 (Summer 2010) (arguing that "[d]efendants are routinely deprived of life and liberty based on conduct for which they have not been convicted or in some instances, have never been charged").

STATEMENT OF THE CASE

The case of Mr. Sikes presents a number of holistic, organic, and conceptual questions and challenges as to how we properly construct any given sentencing hearing in federal criminal court. Mr. Sikes, who was 65-years-old at the time of sentencing, *see* Doc. 125, page 15, pled guilty under the written terms and conditions of a plea agreement to mail fraud, embezzlement, and tax fraud. *See* Doc. 59 (written plea agreement). He was, in effect, stealing from his employer, VyStar Credit Union (turns out it was about $6.8 million over the course of about a decade). *See* Doc. 126, page 97 ("This is not a thousand dollar case. It's not a

million dollar case. It's a multimillion dollar case. . . . [I]t was actually a $6.8 million case."). His Sentencing Guidelines were calculated at a total offense level 24, a criminal history category I, and an advisory prison range between 51 and 63 months (or 4 years, 3 months to 5 years, 3 months). *See* Doc. 125, pages 8 and 9; *see also* Pre-Sentence Report (PSR) at Doc. 89, page 17, ¶ 83 ("[b]ased upon a total offense level 24 and a criminal history category of I, the guideline imprisonment range is 51 months to 63 months"). His overall and total maximum exposure to prison was up to 63 years (30 years for mail fraud (Count 1); 30 years for embezzlement (Count 11); and 3 years for tax fraud (Count 17)). *See* PSR ¶ 82; *see also* Doc. 59, page 2 ("Counts One and Eleven each carry a maximum sentence of 30 years imprisonment . . . . [c]ount Seventeen carries a maximum sentence of 3 years"). Following a two-day sentencing hearing, at which eleven people made statements or testified to the court and 16 exhibits were admitted in the court record, *see* Doc. 95, Mr. Sikes was sentenced to a total term of 120 months' imprisonment (or 10 years), a sentence consisting of 10 years for mail fraud, 10 years for embezzlement, and 3 years for tax fraud, all terms to run concurrently with one another. *See* Doc. 96 (the written judgment and sentence). This was an upward variance from the calculated guidelines range. *See* Doc. 126, pages 109-110. The reason for the upward variance, according to the district court, was "the history and characteristics of Mr. Sikes that have come to light in the context

of the sentencing hearing regarding the theft." *See id.* at 106. The court said that above and beyond the offense of conviction, above and beyond the relevant conduct supporting the offense, Mr. Sikes was guilty, by a preponderance of evidence, of "unrelated" and "uncharged crimes," *see id.*, that Mr. Sikes had committed sex offenses against neighborhood teenagers – in other words, the personal history and characteristics of Mr. Sikes "as it relates to the defendant's alleged, inappropriate relationship with multiple teenage boys." PSR ¶ 102. Hence, "the Court is going to consider the history of Mr. Sikes and his relationship with boys and sexual assaults on them in fashioning a sentence in this case." Doc. 126, page 107. In short, the district court essentially doubled the applicable guidelines range and sentenced Mr. Sikes to 10 years in prison based on its acceptance of the government's allegations of uncharged conduct. *See* Doc. 125, page 46 ("discussing what we call the uncharged conduct").

An original indictment was returned and filed on August 30, 2018, *see* Doc. 1, from which, a Superseding Indictment was entered on April 4, 2019, at Doc. 52. By the terms and conditions of a written plea agreement with the government, Mr. Sikes pled guilty to Count 1 of the Superseding Indictment, (mail fraud), Count 11 (embezzlement of credit union funds), and Count 17 (subscribing to false income tax return). *See* Doc. 59 (written plea agreement). He did so at a change-of-plea hearing held before the assigned magistrate on May 15, 2019. *See* Docs. 56 (court

minutes) and 60 (report and recommendation).The district court, by written order, accepted his guilty plea and adjudicated him as such at Doc. 62, on May 16, 2019. Mr. Sikes underwent a presentence investigation conducted by the U.S. Probation Office and, according to its recommendation, suggested a Sentencing Guidelines score at "a total offense level of 24 and a criminal history category of I," which in turn recommended an "imprisonment range [between] 51 months to 63 months." PSR ¶ 83. Without any objections from the parties below, the district court adopted the proposed PSR. *See* Doc. 125, pages 5 and 6. It thus found the Sentencing Guidelines to be a total offense level 24, criminal history category I, and advisory prison range between 51 and 63 months. *See id.* at 8-9.

The court imposed an upward variance from the governing guidelines range, finding Mr. Sikes culpable of uncharged criminal conduct flowing from allegations related to the sexual abuse of teenage boys unrelated to the offense of conviction ("there's also ample evidence that [Mr. Sikes] provided an environment in which children were enticed and sustained in order for him to have his way with them," Doc. 126, page 108), and sentenced Mr. Sikes to a total term of 10 years' imprisonment (or 120 months) as to Counts 1 and 11, along with the statutory maximum penalty of 3 years for Count 17, all sentences to run concurrently with one another. *See* Doc. 126, pages 109-110; *see also* Doc. 96 (written judgment and sentence). The court entered and filed its written judgment and sentence on

November 6, 2019. *See* Doc. 126. Mr. Sikes timely filed his notice of appeal on November 18, 2019. *See* Doc. 99. His direct criminal appeal followed.

Though Mr. Sikes was originally arrested in connection with this prosecution on September 4, 2018, *see* Doc. 10, he was granted release pending trial, *see* Doc. 14 (order setting conditions of release); but, after sentencing on November 4, 2019, he was ordered detained. *See* Doc. 126, page 115 ("the Court will order that [Mr. Sikes] be remanded"). Mr. Sikes remains incarcerated serving his 10-year prison sentence.

The underlying substantive facts to the offense of conviction are taken directly from the written plea agreement in this cause (to which no objections were made, *see, e.g.*, Doc. 124, pages 43-46), and are reprinted here in their entirety for the ease, benefit, and convenience of the Reader; *see* Doc. 59, pages 23-26:

> From at least 2007 through 2017, the defendant was a Vystar Credit Union employee and worked in the mail room at Vystar Credit Union Corporate Headquarters in Jacksonville, Florida. Vystar Credit Union is a federally insured credit union insured by the National Credit Union Administration. During these years, the defendant, as part of his employment with Vystar, received weekly checks from Vystar made out to "U.S. Postmaster" and was responsible for using the checks to recharge the Pitney Bowes postage meter with postage to be used for mailings for credit union business.
>
> Checks for the postage meter were delivered by Vystar to the defendant every week. From at least 2007 through 2017, the defendant knowingly and without authority from Vystar took the postage checks approximately every other week to the U.S. Post Office to purchase postage stamps for resale. The Defendant's embezzlement included a check he caused Vystar to issue on October 23, 2014 in the amount of

$19,600.00 to the US POSTMASTER which Vystar intended would purchase additional postage for its postage meter. In receiving the check, the defendant willfully acted under the false pretenses that he would use it to purchase postage for the Vystar postage meter. Rather than using the check for the deposit of postage on the credit union postage meter machine, the defendant used the check to purchase stamps at the Main United States Post Office in Jacksonville, Florida, Located at 1100 Kings Road.

A short time after each transaction conducted in this same manner during the period of 2007 through 2017, the defendant would mail to Ben-Art Stamp Company via FedEx the postage stamps he had purchased. Ben-Art Stamp Company is the wholesale division of Mystic Stamp Company in Camden, New York. The defendant's transactions included mailing a package of stamps via FedEx to Ben-Art Stamp Company for re-sale on September 16, 2013.

Ben-Art purchased the stamps from the defendant for re-sale in its store and, in return, sent the defendant checks in payment for the stamps through the United States mail. The defendant then used these proceeds from at least 2007 through 2017, for his own use and benefit. From in or about 2007 through in or about August 2017, the defendant willfully misappropriated funds in this manner from Vystar in the approximate amount of $5.4 million. During this same time period, the defendant caused Ben-Art Stamp Company to pay him approximately $3,663,200.00 for stamps the defendant sold to the company.

Additionally, during this same period, the defendant knowingly failed to report as income the amounts he received from Ben-Art Stamp Company for sale of the postage stamps. The defendant's conduct included his tax return for the 2013 tax year, which he filed with the IRS on or about March 19, 2014. The defendant's 2013 tax return, prepared by a tax preparer, based on documentation provided by the defendant, did not report $405,000.00, which should have been reported as income, resulting in a tax loss to the IRS of approximately $124,191.00 for that year. The defendant reviewed his tax returns with his tax preparer and signed a written declaration under penalty of perjury that his income for the year 2013 was $25,693 when he knew this statement was false and his actual income for that year was $430,693.00. The tax preparer filed the defendant's returns

> electronically after having obtained IRS e-file authorization forms signed by the defendant. The defendant willfully withheld information from his return preparer regarding the income he received from the sale of United States postage stamps that he used for his own use and benefit. He withheld the information to avoid paying taxes on the unreported income. He withheld the information to avoid paying taxes on the unreported income. The defendant's failure in this same manner to report on his federal income tax returns for the years 2007 through 2017 income received from the sale of postage stamps to Ben-Art Stamp resulted in a total tax loss to the Government of $1,009,175.00.

Doc. 59, pages 23-26; *see also* Doc. 124, pages 43-46 (when asked by the court whether the factual basis in the plea agreement was true and accurate, Mr. Sikes answered yes – Question: "Mr. Sikes, is that what you did?" Answer: "Yes, sir.").

What happened after the change-of-plea hearing becomes the focus of this review. Following Mr. Sikes's guilty plea, *see* Doc. 124 (transcript of change-of-plea hearing), he underwent a presentence investigation conducted by the U.S. Probation Office. The probation officer preparing the Pre-Sentence Report (PSR) in this case released the first rough-draft version of the report on July 23, 2019. *See* PSR, Doc. 70. Subsequent to this disclosure, the government notified the probation officer that it did not have any objections to the proposed report nor to the recommended application of the Sentencing Guidelines. *See* Final Draft PSR, Doc. 89, Addendum, page 21 ("The government has not submitted any objections to the presentence report or the application of the guidelines"), as well as page 22 ("[n]o written objection(s) to the material information, sentencing classifications,

sentencing guideline ranges, and policy statements contained in or omitted from the report is (are) being submitted"). Likewise, Mr. Sikes did not object to the PSR nor to its proposed scoring. *See id.* at 21 ("[t]he defendant has not submitted any objections to the presentence report or the application of the guidelines").

Similarly, when asked at the sentencing directly by the district court whether there were any "exceptions or objections" to the report, neither the prosecution nor the defense raised any objections. *See* Doc. 125, pages 6 and 7 (for example, when asking the government, "Do you have any exceptions or objections to make to [the PSR]?" the prosecutor answered, "No, Your Honor."). Thus, the Sentencing Guidelines were found to be, without objection from any party, a total offense level 24, criminal history category I, and an advisory prison range between 51 and 63 months (or 4 years, 3 months to 5 years, 3 months). *See* Doc. 125, pages 6, 8, and 9; *see also* PSR ¶ 83.[5]

Mr. Sikes was afforded his opportunity to present argument and mitigation in sentencing, which he did through the statements of three witnesses, his own personal allocution, and the argument of counsel. *See generally* Doc. 125, pages

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[5] The government framed its sentencing argument by starting with: "Your Honor, Mr. Sikes is facing a guideline range of 51 to 63 months' imprisonment. The United States is requesting a sentence at the top end of the guidelines, a sentence of 63 months' imprisonment." Doc. 126, page 97. It went on to observe, however, "the Court may be well founded to sentence Mr. Sikes far in excess of the advisory guideline range in light of the conduct and the 3553 factors that Your Honor has heard before the Court on Thursday and also today." *Id.*

10-45. Moreover, Mr. Sikes had filed two sentencing memoranda for the court's consideration and study. *See* Docs. 91 and 92.

But, as part of its presentation, the government sought to introduce evidence supporting supposed allegations that Mr. Sikes was engaging in (or had) inappropriate sexual relationships with teenage boys at his house.[6] Mr. Sikes had never been charged with or convicted of this "uncharged conduct." In its sentencing memorandum to the court, it wrote:

> The United States anticipates discussing at the sentencing hearing the factors discussed in 18 U.S.C. § 3553. In this memorandum, the United States wishes to notify the Court specifically of one aspect of these factors it will focus on at sentencing. Section 3553(a)(1) states that the Court in determining the particular sentence to impose should consider "the nature and circumstances of the offense and the history and characteristics of the defendant." Following the initial indictment of the defendant, the United States learned of certain conduct. Specifically, following media reports of the theft from VyStar, anonymous individuals made tips to First Coast Crime Stoppers about certain conduct of the defendant, specifically that the defendant would pay underage boys – of middle school and high school ages – for him

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[6] Generally, the appellate court will review the district court's factual findings for clear error and will "not disturb the district court's finding of fact unless we have a definite and firm conviction that a mistake has been made." *United States v. Maddox*, 803 F.3d 1215, 1220 (11th Cir. 2015) (internal quotation marks omitted); *see also Amadeo v. Zant,* 108 S. Ct. 1771, 1777 (1988) (explaining "that the clearly-erroneous standard of review is a deferential one[:] if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently"); *Lujan v. United States*, 431 F.2d 871, 872 (5th Cir. 1970) ("[a] determination of credibility of testimony is for the trier of facts, who is not bound to accept testimony even if uncontradicted").

> to take photos of them unclothed, often while swimming in his pool, and to pay them to perform certain sex acts on each other. These tips were reported to the United States. At this same time, the United States also learned of a number of Jacksonville Sheriff's Office (JSO) Incident Reports, with dates ranging from 2010 to 2015, in which similar conduct had been reported to JSO. One of the reports discussed that a boy denied to law enforcement that such conduct occurred. It is the United States' understanding that this conduct remains uncharged.

Doc. 88, pages 4-5.

Noting that 18 U.S.C. § 3661 "provides that, 'No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence,'" the government cited *United States v. Bentley*, 756 F. App'x 957 (11th Cir. 2018), for the proposition "that a sentencing court may consider any information, including hearsay, and both uncharged and acquitted conduct, regardless of the admissibility at trial provided the evidence has a sufficient indicia of reliability." Doc. 88, page 7. In short, along with the materials, reports, and documents it submitted through the probation office, *see* PSR, Doc. 89, Addendum, pages 22-60,[7] the government

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[7] In its correspondence to the probation officer, dated August 7, 2019, the government wrote: "In July 2019, the investigating agents in preparation for sentencing have interviewed at least four individuals who have expressed willingness to testify at the sentencing hearing regarding inappropriate sexual contact, such as Mr. Sikes photographing them while nude, touching, filming sexual contact between teenagers, and actual sexual contact between at least two of the young teens and Mr. Sikes, when they were approximately 13-18 years of age,

called IRS Special Agent Fabiana Brown, Christopher Hedges (age 25), Towns Sanford (age 22), and Conner Pumphrey (age 25) in support of proving up the allegations of "uncharged conduct." *See, e.g.,* Doc. 125, pages 84-85 ("The three individuals that I'm intending to call, they – they're not victims of the financial crime, but they – but it is our opinion that they are a victim of Mr. Sikes' conduct. And it is also a sensitive topic."). The government thus argued that the court "has heard of many instances of criminal conduct that he's engaged in, not just the offense charged, but also the conduct that he's engaged in with these many young boys." Doc. 126, page 102. "This was an incredibly difficult thing for these young men to come and relive and testify to, in a crowded courtroom, where everyone is listening, to the sexual abuse, to the sexual encounters that they endured at the hands of Mr. Sikes." *Id.* at 102-103. "And," the government concluded, "you heard that the boys talked about the hundreds of dollars [Mr. Sikes] would dole out for touching, if he was permitted to touch a boy's penis, if he was permitted to photograph the boys' penises, put them in his penis logbook that he kept, and to provide – to take video of the boys masturbating, and even to provide oral sex to the boys himself." *Id.* at 104.

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which would be during the approximate time period of 2012 to 2017." PSR, Addendum, pages 23 and 24. Attached to its correspondence, the government included "some redacted JSO reports that tend to corroborate the recent information produced by the individuals." *Id.* at 24.

Mr. Sikes, for his part, vehemently denied the allegations. *See, e.g.,* Doc. 91, pages 12-18; Doc. 92, pages 12-18.; *see* also Doc. 125, page 23 ("Judge, of course, [Mr. Sikes] completely denies, adamantly denies" the allegations). Moreover, Mr. Sikes argued, at a minimum, "[i]t would be inappropriate to allow the Government to go forward on these accusations and turn this sentencing hearing into a mini-trial of accusations of totally unrelated, uncharged, unproven criminal conduct[.]" Doc. 92, page 18.

"You know," counsel for Mr. Sikes observed, "I do work in state court as well as federal. You [meaning the presiding district judge below] were a state prosecutor. You were a state court judge. And I'm sure you remember, under Florida [state] law, it would be reversible error for the Court to consider these sort of allegations in imposing sentence.[8] I think that's a good rule. Under federal law the Court can consider it but is not required to consider it."[9] Doc. 125, page 21. In

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[8] Some examples of Florida state case law include *Norvil v. State*, 191 So.3d 406 (Fla. 2016) (for the proposition "that a trial court may not consider a subsequent arrest without conviction during sentencing for the primary offense"), as well as *Nusspickel v. State*, 966 So.2d 441, 444-445 (Fla. 2nd DCA 2007) (collecting cases that observe the principle "that the due process clause prohibits a court from considering charges of which an accused has been acquitted in passing sentence"). "Further, unsubstantiated allegations of misconduct or speculation that the defendant probably committed other crimes may not be relied upon by a trial court in imposing sentence." *Nusspickel*, 966 So.2d at 445 (citations omitted).

[9] *See generally, e.g., United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring) ("Importantly, however, even in the absence of a change of course by the Supreme Court, or action by Congress or the Sentencing

sum, "I think it would be inappropriate to give any serious weight to those accusations, again, which Mr. Sikes denies, in imposing sentence." *Id.* at 24.

The court said it was bothered by the specific conviction conduct, suggesting that "it [was] among the most egregious frauds and thefts in this Court's experience." Doc. 126, page 106. But, the Court admonished, "That's not the troubling aspect of the case, however." *Id.* No, "[t]he troubling aspect of the case is the history and characteristics of Mr. Sikes that have come to light in the context of the sentencing hearing regarding the theft." Doc. 126, page 106.

"There's been evidence," the court observed, "establishing the commission of felonies outside of the theft that have not been charged by indictment, that have not been the subject of discovery, but which have been tested in this courtroom during a time when Mr. Sikes, through counsel, had an opportunity to hear and contest the evidence offered by the government of the uncharged crimes, if you will." *Id.* Acknowledging that "one of the concerns is the difference in treatment of criminal versus – criminally charged and proven as opposed to crimes not charged but arguably proven," *id.*, the court said that the evidence supporting the government's "uncharged" accusations was proven by a preponderance in this case. *Id.*

Commission, federal district judges have power in individual cases to disclaim reliance on acquitted or uncharged conduct.").

"I believe these boys," the court found. "Admitting the behavior that was engaged in is difficult for any victims of sexual assault. The difficulty of the witnesses that testified today and yesterday was evident." *Id.* "But there's also ample evidence that [Mr. Sikes] provided an environment in which children were enticed and sustained in order for him to have his way with them. . . . The Court's offended by it." Doc. 126, page 108. "My conscience," the court declared, "is shocked, given the scope, the time, and the length of not only the theft but of the child abuse that occurred." *Id.* "So," the court summarized, "the Court is going to consider the history of Mr. Sikes and his relationship with boys and sexual assaults on them in fashioning a sentence in this case." Doc. 126, page 107.

The court varied upward from the governing guidelines range of roughly 4 to 5 years and sentenced Mr. Sikes to 10 years in prison. *See* Doc. 126, pages 109-110. On appeal, the Eleventh Circuit affirmed the sentence. *See* Appendix. Mr. Sikes now comes to this Honorable Court.

REASONS FOR GRANTING THE WRIT

The use of "uncharged conduct" at sentencing is an important, nationally-relevant and repetitive question that only this Court can answer and resolve.

Mr. Sikes acknowledges that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." S. Ct. Rule 10. He would humbly submit that the issues raised by his case merit this Court's attention, time, and resources. At a minimum, the petition presents a question -- "[t]his Court has never squarely considered whether the Due Process Clause and the Fifth Amendment or the Sixth Amendment's jury-trial guarantee forbid the use of [uncharged conduct] at sentencing." *Asaro*, Petition for Cert., No. 19-107 at 7. Indeed, "[n]umerous Justices and judges have questioned whether using acquitted conduct [if not uncharged conduct] at sentencing comports with due process and the right to a jury trial, urging this Court to 'take up this important, frequently recurring, and troubling contradiction in sentencing law.'" *Ludwikowski*, Petition for Cert., No. 19-1293 at 8 (quoting *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in denial of rehearing *en banc*)). As a procedural matter, the instant case is an excellent vehicle to entertain the question presented, one for which may potentially affect thousands of federal criminal defendants each year. Mr. Sikes comes to this Court having squarely preserved the issue in the courts below, after a direct criminal appeal, and on one question in the context of federal

sentencing – there are no factual questions to address, the record-on-appeal is clean and without complexity, and the matter involves only a legal analysis and application of this Court's jurisprudence.

Mr. Sikes certainly appreciates that the current acceptance or interpretation of law generally allows a federal sentencing court to consider a defendant's past criminal behavior, even if no conviction resulted from that conduct. However, some "Supreme Court Justices and other judges and commentators have asserted that the Fifth and Sixth Amendments preclude district courts from considering uncharged conduct at sentencing," *see* Appendix, *Sikes*, 824 F. App'x at 805, such that, taking his cue from Justices Scalia, Gorsuch, and Kavanaugh, as well as former Eleventh Circuit Judge Barkett, Mr. Sikes raises the constitutional question as to whether that sentencing practice remains or even should remain viable. In this case, for example, Mr. Sikes pled guilty to theft charges. He was stealing from his employer and then lied about it. His applicable Sentencing Guidelines range was 51-63 months, a score Mr. Sikes did not oppose. Mr. Sikes, moreover, came to the sentencing court without any prior criminal history. For its part, the government brought forth allegations of previous criminal conduct against Mr. Sikes (for which Mr. Sikes had never been charged nor convicted) at the time of sentencing, accusing him of having inappropriate sexual relationships with teenage boys. Mr. Sikes denied the allegations and objected to any consideration of the matter by the

sentencing court below. The district court overruled his objection, found the allegations credible by a preponderance of evidence, and grounded an upward variance from the guidelines range on that "uncharged conduct" to 10 years' imprisonment. The sentence itself falls under the statutory maxima and would ordinarily be consistent with a legal sentence; conversely, Mr. Sikes posits that in light of the court's "judicial factfinding," that led to a substantively unreasonable, if not unconstitutional, sentence. In other words, Mr. Sikes contends that the district court's reliance on "uncharged conduct" at sentencing violated his Fifth Amendment right to due process and his Sixth Amendment right to a jury.

> *The Fifth and Sixth Amendments prohibit a federal court from basing a criminal defendant's sentence on "uncharged conduct" unrelated to the offense of conviction and for which the defendant had never been charged or convicted. Here, the 10-year sentence Mr. Sikes suffers is unconstitutional because it was imposed in violation of the Fifth and Sixth Amendments -- it is grounded on putative conduct for which Mr. Sikes was never charged or convicted.*

Mr. Sikes knows that the Eleventh Circuit has "previously explained that 'sentencing courts may consider both uncharged and acquitted conduct in determining the appropriate sentence.'" *United States v. Rushin*, 844 F.3d 933, 942 (11th Cir. 2016) (quoting *United States v. Hasson*, 333 F.3d 1264, 1279 n. 19 (11th Cir. 2003)); *see also United States v. Smith*, 741 F.3d 1211, 1226-1227 (11th Cir. 2013) (sentencing courts may consider both uncharged and acquitted conduct when determining an appropriate sentence); *United States v. Hamaker*, 455 F.3d 1316,

1338 (11th Cir. 2006) ("acquitted conduct and conduct not mentioned in the superseding[] may be considered at sentencing"). Ostensibly, this principle of sentencing stems from the United States Supreme Court's decision and opinion in *United States v. Watts*, 117 S. Ct. 633 (1997).

Watts involved a challenge concerning the Double Jeopardy Clause (it did not involve the Fifth or Sixth Amendments); but, the Supreme Court said that double jeopardy was not an issue for purposes of considering acquitted conduct after a jury trial at sentencing – the Court decided that acquitted conduct can be used to enhance a sentence for a conviction on another charge and not violate double jeopardy as long as that evidence can be proved by a preponderance of evidence: "We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Watts*, 117 S. Ct. at 638; *see also, e.g., United States v. Duncan*, 400 F.3d 1297, 1304 (11th Cir. 2005) (discussing *Watts*, noting that "the Supreme Court held that the Double Jeopardy Clause permitted a court to consider acquitted conduct in sentencing a defendant under the [Sentencing Guidelines] because 'consideration of information about the defendant's character at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted'"). It is Mr. Sikes's position that the lower courts have broadly accepted *Watts* as permission to

constitutionally base *any* federal sentence going forward on acquitted as well as uncharged conduct.

But, because sentencing "is a fluid and dynamic process," *United States v. Bentley*, 756 F. App'x 957, 963 (11th Cir. 2018), Mr. Sikes would take this opportunity to at least recognize the other schools of thought flowing from the highest levels of our judiciary. He would respectfully argue here that the Fifth[10] and Sixth Amendments[11] (aside from the Double Jeopardy Clause) apply to

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[10] The Fifth amendment says:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. V.

[11] The Sixth amendment says:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const., amend VI.

federal sentencing proceedings in such a way as to preclude a district court from accepting, receiving, and relying on the allegations of "uncharged [criminal] conduct" for the purpose of enhancing (or aggravating) any given defendant's sentence or punishment (even if the final sentence falls within the statutory prescriptions – it might arguably be said to be a technically legal sentence, but, it may very well be found substantively unreasonable). *See, e.g., United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (observing the question of challenging a "district court's power to find facts at sentencing"); *see also* Sterback, Megan, Note, *Getting Time for an Acquitted Crime: The Unconstitutional Use of Acquitted Conduct at Sentencing and New York's Call for Change*, 26 Touro L. Rev. 1223 (November 2011).

For example, while a judge on the D.C. Circuit Court of Appeals, now Associate Justice Kavanaugh highlighted in a concurring opinion from *United States v. Bell*, 808 F.3d 926, 927 (D.C. Cir. 2015), "one of the oddities of sentencing law that has long existed and that remains after *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005)."

"Here's the issue," then-Judge Kavanaugh explained:

> Based on a defendant's conduct apart from the conduct encompassed by the offense of conviction – in other words, based on a defendant's uncharged or acquitted conduct – a judge may impose a sentence higher than the sentence the judge would have imposed absent consideration of that uncharged conduct or acquitted conduct. The judge may do so as long as the factual finding regarding that conduct does not increase the statutory sentencing range for the offense of conviction alone. The Sixth Amendment's Jury Trial Clause is deemed satisfied because the judge's factual finding does not increase the statutory sentencing range established by the jury's finding of guilt on the offense of conviction [or, in this case, by those facts admitted by the defendant]. And the Fifth Amendment's Due Process Clause is deemed satisfied because a judge finds the relevant conduct in a traditional adversarial procedure.

Bell, 808 F.3d at 927 (Kavanaugh, J., concurring) (citing *Booker*, 543 U.S. at 267, 125 S. Ct. at 738; *McMillan v. Pennsylvania*, 477 U.S. 79, 91-93 (1986)). Justice Kavanaugh expressed his concerns "about the use of acquitted conduct at sentencing," *Bell*, 808 F.3d at 927, but, he recognized that, quite possibly, "resolving that concern as a constitutional matter would likely require a significant revamp of criminal sentencing jurisprudence . . . ." *Id.* Nonetheless, "[a]t least as a matter of policy, if not also as a matter of constitutional law," he wrote, "I would have little problem with a new federal sentencing regime along those lines." *Id.* at 928. Justice Kavanaugh emphasized, "Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." *Id.*

In his 2018 article prepared for members of Congress, Michael Foster explained:

> Though most critical commentary has focused on the continued use of acquitted conduct specifically, some commentary has suggested that *any* judicial fact-finding which meaningfully increases an offender's sentence could be viewed as constitutionally suspect in light of the Sixth Amendment principles established in the *Apprendi* line of cases.
>
> This view appears to have adherents on the Supreme Court, as well: In a 2014 dissent from the denial of certiorari in *Jones v. United States*, Justice Scalia (joined by Justices Ginsburg and Thomas) argued that judicial fact-finding justifying a sentence that would be unreasonable but for the judge-found facts may run afoul of the Sixth Amendment. Likewise, Justice Scalia's replacement, Justice Gorsuch, wrote in an opinion during his tenure on the United States Court of Appeals for the Tenth Circuit that it is "questionable" whether the Constitution allows a court to increase a defendant's sentence "based on facts the judge finds without the aid of a jury or the defendant's consent," citing to Justice Scalia's *Jones* dissent.

Foster, Michael A., Congressional Research Service (Legal Sidebar), *Judicial Fact-Finding and Criminal Sentencing: Current Practice and Potential Change*, (August 24, 2018), at 3-4; and available at www.crs.gov.

Mr. Sikes understands that Title 18, U.S.C. § 3661 says: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661; *see also United States v. Faust*, 456 F.3d 1342, 1348 (11th Cir. 2006) (discussing section 3661, *Watts*, and post-*Booker* jurisprudence – "it follows that courts may still consider relevant facts concerning a defendant's 'background,

character, and conduct' when making sentencing calculations, even if those facts relate to acquitted conduct . . . so long as the facts underlying the conduct are proved by a preponderance of the evidence and the sentence imposed does not exceed the maximum sentence authorized").[12]

On the other hand, Mr. Sikes would effectively adopt and incorporate for purposes of this petition the concurring opinion rendered by Judge Barkett in *Faust*. She wrote that although she joined the majority in affirming the defendant's conviction there, she was only bound to uphold his sentence because of Circuit precedent. *See Faust*, 456 F.3d at 1349 (Barkett, J., specially concurring) ("I strongly believe ... that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment").

As Judge Barkett explained:

> But as a matter of simple justice, factual findings by a sentencing judge ought to reflect the moral blameworthiness of an *already culpable* defendant. Rather than punishing an offender for his guilt or innocence *per se*, judicially imposed enhancements historically relate to contextual matters like the vulnerability of the victim, the status of the victim, the defendant's role in the offense, or even the quantity of drugs in the defendant's possession. If these "contextual' questions can or should be resolved by a sentencing judge under a

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[12] USSG § 1B1.4 also says, "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. *See* 18 U.S.C. § 3661."

> preponderance standard, that is because our criminal justice system deviates from its preference for the highest standard of proof only when it comes to facts that do not – and could not – go to the basic question of legal culpability, traditionally a jury's responsibility. When a sentencing judge finds facts that could, in themselves, constitute entirely free-standing offenses under the applicable law – that is, when an enhancement factor could have been named in the indictment as a complete criminal charge – the Due Process Clause of the Fifth Amendment requires that those facts be proved beyond a reasonable doubt.

Faust, 456 F.3d at 1351-1352 (Barkett, J., specially concurring) (cleaned up).

In his critique, Professor Barry Johnson synthesized his contribution to this area by acknowledging that "[a]cquitted conduct [as well as, arguably, uncharged conduct] has been a feature of the federal sentencing landscape for decades." Johnson, Barry L., *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 Suffolk U. L. Rev. 1, 45 (2016). It's "[a]n artifact of the unlimited discretion of sentencing judges [from] the pre-Guidelines era," and, to a stronger degree, "it has managed to survive the dramatically altered sentencing landscapes of binding Guidelines and, now, advisory Guidelines." *Id.* Professor Johnson notes that "[d]espite the fact that there is a consensus that use of acquitted conduct [and uncharged conduct] is questionable sentencing policy, and in tension with the purposes underlying the Sixth Amendment right to a jury trial, use of acquitted conduct [as well as uncharged conduct] has continued." *Id.* Conversely, Professor Johnson sums up: "there is an opportunity for the Commission, Congress, the Department of Justice,

and sentencing judges to take steps to restrict, if not to eliminate, use of acquitted conduct [and uncharged conduct]. It is imperative that each of these institutional actors consider its potential role in acquitted conduct [and uncharged conduct] reform." *Id.*

Here, then, in the case at bar, the district court accepted, heard, and made factual findings concerning "uncharged, unrelated, unproven conduct." Doc. 92, page 12. The government urged "the [district court] to consider evidence of uncharged, unproven and unrelated alleged criminal conduct – allegations that in years past [Mr. Sikes] had allowed underage boys to swim in his pool unclothed, and paid underage boys to allow him to take pictures of them unclothed and engage in sex acts in his presence." *Id.* Over objection, *see* Doc. 125, pages 21-24, the court accepted the prosecution's evidence, "turn[ed] [sentencing] into a mini trial," *id.* at 21, and heard the testimony of IRS Special Agent Fabian Brown, *see* Doc. 125, pages 48-83; Christopher Hedges, *see* Doc. 125, pages 84-115; Towns Sanford, *see* Doc. 126, pages 7-40; and Conner Pumphrey, *see* Doc. 126, pages 40-58. "There's been evidence," the district court found, "establishing [by a preponderance] the commission of felonies outside of the theft that have not been charged by indictment, that have not been the subject of discovery, but which have been tested in this courtroom during a time when Mr. Sikes, through counsel, had an opportunity to hear and contest the evidence offered by the government of the

uncharged crimes, if you will." Doc. 126, page 106. The court went on to observe that "one of the concerns is the difference in treatment of criminal versus – criminally charged and proven as opposed to crimes not charged but arguably proven." *Id.* "The sentencing guidelines," the court continued, "contemplate evidence of other relevant conduct being established by a preponderance of the evidence and that history, characteristics, and the like can be established if that burden of proof of met." Doc. 126, page 106.

"It's been met in this case," the court found. *Id.*

The court said, "I believe these boys." *Id.* To be sure, "[t]he reluctance of many more to come forward is understandable. Admitting the behavior that was engaged in is difficult for any victims of sexual assault. The difficulty of the witnesses that testified today and yesterday was evident." *Id.* "The Court's offended by it," it offered, "My conscience is shocked, given the scope, the time, and the length of not only the theft but of the child abuse that occurred." Doc. 126, page 108. The court found as a factual matter that "there's also ample evidence that [Mr. Sikes] provided an environment in which children were enticed and sustained in order for him to have his way with them." *Id.*

"So," the court declared, "the Court is going to consider the history of Mr. Sikes and his relationship with boys and sexual assaults on them in fashioning a sentence in this case." *Id.* at 107. It did so by effectively doubling the applicable

guidelines range of 4-5 years up to 10 years. *See* Doc. 126, page 109.

It is the contention of Mr. Sikes, however, that the district court did all of this in contravention of the Fifth and Sixth Amendments.[13] *See, e.g., Jones v. United* States, 135 S. Ct. 8, 9 (2014) (Scalia, J., dissenting) ("It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable – thereby exposing the defendant to the longer sentence – is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge.") (emphasis in original). Indeed, the district court did so to the tangible harm of Mr. Sikes – it should go without argument that the court effectively sentenced Mr. Sikes to an additional 5 years' imprisonment, to his prejudice, based on the government's allegations that he otherwise committed crimes for which he had never been charged nor convicted.

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[13] Yes, Mr. Sikes knows that Justice O'Conner wrote in her majority opinion from *Witte v. United States*, 115 S. Ct. 2199, 2205 (1995), that "[t]raditionally, '[s]entencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior.'" (quoting *Nichols v. United States*, 114 S. Ct. 1921, 1928 (1994)). But, as Justice Scalia explained almost a decade later in his dissent from the denial of certiorari in *Jones v. United States*, 135 S. Ct. 8, 9 (2014), "the Court of Appeals have uniformly taken our continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range." Justice Scalia admonished, "This has gone on long enough. . . . We should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment – or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable." *Id.* at 9.

> To a prisoner, this prospect of additional time behind bars is not some theoretical or mathematical concept. Any amount of actual jail time is significant, and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration.

Rosales-Mireles v. United States, 138 S. Ct. 1897, 1907 (2018) (cleaned up).

In sum, this Court should hold that the Fifth and Sixth Amendments apply to federal sentencing proceedings in such a way as to preclude district courts from entertaining and accepting factual matters that also rise to the degree of "uncharged conduct." Just like the case of *Vincent Asaro v. United* States, No. 19-107, Mr. Sikes assumes the position that his case "presents an ideal opportunity for the Court to answer the growing chorus of calls"[14] to "resolve the contradictions in the current state of law, by either putting an end to the unbroken string of cases disregarding the Sixth Amendment or eliminating the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable." *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring) (citation and internal quotation omitted). As such, the Court should find in favor of Mr. Sikes, grant his petition for a writ of certiorari, and determine the relevant constitutional protections that lie during the course of federal sentencing.

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[14] *Asaro v. United States*, No. 19-107, petition for writ of certiorari (July 22, 2019), page 29. *See also Michael Ludwikowski v. United States*, No. 19-1293.

CONCLUSION

For the foregoing reasons, the question presented is ripe for review by this Court and the petition should be granted.

Respectfully submitted,

James T. Skuthan
Acting Federal Defender

/s *Stephen J. Langs*
Stephen J. Langs
Research and Writing Attorney
Florida Bar No. 0137227
Supreme Court Bar No. 242621
Federal Defender's Office
201 South Orange Avenue, Suite 300
Orlando, Florida 32801
Phone (407) 648-6338
Fax (407) 648-6095
email stephen_langs@fd.org
Counsel of Record for the Petitioner

Dated Monday, November 9, 2020

Appendix

United States v. Duane Allen Sikes,

824 F. App'x 805 (11th Cir. 2020) (unpublished)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14591
Non-Argument Calendar

D.C. Docket No. 3:18-cr-00150-BJD-JRK-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DUANE ALLEN SIKES,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(August 20, 2020)

Before JORDAN, LAGOA and FAY, Circuit Judges.

PER CURIAM:

Duane Allen Sikes appeals his 120-month, above-guideline sentence for mail fraud, embezzlement of credit union funds, and subscribing to a false tax return. We affirm.

I.

Sikes was charged in a superseding indictment with the following offenses: ten counts of mail fraud, in violation of 18 U.S.C. §§ 2 and 1341; five counts of embezzlement of credit union funds, in violation of 18 U.S.C. §§ 2 and 657; and six counts of willfully making and subscribing, or causing to be made or subscribed, a fraudulent tax return, in violation of 26 U.S.C. § 7206(1). Sikes ultimately pled guilty to one count of mail fraud, one count of embezzlement of credit union funds, and one count of subscribing to a false tax return, pursuant to a written plea agreement with the government. The plea agreement provided that Sikes would forfeit any and all forfeitable assets, including his home.

According to the factual basis for the plea agreement, from at least 2007 to 2017, Sikes worked in the mail room at VyStar Credit Union. In this position, Sikes received weekly checks from VyStar, which were made out to "U.S. Postmaster." Sikes was responsible for using these checks to recharge VyStar's postage meter. Instead of recharging the postage meter, Sikes would use these checks to buy stamps at the post office, which he would then resell to Ben-Art Stamp Company. Sikes used the proceeds of these sales for his own benefit. From

2007 to 2017, Sikes misappropriated about $5,400,000 from VyStar and made approximately $3,663,200 in profits. During this time period, Sikes also failed to report the profits from his stamp sales on his tax returns. These false tax returns resulted in a total loss of $1,009,175 to the government.

After Sikes pled guilty, the government moved to modify the conditions of his release, arguing that it had obtained information suggesting that he should (1) be placed on home confinement with GPS monitoring, (2) undergo individualized counseling sessions, (3) not have any contact with any minors, (4) not have any contact with any victims or witnesses in the case, except through counsel, and (5) be subject to unannounced searches at his residence.

At the hearing on the motion, Sikes opposed the motion and denied the allegations against him; however, he stated that he had no objection to the government's request that he refrain from contacting any minors or any victims or witnesses in the case, except through counsel. Sikes argued that the government had been aware of the allegations against him for several months but did not act on them at that time. Sikes further contended that, if the government sought to present the allegations to the court, he should be permitted to know who the witnesses were and cross-examine them. The magistrate judge denied this request. The magistrate judge then explained that he would either order that Sikes be detained or decline to modify the conditions of his release, depending on whether

there was clear and convincing evidence that he was not a danger to the community.

The government then explained that, through bank records, it had identified four individuals who were willing to testify regarding alleged inappropriate sexual misconduct with boys between the ages of 13 and 17. The government stated that Sikes had performed sex acts on the boys and paid them both in cash and expensive gifts, such as cars and meals. The government summarized the proposed testimony from the alleged victims. Sikes noted that the government had become aware of the allegations against him during the plea negotiations and questioned why the government had not obtained a warrant to search his home or raised the allegations earlier. The magistrate judge permitted Sikes to cross-examine the case agent who investigated the alleged misconduct.

The government contended that the alleged victims' testimony raised a sufficient possibility of ongoing misconduct because it highlighted an extensive scheme on Sikes's part. The magistrate judge declined to subject Sikes to unannounced searches, home confinement, or GPS monitoring; however, he modified the terms of Sikes's release such that he was precluded from making any contact with any minor or the alleged victims, except through counsel.

The presentence investigation report ("PSI") recited similar facts to those stated in the factual proffer for the plea agreement. Based on a total offense level

of 24 and a criminal history category of I, the probation officer calculated Sikes's guideline imprisonment range as 51 to 63 months. The probation officer did not highlight any factors warranting a departure from the applicable guideline range. Neither Sikes nor the government submitted written objections to the PSI.

In its sentencing memorandum, the government contended that Sikes's inappropriate arrangement with the underage boys was his motivation for his underlying financial crimes. The government argued that the district court was permitted to consider Sikes's sexual misconduct in determining his sentence because it was authorized to consider any information relating to his background and character, including uncharged conduct.

In his sentencing memorandum, Sikes asked the district court to consider his acceptance of responsibility, noting that he offered to cooperate early on. Sikes also contended, in part, that he had strong community support and did not use the proceeds from his crimes for greedy or selfish ends, choosing instead to give some of the money to others in the community. He also encouraged the district court to consider his various health problems. Sikes asked the district court to consider a downward variance and submitted an affidavit regarding his assistance to VyStar, a short autobiography, documents summarizing his health issues, and 25 letters of support from community members describing him as generous and of good character.

At the sentencing hearing, the district court noted at the outset that it had considered Sikes's and the government's sentencing memoranda, as well as the PSI. Neither Sikes nor the government raised any objections to the PSI. The district court adopted the guideline calculations from the PSI.

After hearing testimony from Sikes's character witnesses and the government's witnesses, the district court stated, "[b]oth the length and the amount of the loss suffered by the victim in this case make it among the most egregious frauds and thefts in the Court's experience." The court further stated, however, that this was not the troubling aspect of the case. The court stated, "[t]he troubling aspect of the case is the history and characteristics of Mr. Sikes that have come to light in the context of the sentencing hearing regarding the theft." The court explained that the allegations of sexual misconduct were "unrelated, at least theoretically," to the offenses of conviction and had not been the subject of discovery but noted that Sikes had the opportunity to test the allegations in court. The court acknowledged that the sexual-misconduct allegations were uncharged but noted that the Sentencing Guidelines authorized it to consider any information about Sikes's characteristics that was proven by a preponderance of the evidence.

The district found that the government had met that burden of proof, noting that it believed Sikes's accusers and explaining that the accusers had legitimate reasons for previously declining to come forward. The court further noted that

Sikes's sexual misconduct was not wholly unrelated to his financial crimes because he used the proceeds of his embezzlement to sustain his pattern of sexual activity with young boys. The court noted that there were countless examples of Sikes doing good with the fruits of his financial crimes but explained that there also was ample evidence that he used those proceeds to sustain his pattern of sexual misconduct. The court stated that it was shocked and offended by the scope, length, and extent of Sikes's financial and sexual schemes.

The district court explained that it was obliged to fashion a sentence that would protect the community and deter future criminal conduct; it would fashion a sentence that would promote respect for the law, provide just punishment, and account for the different types of sentences available.

The district court sentenced Sikes to 120 months of imprisonment, explaining that it had considered the parties' memoranda, the pretrial status reports, the admitted evidence, the PSI, Sikes's allocution, and the parties' arguments. The court explained that the sentence consisted of concurrent terms of 120 months of imprisonment as to the mail fraud and embezzlement charges, as well as a concurrent sentence of 36 months of imprisonment as to the false-tax-return charge. The court also imposed five years of supervised release as to the mail fraud and embezzlement charges, as well as a concurrent one-year term as to the tax charge. The court ordered Sikes to pay $5,284,800 in restitution to CUMIS

Insurance Society, VyStar's insurer, and $150,000 to VyStar. The court waived the imposition of any fine based on Sikes's financial status and ordered the forfeiture of both of Sikes's parcels of real property. The court explained that it had considered the Sentencing Guidelines and the 18 U.S.C. § 3553(a) factors and found that its sentence was sufficient but not greater than necessary to comply with the statutory purposes of sentencing. The court then ordered Sikes to pay $1,009,175 in restitution to the IRS.

Sikes objected to his sentence, arguing that it was unreasonable for the reasons highlighted in his sentencing memorandum. Sikes also objected that his sentence was unreasonable because the district court's consideration of uncharged conduct that was established only by a preponderance of the evidence violated his constitutional rights. The district court noted these objections for the record and overruled them.

Sikes raises three issues on appeal. First, he argues that the district court violated the Fifth and Sixth Amendments by imposing an above-guideline sentence based on uncharged allegations that he engaged in sexual misconduct with minors. Second, Sikes asserts that his sentence is procedurally unreasonable because the district court did not properly consider the 18 U.S.C. § 3553(a) factors and failed to adequately explain its upward variance from the guideline range. Third, Sikes contends that his sentence is substantively unreasonable because the district court

failed to sufficiently consider the guideline range, focused single-mindedly on his uncharged conduct, and did not provide an adequate explanation for rejecting his mitigation arguments.

II.

A.

We review questions of constitutional law *de novo*. *United States v. Whatley*, 719 F.3d 1206, 1213 (11th Cir. 2013). However, we review sentencing challenges raised for the first time on appeal for plain error. *United States v. Henderson*, 409 F.3d 1293, 1307 (11th Cir. 2005). To prevail under this standard of review, a defendant must establish a plain error that affected his substantial rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904-05 (2018).

To preserve an issue for appeal, a party "must raise an objection that is sufficient to apprise the trial court and the opposing party of the particular grounds upon which appellate relief will later be sought." *United States v. Straub*, 508 F.3d 1003, 1011 (11th Cir. 2007) (quoting *United States v. Dennis*, 786 F.2d 1029, 1042 (11th Cir. 1986)). An objection must be stated in clear and simple language such that the trial court may not misunderstand it. *Id.*

At sentencing, a district court is generally permitted to rely on any information concerning a defendant's background, character, and conduct.

18 U.S.C. § 3661. In addition, the Sentencing Guidelines provide that a district court "may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law," in determining whether to impose a sentence within the guideline range or whether a departure is warranted. U.S.S.G. § 1B1.4.

The Supreme Court explained in *United States v. Watts*, 519 U.S. 148, 117 S. Ct. 633 (1997), that a sentencing court may rely on uncharged and acquitted conduct that has been proven by a preponderance of the evidence, noting that the consideration of such conduct is consistent with the Double Jeopardy and Due Process Clauses. *See id.* at 151-57, 117 S. Ct. at 635-38. Subsequently, in *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010), we held that there was no constitutional violation where the district court sentenced the defendant based on uncharged conduct because the defendant's ultimate sentence was below the applicable statutory maximum sentence. *Id.* at 800-01, 827-28.

We are bound by a prior panel opinion until the opinion's holding is overruled or undermined to the point of abrogation by the Supreme Court or this Court sitting en banc. *United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019). There is no exception to this rule for a perceived defect in the prior panel's analysis. *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016). In addition,

we are bound by Supreme Court precedent. *See United States v. Thomas*, 818 F.3d 1230, 1243 (11th Cir. 2016).

Here, the district court did not err, plainly or otherwise, in considering Sikes's uncharged conduct. The Supreme Court has held that a sentencing court can consider uncharged conduct that has been established by a preponderance of the evidence; furthermore, we have held that a sentencing court does not violate the Constitution when it considers uncharged conduct, so long as the defendant's ultimate sentence does not exceed the applicable statutory maximum. *See Watts*, 519 U.S. at 151-57, 117 S. Ct. at 635-38; *Belfast*, 611 F.3d at 800-01, 827-28. We are bound by this precedent. *See Gillis*, 938 F.3d at 1198; *Thomas*, 818 F.3d at 1243.

Sikes does not contend that his sentence exceeds the applicable statutory maximum or that his sexual misconduct was not established by a preponderance of the evidence. Instead, he contends that Supreme Court Justices and other judges and commentators have asserted that the Fifth and Sixth Amendments preclude district courts from considering uncharged conduct at sentencing. Nevertheless, even if these jurists and scholars are correct and *Watts* and *Belfast* were wrongly decided, we would not be permitted to overlook them because they have not been overruled or otherwise abrogated. *See Gillis*, 938 F.3d 1181, 1198; *Fritts*, 841 F.3d at 942; *Thomas*, 818 F.3d at 1243. Accordingly, the district court did not

violate the Fifth and Sixth Amendments when it imposed an above-guideline sentence based on Sikes's uncharged sexual misconduct.

B.

The first step in reviewing the reasonableness of a sentence is determining whether the sentence is procedurally reasonable. *United States v. Trailer*, 827 F.3d 933, 936 (11th Cir. 2016). The reasonableness of a sentence is generally reviewed under a deferential abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 41, 128 S. Ct. 586, 591 (2007). However, if a party does not raise a procedural sentencing argument before the district court, we will review that argument only for plain error. *United States v. McNair*, 605 F.3d 1152, 1222 (11th Cir. 2010). In addition, the amount of deference involved in an abuse-of-discretion review of a sentence can vary depending on the type of error alleged. *United States v. Barrington*, 648 F.3d 1178, 1194 (11th Cir. 2011). Furthermore, we always review *de novo* the issue of whether the district court failed to explain the reasons for its sentence imposed outside of the guideline range, even if the defendant failed to properly object on those grounds. *United States v. Parks*, 823 F.3d 990, 996-97 (11th Cir. 2016).

Errors that cause a sentence to be procedurally unreasonable include miscalculating the guideline range, treating the Sentencing Guidelines as mandatory, failing to consider the § 3553(a) factors, imposing a sentence based on

clearly erroneous facts, and failing to explain the sentence adequately. *Trailer*, 827 F.3d at 936.

A district court's sentence must be sufficient, but not greater than necessary, to achieve the goals of sentencing, which are: reflecting the seriousness of the offense, promoting respect for the law, providing just punishment, deterring future criminal conduct, protecting the public, and providing the defendant with any needed training or treatment. 18 U.S.C. § 3553(a). A district court must also consider the nature and circumstances of the offense, the defendant's history and characteristics, the kinds of sentences available, the Sentencing Guidelines, any pertinent policy statement, the need to avoid disparate sentences for defendants with similar records, and the need to provide restitution to any victims. *Id.*

In explaining its chosen sentence, a district court "should set forth enough to satisfy the appellate court that [it] has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority." *Rita v. United States*, 551 U.S. 338, 356, 127 S. Ct. 2456, 2468 (2007). It is not necessary, however, for the district court to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors. *United States v. Kuhlman*, 711 F.3d 1321, 1326 (11th Cir. 2013). Nevertheless, the required extent of a district court's explanation may change depending on the type of sentence at issue. *Rita*, 551 U.S. at 356-59, 127 S. Ct. at 2468-69. For example,

if a district court imposes a sentence outside the guideline range, it should "ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50, 128 S. Ct. at 597. In addition, "a major departure" from the guideline range demands more explanation than a minor one. *Id.*, 128 S. Ct. at 597. Even so, an "extraordinary justification" is not required for a sentence outside the guideline range. *United States v. Shaw*, 560 F.3d 1230, 1238 (11th Cir. 2009).

Sikes's procedural challenges fail because the district court imposed a procedurally reasonable sentence, as it considered the § 3553(a) factors and explained its reasoning for the sentence sufficiently.[1] The record reflects that the district court considered the § 3553(a) factors, as it highlighted the circumstances of Sikes's offenses and noted its responsibility to fashion a sentence that protected the community, deterred future criminal activity, promoted respect for the law, provided just punishment, and accounted for the different types of sentences available. In addition, although Sikes contends that the district court focused single-mindedly on his sexual misconduct, the record shows that it considered other factors, such as the high amount of loss involved in his financial crimes.

[1] We note that Sikes's argument that the district court failed to properly consider the § 3553(a) factors is subject to review for plain error because he did not raise such an argument in the district court. *See McNair*, 605 F.3d at 1222. However, Sikes's argument that the district court failed to sufficiently explain its sentence outside the guideline range is subject to *de novo* review, even though he did not object on these grounds in the district court. *See Parks*, 823 F.3d at 996-97.

Furthermore, the district court provided a sufficient explanation for its sentence. The district court imposed an above-guideline sentence and was, therefore, required to provide a justification that was sufficiently compelling to support the degree of variance. *See Gall*, 552 U.S. at 50, 128 S. Ct. at 597. Nevertheless, it was not required to provide an extraordinary justification for its above-guideline sentence. *See Shaw*, 560 F.3d at 1238. Here, the district court's explanation was sufficient because it acknowledged that it considered the parties' submissions and evidence, found that Sikes's sexual misconduct had been established by a preponderance of the evidence, noted that his sexual misconduct was related to his financial crimes, and stated that it was shocked by the extent of his sexual and financial wrongdoing. Thus, the district court's explanation was enough to satisfy us that it considered the parties' arguments and had a reasoned basis for exercising its decisionmaking authority. *See Rita*, 551 U.S. at 356, 127 S. Ct. at 2468. Accordingly, the district court imposed a procedurally reasonable sentence.

C.

We apply an abuse-of-discretion standard and analyze the totality of the circumstances when assessing the substantive reasonableness of a sentence. *Gall*, 552 U.S. at 51, 128 S. Ct. at 597. This standard applies regardless of whether the sentence in a given case is outside the guideline range. *Id.*, 128 S. Ct. at 597.

Overall, we will only vacate a sentence if we are left with a definite and firm conviction that the district court clearly erred in its consideration of the § 3553(a) factors. *United States v. Croteau*, 819 F.3d 1293, 1309 (11th Cir. 2016).

The weight given to any of the § 3553(a) factors is committed to the sound discretion of the district court. *Id.* A district court is not required to explicitly discuss each of the factors, and a sentence may be affirmed so long as the record indicates that the sentencing court considered a number of the factors. *See United States v. Dorman*, 488 F.3d 936, 944 (11th Cir. 2007). Even so, a district court abuses its discretion when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors. *United States v. Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (en banc). Furthermore, a district court's unjustified reliance on any one § 3553(a) factor to the detriment of all the others may be a symptom of an unreasonable sentence. *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008).

When a district court imposes an above-guideline sentence, there is no presumption that the sentence is unreasonable. *United States v. Turner*, 626 F.3d 566, 573 (11th Cir. 2010). When we review an above-guideline sentence, we "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* at 574 (quoting *Gall*, 552 U.S.

at 51, 128 S. Ct. at 597). In addition, a sentence that is well below the statutory maximum "points strongly to reasonableness." *United States v. Nagel*, 835 F.3d 1371, 1377 (11th Cir. 2016).

Here, the district court imposed a substantively reasonable sentence because it did not unreasonably focus on Sikes's sexual misconduct and sufficiently considered the guideline range and Sikes's arguments in mitigation. Although Sikes argues that the district court focused single-mindedly on his sexual misconduct, the record shows that the district court also considered other factors, such as the high amount of loss involved in and the duration of his financial crimes. The record indicates that the court gave significant weight to Sikes's sexual misconduct, but it had the discretion to determine how this factor, which pertained to the nature and circumstances of the offense and Sikes's history and characteristics, should be weighted. *See* 18 U.S.C. § 3553(a); *Croteau*, 819 F.3d at 1309. In addition, the record shows that the court sufficiently considered the guideline range because an extraordinary justification is not required for an above-guideline sentence, and the court noted that it was required to fashion a sentence that accounted for the different types of available sentences. *See Shaw*, 560 F.3d at 1238.

Sikes also contends that his sentence is substantively unreasonable because the district court did not explain why it rejected his mitigation arguments. A

sentence may be substantively unreasonable when the district court fails to consider relevant factors that were due significant weight, *see Irey*, 612 F.3d at 1189, but the record shows that the district court considered Sikes's mitigation arguments and addressed one of them specifically. The court specifically addressed Sikes's argument that he used the proceeds of his financial crimes for unselfish ends, noting that, although he may have used some of the proceeds to help others, he also used the proceeds to support his pattern of sexual misconduct. In addition, although the court did not specifically address Sikes's other mitigation arguments, it stated that it considered them and cited the extent of Sikes's inappropriate conduct in imposing an above-guideline sentence. Thus, the district court sufficiently considered and addressed Sikes's mitigation arguments. *See id.*

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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August 20, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-14591-AA
Case Style: USA v. Duane Sikes
District Court Docket No: 3:18-cr-00150-BJD-JRK-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call T. L. Searcy, AA at (404) 335-6180.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 19-14591

District Court Docket No.
3:18-cr-00150-BJD-JRK-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DUANE ALLEN SIKES,

Defendant - Appellant.

Appeal from the United States District Court for the
Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: August 20, 2020
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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September 18, 2020

Clerk - Middle District of Florida
U.S. District Court
300 N HOGAN ST
JACKSONVILLE, FL 32202

Appeal Number: 19-14591-AA
Case Style: USA v. Duane Sikes
District Court Docket No: 3:18-cr-00150-BJD-JRK-1

A copy of this letter, and the judgment form if noted above, but not a copy of the court's decision, is also being forwarded to counsel and pro se parties. A copy of the court's decision was previously forwarded to counsel and pro se parties on the date it was issued.

The enclosed copy of the judgment is hereby issued as mandate of the court. The court's opinion was previously provided on the date of issuance.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Lois Tunstall
Phone #: (404) 335-6191

Enclosure(s)

MDT-1 Letter Issuing Mandate

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 19-14591

District Court Docket No.
3:18-cr-00150-BJD-JRK-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DUANE ALLEN SIKES,

Defendant - Appellant.

Appeal from the United States District Court for the
Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: August 20, 2020
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch

824 Fed.Appx. 805
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Duane Allen SIKES, Defendant-Appellant.

No. 19-14591
|
Non-Argument Calendar
|
(August 20, 2020)

Synopsis

Background: Defendant pled guilty and was convicted of one count of mail fraud, embezzlement of credit union funds, and subscribing to a false tax return, and was sentenced by the United States District Court for the Middle District of Florida, No. 3:18-cr-00150-BJD-JRK-1, Brian Davis, J., to 120 months' imprisonment. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] district court's consideration of uncharged sexual misconduct did not violate the Fifth or Sixth Amendment;

[2] sentence was not procedurally unreasonable; and

[3] sentence was not substantively unreasonable.

Affirmed.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (3)

[1] **Constitutional Law** ⇦ Matters Considered in Sentencing

Double Jeopardy ⇦ Sentencing Proceedings; Cumulative Punishment

Jury ⇦ Particular cases in general

Sentencing and Punishment ⇦ Arrests, charges, or unadjudicated misconduct

District court's consideration of defendant's alleged uncharged sexual misconduct during sentencing did not violate due process or double jeopardy under the Fifth Amendment or violate the Sixth Amendment, for purposes of sentencing defendant to 120 months' imprisonment for one count of mail fraud, embezzlement of credit union funds, and subscribing to a false tax return; defendant did not contend that his sentence exceeded the applicable statutory maximum, or that his sexual misconduct was not established by a preponderance of the evidence. U.S. Const. Amends. 5, 6; 18 U.S.C.A. §§ 2, 657, 1341; 26 U.S.C.A. § 7206(1).

[2] **Sentencing and Punishment** ⇦ Factors enhancing sentence

Sentencing and Punishment ⇦ Sufficiency

Defendant's sentence of 120 months' imprisonment was not procedurally unreasonable, for purposes of sentencing for one count of mail fraud, embezzlement of credit union funds, and subscribing to a false tax return, despite contention sentencing court focused on uncharged sexual misconduct; court considered the statutory sentencing factors and explained its reasoning, including that court highlighted circumstances of defendant's offenses and noted its responsibility to fashion a sentence that deterred future criminal activity, and court acknowledged that it considered parties' submissions and evidence, found that defendant's sexual misconduct had been established by a preponderance of the evidence, and noted that the sexual misconduct was related to defendant's financial crimes. 18 U.S.C.A. §§ 2, 657, 1341, 3553(a); 26 U.S.C.A. § 7206(1).

[3] **Sentencing and Punishment** ⇐ Nature, degree or seriousness of offense

Sentencing and Punishment ⇐ Total sentence deemed not excessive

Defendant's sentence of 120 months' imprisonment was not substantively unreasonable, for purposes of sentencing for one count of mail fraud, embezzlement of credit union funds, and subscribing to a false tax return, despite contention sentencing court focused on uncharged sexual misconduct; statutory sentencing factors court considered included high amount of loss involved and duration of financial crimes, court noted that it was required to fashion a sentence that accounted for the different types of available sentences, and court specifically addressed defendant's mitigation argument that he used the proceeds of his financial crimes for unselfish ends, noting that defendant also used proceeds to support his pattern of sexual misconduct. 18 U.S.C.A. §§ 2, 657, 1341, 3553(a); 26 U.S.C.A. § 7206(1).

Attorneys and Law Firms

*806 Todd B. Grandy, Linda Julin McNamara, U.S. Attorney Service - Middle District of Florida, U.S. Attorney's Office, Tampa, FL, for Plaintiff-Appellee

Rosemary Cakmis, Stephen John Langs, Federal Public Defender's Office, Orlando, FL, for Defendant-Appellant

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 3:18-cr-00150-BJD-JRK-1

Before JORDAN, LAGOA and FAY, Circuit Judges.

Opinion

PER CURIAM:

Duane Allen Sikes appeals his 120-month, above-guideline sentence for mail fraud, embezzlement of credit union funds, and subscribing to a false tax return. We affirm.

I.

Sikes was charged in a superseding indictment with the following offenses: ten counts of mail fraud, in violation of 18 U.S.C. §§ 2 and 1341; five counts of embezzlement of credit union funds, in violation of 18 U.S.C. §§ 2 and 657; and six counts of willfully making and subscribing, or causing to be made or subscribed, a fraudulent tax return, in violation of 26 U.S.C. § 7206(1). Sikes ultimately pled guilty to one count of mail fraud, one count of embezzlement of credit union funds, and one count of subscribing to a false tax return, pursuant to a written plea agreement with the government. The plea agreement provided that Sikes would forfeit any and all forfeitable assets, including his home.

According to the factual basis for the plea agreement, from at least 2007 to 2017, Sikes worked in the mail room at VyStar Credit Union. In this position, Sikes received weekly checks from VyStar, which were made out to "U.S. Postmaster." Sikes was responsible for using these checks to recharge VyStar's postage meter. Instead of recharging the postage meter, Sikes would use these checks to buy stamps at *807 the post office, which he would then resell to Ben-Art Stamp Company. Sikes used the proceeds of these sales for his own benefit. From 2007 to 2017, Sikes misappropriated about $5,400,000 from VyStar and made approximately $3,663,200 in profits. During this time period, Sikes also failed to report the profits from his stamp sales on his tax returns. These false tax returns resulted in a total loss of $1,009,175 to the government.

After Sikes pled guilty, the government moved to modify the conditions of his release, arguing that it had obtained information suggesting that he should (1) be placed on home confinement with GPS monitoring, (2) undergo individualized counseling sessions, (3) not have any contact with any minors, (4) not have any contact with any victims or witnesses in the case, except through counsel, and (5) be subject to unannounced searches at his residence.

At the hearing on the motion, Sikes opposed the motion and denied the allegations against him; however, he stated that he had no objection to the government's request that he refrain from contacting any minors or any victims or witnesses in the case, except through counsel. Sikes argued that the government had been aware of the allegations against him for several months but did not act on them at that time. Sikes further contended that, if the government sought to

present the allegations to the court, he should be permitted to know who the witnesses were and cross-examine them. The magistrate judge denied this request. The magistrate judge then explained that he would either order that Sikes be detained or decline to modify the conditions of his release, depending on whether there was clear and convincing evidence that he was not a danger to the community.

The government then explained that, through bank records, it had identified four individuals who were willing to testify regarding alleged inappropriate sexual misconduct with boys between the ages of 13 and 17. The government stated that Sikes had performed sex acts on the boys and paid them both in cash and expensive gifts, such as cars and meals. The government summarized the proposed testimony from the alleged victims. Sikes noted that the government had become aware of the allegations against him during the plea negotiations and questioned why the government had not obtained a warrant to search his home or raised the allegations earlier. The magistrate judge permitted Sikes to cross-examine the case agent who investigated the alleged misconduct.

The government contended that the alleged victims' testimony raised a sufficient possibility of ongoing misconduct because it highlighted an extensive scheme on Sikes's part. The magistrate judge declined to subject Sikes to unannounced searches, home confinement, or GPS monitoring; however, he modified the terms of Sikes's release such that he was precluded from making any contact with any minor or the alleged victims, except through counsel.

The presentence investigation report ("PSI") recited similar facts to those stated in the factual proffer for the plea agreement. Based on a total offense level of 24 and a criminal history category of I, the probation officer calculated Sikes's guideline imprisonment range as 51 to 63 months. The probation officer did not highlight any factors warranting a departure from the applicable guideline range. Neither Sikes nor the government submitted written objections to the PSI.

In its sentencing memorandum, the government contended that Sikes's inappropriate arrangement with the underage ***808** boys was his motivation for his underlying financial crimes. The government argued that the district court was permitted to consider Sikes's sexual misconduct in determining his sentence because it was authorized to consider any information relating to his background and character, including uncharged conduct.

In his sentencing memorandum, Sikes asked the district court to consider his acceptance of responsibility, noting that he offered to cooperate early on. Sikes also contended, in part, that he had strong community support and did not use the proceeds from his crimes for greedy or selfish ends, choosing instead to give some of the money to others in the community. He also encouraged the district court to consider his various health problems. Sikes asked the district court to consider a downward variance and submitted an affidavit regarding his assistance to VyStar, a short autobiography, documents summarizing his health issues, and 25 letters of support from community members describing him as generous and of good character.

At the sentencing hearing, the district court noted at the outset that it had considered Sikes's and the government's sentencing memoranda, as well as the PSI. Neither Sikes nor the government raised any objections to the PSI. The district court adopted the guideline calculations from the PSI.

After hearing testimony from Sikes's character witnesses and the government's witnesses, the district court stated, "[b]oth the length and the amount of the loss suffered by the victim in this case make it among the most egregious frauds and thefts in the Court's experience." The court further stated, however, that this was not the troubling aspect of the case. The court stated, "[t]he troubling aspect of the case is the history and characteristics of Mr. Sikes that have come to light in the context of the sentencing hearing regarding the theft." The court explained that the allegations of sexual misconduct were "unrelated, at least theoretically," to the offenses of conviction and had not been the subject of discovery but noted that Sikes had the opportunity to test the allegations in court. The court acknowledged that the sexual-misconduct allegations were uncharged but noted that the Sentencing Guidelines authorized it to consider any information about Sikes's characteristics that was proven by a preponderance of the evidence.

The district found that the government had met that burden of proof, noting that it believed Sikes's accusers and explaining that the accusers had legitimate reasons for previously declining to come forward. The court further noted that Sikes's sexual misconduct was not wholly unrelated to his financial crimes because he used the proceeds of his embezzlement to sustain his pattern of sexual activity with young boys. The court noted that there were countless examples of Sikes doing good with the fruits of his financial

crimes but explained that there also was ample evidence that he used those proceeds to sustain his pattern of sexual misconduct. The court stated that it was shocked and offended by the scope, length, and extent of Sikes's financial and sexual schemes.

The district court explained that it was obliged to fashion a sentence that would protect the community and deter future criminal conduct; it would fashion a sentence that would promote respect for the law, provide just punishment, and account for the different types of sentences available.

The district court sentenced Sikes to 120 months of imprisonment, explaining that it had considered the parties' memoranda, the pretrial status reports, the admitted ***809** evidence, the PSI, Sikes's allocution, and the parties' arguments. The court explained that the sentence consisted of concurrent terms of 120 months of imprisonment as to the mail fraud and embezzlement charges, as well as a concurrent sentence of 36 months of imprisonment as to the false-tax-return charge. The court also imposed five years of supervised release as to the mail fraud and embezzlement charges, as well as a concurrent one-year term as to the tax charge. The court ordered Sikes to pay $5,284,800 in restitution to CUMIS Insurance Society, VyStar's insurer, and $150,000 to VyStar. The court waived the imposition of any fine based on Sikes's financial status and ordered the forfeiture of both of Sikes's parcels of real property. The court explained that it had considered the Sentencing Guidelines and the 18 U.S.C. § 3553(a) factors and found that its sentence was sufficient but not greater than necessary to comply with the statutory purposes of sentencing. The court then ordered Sikes to pay $1,009,175 in restitution to the IRS.

Sikes objected to his sentence, arguing that it was unreasonable for the reasons highlighted in his sentencing memorandum. Sikes also objected that his sentence was unreasonable because the district court's consideration of uncharged conduct that was established only by a preponderance of the evidence violated his constitutional rights. The district court noted these objections for the record and overruled them.

Sikes raises three issues on appeal. First, he argues that the district court violated the Fifth and Sixth Amendments by imposing an above-guideline sentence based on uncharged allegations that he engaged in sexual misconduct with minors. Second, Sikes asserts that his sentence is procedurally unreasonable because the district court did not properly consider the 18 U.S.C. § 3553(a) factors and failed to adequately explain its upward variance from the guideline range. Third, Sikes contends that his sentence is substantively unreasonable because the district court failed to sufficiently consider the guideline range, focused single-mindedly on his uncharged conduct, and did not provide an adequate explanation for rejecting his mitigation arguments.

II.

A.

[1] We review questions of constitutional law *de novo*. *United States v. Whatley*, 719 F.3d 1206, 1213 (11th Cir. 2013). However, we review sentencing challenges raised for the first time on appeal for plain error. *United States v. Henderson*, 409 F.3d 1293, 1307 (11th Cir. 2005). To prevail under this standard of review, a defendant must establish a plain error that affected his substantial rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Rosales-Mireles v. United States*, —— U.S. ——, 138 S. Ct. 1897, 1904-05, 201 L.Ed.2d 376 (2018).

To preserve an issue for appeal, a party "must raise an objection that is sufficient to apprise the trial court and the opposing party of the particular grounds upon which appellate relief will later be sought." *United States v. Straub*, 508 F.3d 1003, 1011 (11th Cir. 2007) (quoting *United States v. Dennis*, 786 F.2d 1029, 1042 (11th Cir. 1986)). An objection must be stated in clear and simple language such that the trial court may not misunderstand it. *Id.*

At sentencing, a district court is generally permitted to rely on any information concerning a defendant's background, character, and conduct. 18 U.S.C. § 3661. In addition, the Sentencing Guidelines provide that a district court "may consider, ***810** without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law," in determining whether to impose a sentence within the guideline range or whether a departure is warranted. U.S.S.G. § 1B1.4.

The Supreme Court explained in *United States v. Watts*, 519 U.S. 148, 117 S. Ct. 633, 136 L.Ed.2d 554 (1997), that a sentencing court may rely on uncharged and acquitted conduct that has been proven by a preponderance of the evidence, noting that the consideration of such conduct is consistent with the Double Jeopardy and Due Process Clauses. *See id.* at 151-57, 117 S. Ct. at 635-38. Subsequently, in *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010), we held that there was no constitutional violation where the district court sentenced the defendant based on uncharged conduct because the defendant's ultimate sentence was below the applicable statutory maximum sentence. *Id.* at 800-01, 827-28.

We are bound by a prior panel opinion until the opinion's holding is overruled or undermined to the point of abrogation by the Supreme Court or this Court sitting en banc. *United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019). There is no exception to this rule for a perceived defect in the prior panel's analysis. *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016). In addition, we are bound by Supreme Court precedent. *See United States v. Thomas*, 818 F.3d 1230, 1243 (11th Cir. 2016).

Here, the district court did not err, plainly or otherwise, in considering Sikes's uncharged conduct. The Supreme Court has held that a sentencing court can consider uncharged conduct that has been established by a preponderance of the evidence; furthermore, we have held that a sentencing court does not violate the Constitution when it considers uncharged conduct, so long as the defendant's ultimate sentence does not exceed the applicable statutory maximum. *See Watts*, 519 U.S. at 151-57, 117 S. Ct. at 635-38; *Belfast*, 611 F.3d at 800-01, 827-28. We are bound by this precedent. *See Gillis*, 938 F.3d at 1198; *Thomas*, 818 F.3d at 1243.

Sikes does not contend that his sentence exceeds the applicable statutory maximum or that his sexual misconduct was not established by a preponderance of the evidence. Instead, he contends that Supreme Court Justices and other judges and commentators have asserted that the Fifth and Sixth Amendments preclude district courts from considering uncharged conduct at sentencing. Nevertheless, even if these jurists and scholars are correct and *Watts* and *Belfast* were wrongly decided, we would not be permitted to overlook them because they have not been overruled or otherwise abrogated. *See Gillis*, 938 F.3d 1181, 1198; *Fritts*, 841 F.3d at 942; *Thomas*, 818 F.3d at 1243. Accordingly, the district court did not violate the Fifth and Sixth Amendments when it imposed an above-guideline sentence based on Sikes's uncharged sexual misconduct.

B.

[2] The first step in reviewing the reasonableness of a sentence is determining whether the sentence is procedurally reasonable. *United States v. Trailer*, 827 F.3d 933, 936 (11th Cir. 2016). The reasonableness of a sentence is generally reviewed under a deferential abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 41, 128 S. Ct. 586, 591, 169 L.Ed.2d 445 (2007). However, if a party does not raise a procedural sentencing argument before the district court, we will review that argument only for plain error. *United States v. McNair*, 605 F.3d 1152, 1222 (11th Cir. 2010). In addition, the amount of deference ***811** involved in an abuse-of-discretion review of a sentence can vary depending on the type of error alleged. *United States v. Barrington*, 648 F.3d 1178, 1194 (11th Cir. 2011). Furthermore, we always review *de novo* the issue of whether the district court failed to explain the reasons for its sentence imposed outside of the guideline range, even if the defendant failed to properly object on those grounds. *United States v. Parks*, 823 F.3d 990, 996-97 (11th Cir. 2016).

Errors that cause a sentence to be procedurally unreasonable include miscalculating the guideline range, treating the Sentencing Guidelines as mandatory, failing to consider the § 3553(a) factors, imposing a sentence based on clearly erroneous facts, and failing to explain the sentence adequately. *Trailer*, 827 F.3d at 936.

A district court's sentence must be sufficient, but not greater than necessary, to achieve the goals of sentencing, which are: reflecting the seriousness of the offense, promoting respect for the law, providing just punishment, deterring future criminal conduct, protecting the public, and providing the defendant with any needed training or treatment. 18 U.S.C. § 3553(a). A district court must also consider the nature and circumstances of the offense, the defendant's history and characteristics, the kinds of sentences available, the Sentencing Guidelines, any pertinent policy statement, the

need to avoid disparate sentences for defendants with similar records, and the need to provide restitution to any victims. *Id.*

In explaining its chosen sentence, a district court "should set forth enough to satisfy the appellate court that [it] has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority." *Rita v. United States*, 551 U.S. 338, 356, 127 S. Ct. 2456, 2468, 168 L.Ed.2d 203 (2007). It is not necessary, however, for the district court to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors. *United States v. Kuhlman*, 711 F.3d 1321, 1326 (11th Cir. 2013). Nevertheless, the required extent of a district court's explanation may change depending on the type of sentence at issue. *Rita*, 551 U.S. at 356-59, 127 S. Ct. at 2468-69. For example, if a district court imposes a sentence outside the guideline range, it should "ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50, 128 S. Ct. at 597. In addition, "a major departure" from the guideline range demands more explanation than a minor one. *Id.*, 128 S. Ct. at 597. Even so, an "extraordinary justification" is not required for a sentence outside the guideline range. *United States v. Shaw*, 560 F.3d 1230, 1238 (11th Cir. 2009).

Sikes's procedural challenges fail because the district court imposed a procedurally reasonable sentence, as it considered the § 3553(a) factors and explained its reasoning for the sentence sufficiently.[1] The record reflects that the district court considered the § 3553(a) factors, as it highlighted the circumstances of Sikes's offenses and noted its responsibility to fashion a sentence that protected the community, ***812** deterred future criminal activity, promoted respect for the law, provided just punishment, and accounted for the different types of sentences available. In addition, although Sikes contends that the district court focused single-mindedly on his sexual misconduct, the record shows that it considered other factors, such as the high amount of loss involved in his financial crimes.

Furthermore, the district court provided a sufficient explanation for its sentence. The district court imposed an above-guideline sentence and was, therefore, required to provide a justification that was sufficiently compelling to support the degree of variance. *See Gall*, 552 U.S. at 50, 128 S. Ct. at 597. Nevertheless, it was not required to provide an extraordinary justification for its above-guideline sentence. *See Shaw*, 560 F.3d at 1238. Here, the district court's explanation was sufficient because it acknowledged that it considered the parties' submissions and evidence, found that Sikes's sexual misconduct had been established by a preponderance of the evidence, noted that his sexual misconduct was related to his financial crimes, and stated that it was shocked by the extent of his sexual and financial wrongdoing. Thus, the district court's explanation was enough to satisfy us that it considered the parties' arguments and had a reasoned basis for exercising its decisionmaking authority. *See Rita*, 551 U.S. at 356, 127 S. Ct. at 2468. Accordingly, the district court imposed a procedurally reasonable sentence.

C.

[3] We apply an abuse-of-discretion standard and analyze the totality of the circumstances when assessing the substantive reasonableness of a sentence. *Gall*, 552 U.S. at 51, 128 S. Ct. at 597. This standard applies regardless of whether the sentence in a given case is outside the guideline range. *Id.*, 128 S. Ct. at 597. Overall, we will only vacate a sentence if we are left with a definite and firm conviction that the district court clearly erred in its consideration of the § 3553(a) factors. *United States v. Croteau*, 819 F.3d 1293, 1309 (11th Cir. 2016).

The weight given to any of the § 3553(a) factors is committed to the sound discretion of the district court. *Id.* A district court is not required to explicitly discuss each of the factors, and a sentence may be affirmed so long as the record indicates that the sentencing court considered a number of the factors. *See United States v. Dorman*, 488 F.3d 936, 944 (11th Cir. 2007). Even so, a district court abuses its discretion when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors. *United States v. Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (en banc). Furthermore, a district court's unjustified reliance on any one § 3553(a) factor to the detriment of all the others may be a symptom of an unreasonable sentence. *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008).

When a district court imposes an above-guideline sentence, there is no presumption that the sentence is unreasonable. *United States v. Turner*, 626 F.3d 566, 573 (11th Cir. 2010). When we review an above-guideline sentence, we "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* at 574 (quoting *Gall*, 552 U.S. at 51, 128 S. Ct. at 597). In addition, a sentence that is well below the statutory maximum "points strongly to reasonableness." *United States v. Nagel*, 835 F.3d 1371, 1377 (11th Cir. 2016).

***813** Here, the district court imposed a substantively reasonable sentence because it did not unreasonably focus on Sikes's sexual misconduct and sufficiently considered the guideline range and Sikes's arguments in mitigation. Although Sikes argues that the district court focused single-mindedly on his sexual misconduct, the record shows that the district court also considered other factors, such as the high amount of loss involved in and the duration of his financial crimes. The record indicates that the court gave significant weight to Sikes's sexual misconduct, but it had the discretion to determine how this factor, which pertained to the nature and circumstances of the offense and Sikes's history and characteristics, should be weighted. *See* 18 U.S.C. § 3553(a); *Croteau*, 819 F.3d at 1309. In addition, the record shows that the court sufficiently considered the guideline range because an extraordinary justification is not required for an above-guideline sentence, and the court noted that it was required to fashion a sentence that accounted for the different types of available sentences. *See Shaw*, 560 F.3d at 1238.

Sikes also contends that his sentence is substantively unreasonable because the district court did not explain why it rejected his mitigation arguments. A sentence may be substantively unreasonable when the district court fails to consider relevant factors that were due significant weight, *see Irey*, 612 F.3d at 1189, but the record shows that the district court considered Sikes's mitigation arguments and addressed one of them specifically. The court specifically addressed Sikes's argument that he used the proceeds of his financial crimes for unselfish ends, noting that, although he may have used some of the proceeds to help others, he also used the proceeds to support his pattern of sexual misconduct. In addition, although the court did not specifically address Sikes's other mitigation arguments, it stated that it considered them and cited the extent of Sikes's inappropriate conduct in imposing an above-guideline sentence. Thus, the district court sufficiently considered and addressed Sikes's mitigation arguments. *See id.*

AFFIRMED.

All Citations

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Footnotes

1 We note that Sikes's argument that the district court failed to properly consider the § 3553(a) factors is subject to review for plain error because he did not raise such an argument in the district court. *See McNair*, 605 F.3d at 1222. However, Sikes's argument that the district court failed to sufficiently explain its sentence outside the guideline range is subject to *de novo* review, even though he did not object on these grounds in the district court. *See Parks*, 823 F.3d at 996-97.