

No. 23-_____

IN THE
Supreme Court of the United States

MOSES MOREIRA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED

1. U.S.S.G. § 3B1.1 provides a sentencing enhancement for a defendant's status as a "manager or supervisor" of certain criminal activity. Under the Application Notes, "the defendant must have been the organizer, leader, manager, or supervisor *of one or more other participants*" to apply the enhancement. (emphasis added). Under Fifth Circuit precedent, a defendant's management of a criminal activity's assets is sufficient to qualify the defendant for the "manager or supervisor" enhancement. Must a defendant have exercised some direction or supervision over a subordinate *participant* in a criminal activity to give rise to the enhancement?

II. PARTIES

The parties to the proceeding below are as follows:

Petitioner is Moses Moreira. He is the defendant in the district court and appellant in the court of appeals.

Respondent is the United States. Respondent is the appellee in the court of appeals.

The related proceedings below are:

1. *United States v. Moreira*: 4:19-cr-00316-SDJ-CAN – Judgment Entered

October 25, 2021; Amended Judgment Entered January 26, 2022 and

2. *United States v. Moreira*: No. 21-40811 (5th Cir.) – Judgment Entered

September 1, 2023.

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VI. PETITION FOR WRIT OF CERTIORARI

Moses Moreira petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

VII. OPINIONS BELOW

The Fifth Circuit's opinion, No. 21-40811, 2023 WL 5665770 (Sept. 1, 2023) is not published. It is attached in the It is attached in the Appendix. See Appendix pg. 1a-5a. The District Court for the Eastern District of Texas entered a judgment verbally against the Defendant on October 22, 2021. Relevant excerpts of the oral transcript of the Court's determinations in connection with the judgment are attached in the Relevant excerpts of the oral transcript of the Court's determinations in connection with the judgment are attached in the Appendix. See Appendix, pg. 6a-16a.

VIII. JURISDICTION

The Fifth Circuit rendered its decision affirming the judgment on September 1, 2023. See Appendix, pg. 1a-5a. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

IX. STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions involved in this case are:

U.S.S.G. § 3B1.1, attached as Appendix 22a-23a; and

18 U.S.C. § 3553, attached as Appendix 16a-21a4.

X. STATEMENT OF THE CASE

This case presents an important issue of statutory interpretation that has given rise to a conflict among the federal courts of appeal and that, if left unremedied, will

systematically result in overstated criminal sentences for those affected: Whether a defendant must have exercised some direction or supervision over a subordinate *participant* in a criminal activity to give rise to a sentencing enhancement under U.S.S.G. § 3B1.1(b)?

The case concerns the miscalculation of a defendant’s offense level and, therefore, the appropriate “Guidelines sentence range” pursuant to the United States Sentencing Guidelines. Because miscalculations of a defendant’s “offense level” and the corresponding “sentence range” have a probable impact on the length of a defendant’s actual sentence, miscalculations implicate a defendant’s constitutional liberty interests. The trial court’s miscalculation was made pursuant to flawed, but binding, Fifth Circuit precedent. *United States v. Delgado*, 672 F.3d 320 (5th Cir. 2012) (en banc), *cert. denied*, 568 U.S. 978 (2012).

As a result, Petitioner Moses Moreira received a procedurally erroneous sentence exceeding the Guidelines sentence range. The Fifth Circuit’s decision in *Delgado* authorizes trial courts to apply enhancements pursuant to U.S.S.G. § 3B1.1(b) based on a defendant’s “management of the property, assets, or activities of a criminal organization.” That standard, however, is contrary to the plain text of U.S.S.G. § 3B1.1(b) and its Application Note 2, which provides that while a defendant’s “management of assets” *may warrant an upward departure* from a Guidelines sentence, only management of “one or more other participants” can qualify a defendant for *an enhancement as an organizer, leader or supervisor*. An enhancement is an “automatic” increase to a defendant’s “offense level.”

Despite this textual limitation, the trial court applied a three-level enhancement to Moreira's offense level pursuant to U.S.S.G. § 3B1.1(b). On appeal, a Fifth Circuit panel affirmed the trial court's sentencing decision. *See Appendix, pg. 1a-6a.* To sustain application of the U.S.S.G. § 3B1.1(b) adjustment to Petitioner, the panel relied on *United States v. Ochoa-Gomez*, 777 F.3d 278, 281 (5th Cir. 2015), which is grounded on *Delgado*. Both decisions are wrongly decided and are out of step with the decisions of this Court and the other courts of appeal.

Accordingly, Petitioner brings this Petition for Writ of Certiorari to challenge the Fifth Circuit's affirmance of the trial court's application of the U.S.S.G. § 3B1.1(b) adjustment based on its incorrect decisions in *Ochoa-Gomez* and *Delgado*. The Fifth Circuit's decision constitutes clear error. *See Rosales-Mireles v. United States*, 585 U.S. ----, 138 S. Ct. 1897 (2018) ("Failure to calculate the correct Guidelines range constitutes procedural error.") (citing *Peugh v. United States*, 569 U.S. 530, 537 (2013)).

Under *Delgado*, a defendant's "offense level" is enhanced under the incorrect premise that management of property, assets, or activities qualifies a defendant for a U.S.S.G. § 3B1.1(b) adjustment. Therefore, *Delgado* allows trial courts—as the trial court did in this case—to construe sentences as lying within the Guidelines range even though they are based on level enhancements that, pursuant to the text of the Sentencing Guidelines, are inapplicable. A defendant whose final offense level is mistakenly enhanced in this manner and who receives a sentence in the upper range

corresponding to that offense level will necessarily receive a sentence in excess of the correct Guidelines range.

When courts in the Fifth Circuit rely on *Delgado* to increase a defendant's offense level pursuant to U.S.S.G. § 3B1.1(b), they do so against the express intent of the Sentencing Guidelines, and against binding precedent of this Court. The U.S.S.G. § 3B1.1(b) adjustment applies only in connection with the management or supervision of "other participants." Therefore, applying the adjustment based on a defendant's management of assets or property results in sentences that exceed the Guidelines range—as is the case with Mr. Moreira. Accordingly, the petitioner requests that this Court grant certiorari to set right this situation.

1. General Background: Guilty Plea, Wire Fraud.

Moreira pleaded guilty to wire fraud and conspiracy to commit wire fraud in connection with romance scams. Moreira and the government agreed that Moreira did not select the victims of the romance scams or have contact with them: he essentially functioned as a conduit for receiving victim funds and transmitting funds to co-conspirators.

2. Objections to Adjustments Proposed in Pre-Sentence Report.

Moreira objected to, and never admitted to or agreed to, facts supporting several adjustments proposed in his Pre-Sentence Report (PSR). At sentencing, the trial court heard evidence concerning the adjustments. . Petitioner's longer-than-average sentence resulted from the trial court's application of adjustments pursuant to U.S.S.G. § 3A.1.1(b)(1), U.S.S.G. § 2B1.1(b)(2)(d), and U.S.S.G. § 3B1.1(b) (the

“manager” or “supervisor” enhancement, which is the subject of this Petition). As noted above, Moreira brings this Petition to challenge the Fifth Circuit’s application and affirmance of the trial court’s adjustment pursuant to U.S.S.G. §3B1.1(b).

3. Application of the U.S.S.G. § 3B1.1(b) Adjustment to Moreira.

Key to this Petition, at sentencing Moreira objected that he could not qualify as a manager or supervisor because he never “managed” or controlled anyone involved in the charged criminal activity. Appendix, pg. 11a;14-12a:4. Without entering any specific findings regarding which participants Moreira managed, the trial court stated at the sentencing hearing that “Mr. Moreira plainly meets the applicable standard for a manager or supervisor and that particular enhancement.” Appendix, pg. 14a:14-18.

Moreira argued on appeal that the trial court engaged in clear error in applying the U.S.S.G. § 3B1.1(b) adjustment, in part, because there was no evidence in the PSR or at sentencing showing that Moreira managed, supervised, or controlled any participant in the criminal activity or alleged criminal organization. The government disagreed on this issue. It maintained that Moreira’s instructions to co-conspirators regarding where and how he would receive the victim funds (which he agreed to “move,” for a percentage-based fee), demonstrated direction or supervision of his co-conspirators. In contrast, and in alignment with *United States v. Holden*, 908 F.3d 395, 402 (9th Cir. 2018), Moreira argued that he gave only “how to” or “facilitative” instructions to his co-conspirators—not “must do” instructions. On that basis, Moreira asserted that the government could not demonstrate that he exercised the

level of control over “other participants” necessary to substantiate the U.S.S.G. § 3B1.1(b) adjustment.

4. *The Fifth Circuit Sustained the Application of the U.S.S.G. § 3B1.1(b) Adjustment Based on Wrongly Decided Precedent.*

On review, the Fifth Circuit panel did not address whether Moreira’s instructions concerning delivery of victim funds demonstrated management or supervision over other participants that satisfies the text of the U.S.S.G. § 3B1.1(b) adjustment. Instead, the Court relied on *United States v. Ochoa-Gomez*, 777 F.3d 278 (5th Cir. 2015), to uphold the application of the adjustment on the ground that “Moreira exercised control over the assets, property, and activities of the ‘romance scheme.’” Appendix, pg. 2a. However, Application Note 2 to U.S.S.G. § 3B1.1 expressly states that “[t]o qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor **of one or more other participants.**” (emphasis added).

According to this Court, that statement should be conclusive of the issue. The Sentencing Guidelines and its application notes are authoritative. *United States v. Stinson*, 508 U.S. 36, 37–38 (1993). But despite Moreira’s objection at sentencing and on appeal that he did not manage or supervise any “other participants” and, consequently, could not qualify for the U.S.S.G. § 3B1.1(b) adjustment, the Fifth Circuit upheld this aspect of the trial court’s sentence.

5. Delgado Results in Procedurally Erroneous Sentences Outside the Guidelines Range and Circumvents other Applicable Requirements.

As stated above, the Fifth Circuit panel upheld the trial court's application of the enhancement based on *United States v. Ochoa-Gomez*, 777 F.3d 278 (5th Cir. 2015), which is based on flawed precedent. *Ochoa-Gomez* accurately describes a special Fifth Circuit rule, adopted in *Delgado*, that “a § 3B1.1 adjustment may be based on either control over people or management of assets.” *See Ochoa-Gomez*, 777 F.3d at 283. The Fifth Circuit’s panel opinion in *Ochoa-Gomez* expressly recognizes that *Delgado* is inconsistent with the plain text of Application Note 2 for U.S.S.G. § 3B1.1 (stating “that the defendant ‘must’ be an organizer, leader or supervisor ‘of one or more participants’”), but also notes that, as an *en banc* decision, it is binding. *Id.* at 282–83 (quoting Application Note 2 for U.S.S.G. § 3B1.1).

Nevertheless, a concurring opinion by two of the panelists in *Ochoa-Gomez* expressly advocated that the Fifth Circuit should review the issue *en banc* to correct what was wrongly decided in *Delgado*. *Id.* at 286 (Prado, J. and Elrod, J., concurring) (stating “[g]iven that our precedent appears to conflict with the plain language of Application Note 2, sub silentio overruled [*United States v. Jobe*, 101 F.3d 1046, 1068 (5th Cir. 1996)] and places this circuit at odds with several other circuits, the issue merits *en banc* review”).

This is a serious and concerning issue because a district court that “improperly calculat[es]” a defendant's Guidelines range, has committed a “significant procedural error.” *Molina-Martinez v. United States*, 578 U.S. 189, 199 (2016) (citing *Gall*, 552

U.S. at 51). Following *Delgado*, the Fifth Circuit’s precedent authorizes trial courts to miscalculate the Guidelines sentence range by applying the U.S.S.G. § 3B1.1(b) adjustment based on the defendant’s exercise of management responsibility over the property, assets, or activities of a criminal organization. This precedent is clearly incorrect, inconsistent with other rulings of this Court, out of step with the Sentencing Guidelines, and out of step with sentencing practices in trial courts within the other circuits.

As a result of the Fifth Circuit’s continued and mistaken adherence to its decision in *Delgado*, Mr. Moreira received a procedurally erroneous sentence that is outside of the Guidelines range: his sentence was calculated in error by including a three-level increase and is at the top end of the Guidelines range that corresponds with his mistakenly calculated offense level. Pursuant to the text of U.S.S.G. § 3B1.1(b) and Application Note 2, only management of “other participants” can qualify a defendant for an offense level enhancement, whereas “management of assets” *may* warrant an upward departure. Whether an upward departure is warranted must be demonstrated consistent with proper sentencing procedure. Consequently, the three-level increase to Mr. Moreira’s offense level should not have applied unless the government and the trial court complied with the Sentencing Guideline’s provisions for imposing an upward departure.

The imposition of an upward departure requires specific findings and justification. See U.S.S.G. § 5K2.0. Further, defendants are entitled to notice of a trial court’s intent to impose an upward departure. Fed. R. Crim. P. 32(h); *Burns v. United States*,

501 U.S. 129, 13 (1991); *Irizarry v. United States*, 553 U.S. 708, 710, 128 S. Ct. 2198, 2200, 171 L. Ed. 2d 28 (2008). By allowing trial courts to impose enhancements under U.S.S.G. § 3B1.1 whenever defendants manage “property, assets, or activities,” the Fifth Circuit allows trials courts to circumvent the requirement of Fed. R. Crim. P. 32(h) that courts give defendants notice of their intent to seek, and the grounds for seeking, an upward departure from a Guidelines sentence range. “[U]nder Federal Rule of Criminal Procedure 32(h), the district court cannot impose a departure unless it first notifies the parties that it is contemplating doing so.” *United States v. Jacobs*, 635 F.3d 778, 782 (5th Cir. 2011). There is disagreement among the circuits regarding whether failure to provide advance notice of intent to enter an upward departure constitutes plain error or harmless error, and whether it should be corrected on review. *Compare U.S. v. Evans-Martinez*, 530 F.3d 1164 (9th Cir. 2008), *cert. denied*, 562 U.S. 1157 (2011); *U.S. v. Dozier*, 444 F.3d 1215 (10th Cir. 2006); *United States v. Blatstein*, 482 F.3d 725, 731 (4th Cir. 2007) *with United States v. Mejia-Huerta*, 480 F.3d 713, 722 (5th Cir. 2007), *cert. denied*, 554 U.S. 917 (2008).

6. *Adjustments vs. Departures: A Distinction with a Difference.*

Referencing *Delgado*, Judge Prado wrote in his concurring opinion in *Ochoa-Gomez* that “an apparent error … crept into the controlling authority” and merited *en banc* review. 777 F.3d 278, 285. The error involved the apparent conflation of an “adjustment” and an “upward departure” for purposes of Application Note 2 to U.S.S.G. § 3B1.1.” *Id.* Judge Prado continued, “the distinction between an adjustment and a departure is not merely semantic: an adjustment affects the defendant's offense

level and corresponding guideline range, see U.S.S.G. § 1.1(a), while a departure involves the ["]imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence[.]" "*U.S. v. Ochoa-Gomez*, 777 F.3d 278, 285 (5th Cir. 2015) (Prado, J. and Elrod, J., concurring) (quoting U.S.S.G. § 1.1 cmt. n.1(E); citing *U.S. v. Ramos-Paulino*, 488 F.3d 459, 464 (1st Cir. 2007)). Although both adjustments and departures "may lead to similar outcomes, there is an important structural distinction between sentencing enhancements and sentencing departures." *United States v. Ramos-Paulino*, 488 F.3d 459, 464 (1st Cir. 2007) (citing *United States v. Cali*, 87 F.3d 571, 576–79 (1st Cir. 1996); U.S.S.G. § 1B1.1 cmt. n. 1(E) (defining departures generally)).

There are several important structural differences. As noted above, defendants are entitled to notice of any intent to seek an upward departure. Additionally, adjustments are automatic. In contrast, in connection with departures from Guidelines sentences, "a district judge must give serious consideration to the extent of any departure ... and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications." *Gall v. United States*, 552 U.S. 38, 46 (2007).

Further, the process a sentencing court must follow to impose a variance differs from the process required to impose a departure, and a court's power to impose either derives from distinct provisions of the United States Code. *United States v. Jacobs*, 635 F.3d 778, 782 (5th Cir. 2011). In determining whether a requested departure is reasonable, district courts should consider the "heartland" sentencing range set by

“typical cases embodying the conduct that each guideline describes.” *United States v. Grossenheider*, 200 F.3d 321, 330–31 (5th Cir. 2000) (U.S.S.G. Ch. 1, Pt. A 4.(b)); *Rita v. United States*, 551 U.S. 338, 351 (2007); *Koon v. United States*, 518 U.S. 81 (1996) (holding, prior to *Booker*’s ruling that the Sentencing Guidelines are advisory, that before “a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline.”); *United States v. Robinson*, 741 F.3d 588, 600 (5th Cir. 2014) (also stating that departures and variances are two distinct post-*Booker* categories that “have continuing importance not least because of the sort of review each occasions”).

Pursuant to U.S.S.G. § 5K2.0 (Grounds for Departure (Policy Statement)), a court may depart from the Guidelines range if it finds an aggravating or mitigating circumstance “of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission” that should result in a sentence different than the Guidelines sentence in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2). U.S.S.G. § 5K2.0(a)(1). “This departure provision reflects the fact that the guidelines are designed to account for offenses that fall in the ‘heartland’ of the offense type, but that conduct or circumstances may make an individual offense fall outside of that ‘heartland.’” See United States Sentencing Commission, Office of the General Counsel: *Primer on Departures and Variances* (2023).

U.S.S.G. § 5K2.0 requires a trial court that departs from the applicable Guidelines range to state, as required by 18 U.S.C. § 3553(c), its specific reasons for departure in open court at the time of sentencing, and to state those reasons with specificity in

the written judgment and commitment order. *Id.* Consequently, relative to an increase by an upward departure, an enhancement by way of an adjustment requires additional procedural and substantive steps and analyses. At least in some cases, this difference should be expected to lead to differences in the sentences applied pursuant to U.S.S.G. § 3B.1.1.

7. Given that the Trial Court Entered a Procedurally Incorrect Sentence, which is not Saved by Countervailing Factors or Harmless Error, the Fifth Circuit Should Have Remanded the Case for Resentencing.

In *Molina-Martinez*, the Supreme Court held that, in most cases, errors applying the Guidelines will affect the sentencing range and thereby, the sentence and the defendant's substantial rights (i.e., the third prong of *United States v. Olano*, 507 U.S. 725 (1993)). 578 U.S. at 200. This results in error that is, at least presumptively, not harmless. *See id.* at 203 (holding that "a defendant can rely on the application of an incorrect Guidelines range to show an effect on his substantial rights").

The *Molina-Martinez* Court recognized that "[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Id.* Accordingly, because Moreira has shown a procedural error that resulted in a sentence in excess of the applicable Guidelines range, he has shown a reasonable probability that a Guidelines error affected his substantial rights.

On that basis, the Court should have vacated Moreira’s sentence. In an “ordinary case” (and there is no basis for considering this to be anything other than an ordinary case), “[a] miscalculation of a Guidelines sentencing range that has been determined to be plain and to affect a defendant’s substantial rights calls for a court of appeals to exercise its discretion under Rule 52(b) to vacate the defendant’s sentence [...].” *Id.* Similarly, in this case, the trial court miscalculated the Guidelines sentence. Therefore, the trial court’s error was clear and presumptively affected Moreira’s substantial rights.

For that same reason, pursuant to *Rosales-Mireles*, Moreira has shown “a reasonable probability” that he will serve “a prison sentence greater than ‘necessary’ to fulfill the purposes of incarceration and, therefore, he has demonstrated a risk of an “unnecessary deprivation of liberty” that “undermines” or would “seriously affect the fairness, integrity or public reputation of judicial proceedings.” 138 S. Ct. 1897, 1901. Therefore, under *Rosales-Mireles* and *Molina-Martinez*, because the trial court’s miscalculation of the Guidelines range presumptively affected Moreira’s substantial rights and the fairness, integrity or public reputation of the judicial proceedings and because the court’s application of the U.S.S.G. § 3B1.1 enhancement was clearly erroneous (and would further substantiate “plain error”), the Fifth Circuit should have vacated Mr. Moreira’s sentence and required resentencing.

The *Rosales-Mireles* Court indicated that its decision would not require remand on every occasion that a Court of Appeals reviews a procedurally erroneous sentence, because several “countervailing factors” might be present and dissuade an appeals

court that resentencing is necessary. 138 S. Ct., at 1909. Notwithstanding, by suggesting that the Court should seek to identify any countervailing factors upon discovery of a procedurally erroneous sentence made in plain error, the *Rosales-Mireles* Court made clear that unless “countervailing factors” (perhaps, e.g., “harmless error”) are present, appellate courts should generally vacate and remand procedurally erroneous sentences. *Id.* at 1906-10. Particularly when—as in this case—the “district court sentences the defendant at the range’s apex,” an “accurate calculation of the range is particularly important.” *United States v. Ramos-Paulino*, 488 F.3d 459, 464 (1st Cir. 2007).

Accordingly, in this case, just as the First Circuit found in *Ramos-Paulino* when correcting a similar error involving U.S.S.G. § 3B1.1, there is “no principled choice but to vacate the defendant’s sentence and remand for resentencing.” *Id.* As stated by this Court in *Koon*, certain decisions “may be owed no deference, for instance, when the claim on appeal is that [the sentencing court] made some sort of mathematical error in applying the Guidelines.” *Koon v. United States*, 518 U.S. 81, 98 (1996). This is precisely what occurred in this case. Due to a mistake of law in *Delgado*, the court enhanced Moreira’s offense level by three points, leading to a longer sentence. Consequently, Mr. Moreira’s sentence should be vacated and remanded.

XI. REASONS FOR GRANTING THE WRIT

A. The Fifth Circuit’s Decision Conflicts with Decisions of this Court

In recent years the Supreme Court has emphasized the careful focus trial courts should employ in calculating sentences consistent with procedural and substantive

fairness. Among other cases, this Court described these obligations in *Rosales-Mirleles*, *Molina-Martinez*, and *Gall v. United States*. Failing to correctly calculate a guidelines sentence is a serious procedural error that is likely to lead to substantive errors and unnecessary deprivations of liberty, yet it is replicated on a day-to-day basis throughout the Fifth Circuit.

The Fifth’s Circuit application of the U.S.S.G. § 3B1.1(b) adjustment in this case (mandated by its decision in *Delgado* and its progeny) directly conflicts with this Court’s long-standing decisions concerning the application of the Sentencing Guidelines and the Application Notes. Courts must give the application notes to the Sentencing Guidelines “controlling weight” and treat them like an agency’s interpretation of its own rules. *See Stinson v. United States*, 508 U.S. 36, 44–45 (1993) (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, (U.S. 1945)). Pursuant to *Stinson*, an application note is binding authority “unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, [the relevant] guideline.” *Id.*, at 38. Nothing in *Delgado* indicates why Application Note 2 conflicts with the constitution, any statute, or with any sound reading of U.S.S.G. § 3B1.1. Consequently, throughout the Fifth Circuit, *Delgado* facilitates and even encourages trial courts to make procedurally and substantively erroneous calculations by erroneously increasing the final offense level calculated for convicted defendants.

As stated in *Ochoa-Gomez*, Application Note 2 is clear that management of assets could potentially justify an “upward departure” but cannot justify the application of

the enhancement. 777 F.3d., 282-283. And as further noted by the First Circuit in *United States v. Cali*, 87 F.3d 571 (1st Cir. 1996), the gap between an upward departure and an adjustment is not a distinction without a difference. Each concept is different in its application and with respect to the corresponding procedure: “adjustments involve enhancements in the base offense level, whereas section 3B1.1 departures involve enhancements in the total adjusted offense level and must adhere to” frameworks for justifying Guidelines departures. *Id. at 576-571*. District courts are required to furnish specific notice to a defendant on which grounds it is contemplating a “departure” from the applicable sentencing range before they “may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission.” Fed. Rule. Crim. P. 32(h); U.S.S.G. § 6A1.4; *see Burns v. United States*, 501 U.S. 129, 130 (1991); *see Irizarry v. United States*, 553 U.S. 708, 716 (2008) (recognizing that “Rule 32(h) remains in effect today”). Failing to account for these differences when sentencing defendants who have managed property, assets, or activities of a criminal enterprise could reasonably be expected to have a non-trivial impact on sentences in relevant cases.

B. The Fifth Circuit’s Decision Conflicts with Decisions of other Circuits

The Court should grant the writ of certiorari to align Fifth Circuit jurisprudence regarding U.S.S.G. § 3B1.1(b) with that of other courts of appeal. The Fifth Circuit’s jurisprudence is based on the mistaken conclusion that “upward departures” can be justified based on “management of the property, assets, or activity” of a criminal

organization. However, that conclusion is out of step with all of the other circuits, which have all given appropriate deference to the Sentencing Guidelines and their comments consistent with *United States v. Stinson*. 508 U.S. 36 (1993). In contrast to the Fifth Circuit, decisional law in the courts of appeals is clear that management of assets cannot support application of the manager enhancement, as at least some control over participants in the criminal activity is necessary. *United States v. Fuller*, 897 F.2d 1217 (1st Cir.1990); *U.S. v. Greenfield*, 44 F.3d 1141 (2d Cir. 1995) (same); *United States v. Fuentes*, 954 F.2d 151 (3d Cir.1992) (same); *United States v. Steffen*, 741 F.3d 411 (4th Cir. 2013) (same); *United States v. Carroll*, 893 F.2d 1502 (6th Cir.1990) (same); *U.S. v. Fones*, 51 F.3d 663 (7th Cir. 1995) (same); *United States v. McFarlane*, 64 F.3d 1235, 1238 (8th Cir.1995) (same); *United States v. Mares-Molina*, 913 F.2d 770 (9th Cir.1990) (same); *U.S. v. Albers*, 93 F.3d 1469 (10th Cir. 1996); *United States v. Glover*, 179 F.3d 1300, 1303 (11th Cir.1999) (same); *United States v. Bapack*, 129 F.3d 1320, 1325 (D.C. Cir. 1997).

In addition to requiring a general finding that a defendant managed other participants in a criminal activity, typically, the other courts of appeal require specific findings, supported by the record, demonstrating defendant's management or control of other participants. For instance, in *U.S. v. Slade*. 631 F.3d 185 (4th Cir. 2011), the Fourth Circuit reversed a U.S.S.G. § 3Bl.1(b) enhancement against a defendant who had an important role in a drug distribution conspiracy and sold large quantities of drugs to co-conspirators, because “there [was] simply no evidence that [the defendant]

exercised any supervisory responsibility over [co-conspirators] by controlling them or directing the terms of their sales.”

Similarly, in *U.S. v. Medina*, 167 F.3d 77 (1st Cir. 1999), the court vacated a U.S.S.G. § 3B1.1(c) enhancement because its basis was not sufficiently apparent from the record, and the sentencing court was required, “[to] make a specific finding which identifies [participants] being managed ‘with enough particularity to give credence to the upward adjustment.’”. The Second Circuit vacated a U.S.S.G. § 3B1.1(b) enhancement for supervising five or more participants because the record was unclear as to the actual number of participants supervised by the defendant. *U.S. v. Lanese*, 890 F.2d 1284 (2nd Cir. 1989).

The Sixth Circuit vacated an application of U.S.S.G. § 3B1.1(c) where no witnesses discussed an organizational role for the defendant, either administratively or by actual direction, and no one mentioned hearing the defendant directing anyone to do anything. *U.S. v. Walker*, 160 F.3d 1078 (6th Cir. 1998). The Seventh Circuit remanded a U.S.S.G. § 3B1.1 determination because the district court failed to adequately explain its factual basis as the district court gave no indication concerning which of the alleged participants each defendant had supervised. *U.S. v. Jewel*, 947 F.2d 224 (7th Cir. 1991). The Ninth Circuit held in *U.S. v. Luca*, 183 F.3d 1018 (9th Cir. 1999), that the § 3B1.1(a) enhancement cannot be applied unless the district court identifies a participant over whom the defendant exercised managerial or organizational control. In alignment with these decisions, in *U.S. v. Gallant*, 537 F.3d 1202 (10th Cir. 2008), the Tenth Circuit reversed a district court’s application of the

U.S.S.G. § 3B1.1(a) enhancement because it failed to make findings regarding which other criminally responsible persons the defendants had organized or led.

The Court should grant writ of certiorari to bring U.S.S.G. § 3B1.1 sentencing practice within the Fifth Circuit into alignment with practice in its sister circuits.

In this case, the trial court did not enter any specific findings regarding which, if any, alleged co-conspirators worked under the control of Moreira. Rather, the trial court noted that (a) Moreira managed bank accounts and funds, and that (b) Moreira “directed his co-conspirators on where and how money should be sent by victims, troubleshooting issues with victims and telling them how to deal with victims”

Given that Moreira worked for a percentage of the funds he laundered in response to co-conspirators’ requests for his assistance in receiving victim funds, Moreira’s instructions concerning receipt of victim funds clearly do not demonstrate control over his co-conspirators. See Appendix, pg. 12a:18-22. Rather, Moreira’s instructions were intended to facilitate Moreira’s participation in the scheme upon request of his co-conspirators and, furthermore, were executed by victims, who are clearly not participants. Consequently, the trial court did not enter specific findings sufficient to support the U.S.S.G. §3B1.1(b) enhancement.

C. Correcting the Fifth Circuit’s Errors would Promote the Goals of the Guidelines and Should Have Broad Impact

One of the goals of “the Sentencing Guidelines is [...] to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice.” *Koon v. United States*, 518 U.S. 81, 113

(1996). They are intended to “provide uniformity, predictability, and a degree of detachment lacking in our earlier system.” *Id.* Unfortunately, however, *Delgado*’s misconstruction of textual directives followed in the other circuits means that sentencing practice within the Fifth Circuit is distinctly non-uniform with respect to U.S.S.G. §3B1.1 and “management of property, assets, or activities.” Granting writ of certiorari in this case would give this Court the opportunity to correct this aspect of sentencing practice within the Fifth Circuit at large. For that reason, the potential impact on defendants facing excessively long sentences and, therefore, potentially unjust or unnecessary deprivations of their liberty interests is significant.

Correcting the errors demonstrated by the Fifth Circuit in this case is of further importance to ensure adequate procedural review, which this Court has found “will indirectly produce, over time, reduction of sentencing disparities.” *Rita v. United States*, 551 U.S. 338, 382–83 (2007). “By ensuring that district courts give reasons for their sentences, and more specific reasons when they decline to follow the advisory Guidelines range, see § 3553(c)(2) (2000 ed., Supp. IV), appellate courts will enable the Sentencing Commission to perform its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts.” *Id.* (citing *Booker*, at 264; citing 28 U.S.C. § 994 (2000 ed. and Supp. IV)). The Fifth Circuit’s rule in *Delgado* permits sentencing courts to assume that “management of property, assets, or activities” justifies departures from guidelines range sentences, and to ignore the differences between “asset management” cases in which upward departures are justified from those in which they are not. This practice creates a high risk of over-

sentencing in the Fifth Circuit and to sentencing disparities between the circuits. Further, it fails to contribute to the development of case law in a manner that would allow the Sentencing Commission to meaningfully revise the Guidelines to reflect desirable sentencing practices of the district courts.

XII. CONCLUSION AND REQUEST FOR RELIEF

The Fifth Circuit’s decision approves of a procedurally erroneous sentence that is based on a miscalculated Guidelines range. The Fifth Circuit’s standard with respect to U.S.S.G. §3B1.1 has been judicially engrafted onto the sentencing system—it finds no textual home in the Sentencing Guidelines. It is thus in direct contravention of this Court’s decisional law concerning the import and interpretation of the Sentencing Guidelines and its comments. Accordingly, Mr. Moreira respectfully requests that this Court exercise its discretion to grant a writ of certiorari to correct the above-mentioned errors and to reverse the decision of the Fifth Circuit in Petitioner’s case.

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APPENDIX

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United States Court of Appeals for the Fifth Circuit

No. 21-40811
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
September 1, 2023

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MOSES MOREIRA,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:19-CR-316-1

Before WILLETT, DUNCAN, and DOUGLAS, *Circuit Judges.*

PER CURIAM:*

Moses Moreira pleaded guilty to conspiracy to commit wire fraud and wire fraud. He was sentenced to 168 total months in prison and three years of supervised release. He raises multiple challenges to his sentence.

Moreira contends that the district court wrongly applied a three-level adjustment under U.S.S.G. § 3B1.1(b) on the ground that he was a manager

* This opinion is not designated for publication. *See 5TH CIR. R. 47.5.*

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or supervisor of a criminal activity that involved five or more participants or was otherwise extensive. Whether a defendant occupied a role as a manager or supervisor is a finding of fact that is reviewed for clear error. *United States v. Ochoa-Gomez*, 777 F.3d 278, 281 (5th Cir. 2015). We consider whether the record plausibly supports a finding that a defendant either controlled other participants or exercised management responsibility over property, assets, or activities. *See id.* at 283.

There is record evidence to support the finding that Moreira exercised control over the assets, property, and activities of the “romance scheme” in which he participated. In particular, he opened and oversaw bank accounts in which the proceeds of the scheme were deposited and had authority over the proceeds. *See United States v. Aderinoye*, 33 F.4th 751, 756 (5th Cir. 2022). Moreira effectively was accountable for overseeing and handling the victims’ funds for the purpose of carrying out the offense. He, *inter alia*, arranged for receipt of the funds and advised his coconspirators how the money should be sent to him, addressed issues as to the delivery and availability of the funds, oversaw and facilitated the disbursement of funds to pay his coconspirators and others, used the funds to effectuate trade-based money laundering, and retained a portion of the funds as compensation. Furthermore, the record reflects that the scheme was otherwise extensive and involved a large number of participants, both witting and unwitting, to achieve its aims. *See* § 3B1.1 & comment. (n.3). The scam operated on a relatively large scale and relied on the services of myriad participants to defraud numerous people and entities. *See Aderinoye*, 33 F.4th at 756; *United States v. Fullwood*, 342 F.3d 409, 415 (5th Cir. 2003). Thus, the § 3B1.1(b) adjustment was properly applied.

Moreira argues that the district court wrongly decided that an 18-level increase applied under U.S.S.G. § 2B1.1(b)(1) because the loss attributable to him was between \$3,500,000 and \$9,500,000. We need not resolve the

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question of whether Moreira preserved the issue because his claim fails under any standard. *See United States v. Infante*, 404 F.3d 376, 389 (5th Cir. 2005).

The district court did not err, clearly or otherwise, in determining that Moreira was accountable for a loss exceeding \$3,500,000. While he disputes the loss finding, he effectively makes a bare denial of its correctness. Moreira has not offered evidence to rebut the loss calculation, which was detailed in the presentence report (PSR) and explained and verified by testimony at the sentencing hearing, was incorrect or unreliable. *See United States v. Simpson*, 741 F.3d 539, 557 (5th Cir. 2014). He cites no evidence that undermines the calculated amount, identifies no valid sources for the funds that were deemed victims' losses, and alleges no source of income that could legitimize those funds. The district court properly relied on the amount of funds in the bank accounts opened by Moreira to further the scheme. Investigators identified deposits and transfers into the accounts from known victims and recognized transactions that fit the pattern of funds that were fraudulently obtained via the scheme. Those transactions were attributed to the scheme based on the plausible inference that they were victims' funds. *See United States v. Masha*, 990 F.3d 436, 446-47 (5th Cir. 2021). The district court reasonably decided that most of the unexplained deposits into the accounts were fraudulent. *See id.* at 446-47; *United States v. De Nieto*, 922 F.3d 669, 675 (5th Cir. 2019); *United States v. Jones*, 475 F.3d 701, 705 (5th Cir. 2007).

Moreira argues that the district court incorrectly assessed a two-level adjustment under U.S.S.G. § 3A1.1(b)(1) that applies when an offense affects an unusually vulnerable victim. He contends that the district court baselessly reasoned that the scam targeted elderly or otherwise vulnerable women and argues that there was insufficient record evidence to support that he knew or should have known that victims of the offense were especially vulnerable. We review this claim, which Moreira asserts for the first time on appeal, for plain error. *See United States v. Mazkouri*, 945 F.3d 293, 305 (5th Cir. 2019).

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The district court did not plainly err in concluding that the vulnerable-victim enhancement applied. The record established that at least one victim was unusually vulnerable. *See* § 3A1.1(b)(1). The evidence—including the unrebutted PSR and the evidence offered at sentencing—reflected that the advanced age, lack of sophistication, and personal circumstances of many of the victims made them susceptible to the skillful deceit of the perpetrators of the scheme. The evidence plausibly supported that the point of the scam was to identify people online who appeared to be vulnerable and to develop close relationships with them based on a belief that they could be deceived and later defrauded. The description of specific victims’ experiences, and the impact statements that some victims submitted, detailed their unique vulnerabilities. Also, the record plausibly establishes that, given his involvement in the scam, Moreira should have known that the funds placed into his accounts were from women who were deceived and entrapped by a scheme that focused on and exploited their specific vulnerabilities. Many of the women were targeted on more than one instance and made multiple transfers or deposits into the bank accounts controlled by Moreira. Thus, he at least should have known that the victims included at least one person who was a vulnerable victim under § 3A1.1. *See United States v. Myers*, 772 F.3d 213, 221 (5th Cir. 2014).

Finally, Moreira argues that a heightened burden of proof should have been used for the sentencing enhancements in this case. He alleges that his ability to discuss the case with his counsel was limited and that his counsel was ineffective on multiple grounds. We review this claim, which Moreira raises for the first time on appeal, for plain error. *See United States v. Cabral-Castillo*, 35 F.3d 182, 188-89 (5th Cir. 1994).

Although we have noted the possibility that a heightened standard of proof may be required in cases involving a dramatic increase in sentencing based on judicial factfinding, we have never required such a burden for factual findings at sentencing. *See United States v. Simpson*, 741 F.3d 539, 558 (5th

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Cir. 2014); *United States v. Mergerson*, 4 F.3d 337, 344 (5th Cir.1993). Rather, after *United States v. Booker*, 543 U.S. 220 (2005), we have held that all facts relevant to sentencing—that do not affect the statutory range—may be found by a preponderance of the evidence. *See United States v. Scroggins*, 485 F.3d 824, 834 (5th Cir. 2007); *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005). Thus, the district court’s use of the preponderance-of-the-evidence standard was not clear or obvious error. *See United States v. Fuchs*, 467 F.3d 889, 901 (5th Cir. 2006); *Mares*, 402 F.3d at 519. To the extent that Moreira seeks to assert a claim of ineffective assistance of counsel, the record is not adequately developed to allow us to review such a claim in the first instance. *See United States v. Isgar*, 739 F.3d 829, 841 (5th Cir. 2014); *United States v. Aguilar*, 503 F.3d 431, 436 (5th Cir. 2007).

Accordingly, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA,

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Court of Appeals No.:
21-40811

vs.

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Case No.

MOSES MOREIRA,

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4:19-cr-0

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Defendant.

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TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE SEAN D. JORDAN
UNITED STATES DISTRICT JUDGE

Friday, October 22, 2021; 2:17 p.m.
Plano, Texas

APPEARANCES OF COUNSEL:

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1 ALSO PRESENT:

2 Mike Pannitto

3 Victim Impact Witness DS

4 Linda Wright-Bailey, Probation Officer (telephonically)

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1 October 22, 2021

2:17 p.m.

2 ---oo---

3 P R O C E E D I N G S

4 ---oo---

5 THE COURT: Good afternoon. You can be seated.

6 The Court calls for sentencing cause number

7 4:19-cr-316, United States of America versus Moses Moreira.

8 Are the parties ready to proceed?

9 MR. VARADARAJAN: Yes, Your Honor.

10 THE COURT: Is that -- do you want to announce
11 yourself?

12 MR. VARADARAJAN: Yes, Your Honor. I am Anand
13 Varadarajan for the United States proceeding here. I'm
14 standing here along with Mr. Gibson, Mr. Jackson, Mr. Wells,
15 and Special Agent Jason Rennie with the FBI.

16 THE COURT: All right. Thank you, counsel.

17 MS. BENSON: Yes. Denise Benson for Mr. Moreira,
18 and we're ready for sentencing, Your Honor. Also at my table
19 is Mike Pannitto.

20 THE COURT: All right. Thank you, counsel.

21 So the reason we're starting late today is that in
22 this matter I got a number of sentencing items near the last
23 possible moment or at the last possible moment, which
24 included not getting victim impact statements until literally
25 not this morning but late this morning. I didn't get the

1 defendant's letters until very late in the game. And, you
2 know, I'm just going to say I think that's disrespectful to
3 the process. I think it's disrespectful to the Court's time.
4 It's unhelpful to the parties. And you've just got to do
5 better.

6 I know we have Probation on the line. I'm not sure
7 who is responsible for not getting the victim impact
8 statements to me, but that's just -- I'm just going to say
9 it, it's unacceptable. And that's why we're starting late,
10 because I have no time to read these items, and I'm going to
11 read them before we start the hearing. But I count on the
12 lawyers and I count on Probation to get these items to me.
13 So I'm just going to say you've got to do better, counsel.
14 We have to do better than that.

15 So, Mr. Moreira, would you please acknowledge your
16 presence in court today by stating your full name for the
17 record.

18 THE DEFENDANT: Moses Moreira.

19 THE COURTROOM DEPUTY: I don't think --

20 THE COURT: Is his microphone on?

21 MS. BENSON: Hang on.

22 THE DEFENDANT: Moses Moreira.

23 THE COURT: All right. You can be seated,
24 Mr. Moreira, at this time.

25 At the outset, so I will note the Court has

1 In this case, we also have the *United States v.*
2 *Faulkner*, at 598 F.Appx 301. In this case, this was an
3 individual who created fictitious room revenue credits using
4 the house account I guess at a hotel, issued these funds to
5 her personal accounts.

6 You have your client who is using fictitious
7 business names, opening multiple bank accounts, engaging in a
8 fraudulent marriage, and doing all the other things that
9 we've heard about this afternoon, many of which were designed
10 to conceal the entire fraudulent scheme. The Fifth Circuit I
11 think has said repeatedly that's exactly the kind of conduct
12 that qualifies for this enhancement. So for those reasons,
13 I'm going to overrule the objection.

14 So and I have objection number 4, which is to
15 paragraph 71 of the presentence report, which assesses a
16 three-level enhancement, that the defendant was a manager or
17 supervisor of criminal activity that involved five or more
18 participants or was otherwise extensive. And you may have --
19 do you want to add anything on that argument to what you have
20 in your written objection?

21 MS. BENSON: No, Your Honor, other than
22 Mr. Moreira's position is just that he took orders from other
23 people as to what to do with the money, where to send it out.
24 That I know there were some screenshots where he was
25 answering questions to other people, but he said he didn't

1 have any power as to how the money was spent. He didn't
2 recruit anybody; that he got his directions from somewhere
3 else. But I do know the government did present some
4 screenshots. But that would be all we would add, Your Honor.

5 THE COURT: All right. Mr. Varadarajan, do you
6 have a response?

7 MR. VARADARAJAN: Your Honor, I think there are
8 three aspects of his managerial supervisory role in this that
9 are worth noting. First, that he did provide instructions to
10 co-conspirators as to where and how to send that money, and
11 we saw evidence of that in the PowerPoint presentation.

12 Second, as the agent testified, he interfaced with
13 his co-conspirators, frequently discussing how to
14 troubleshoot issues that were coming up as the
15 co-conspirators tried to get money from victims. And the
16 fact that he's being consulted on what to do, how to do it,
17 that again shows his authority role in this entire scheme.

18 And then, finally, Your Honor, we heard from the
19 agent how, in his review of the messages, those messages show
20 them discussing percentage cuts and fees that are supposed to
21 be paid out to the other co-conspirators after Mr. Moreira
22 receives the money.

23 All these, coupled with the fact that he is
24 referred to as, quote, unquote, "boss" in some of these
25 messages, are indicative of a leadership role, a supervisory,

1 an organizational -- or supervisor or organizer role that's
2 worthy of the three-level or three-point enhancement.

3 THE COURT: All right. I'm going to overrule that
4 objection as well. Under the Comments to section 3D1.1, the
5 sentencing guidelines do note that in determining whether a
6 defendant is a leader, a Court should consider the following
7 factors: quote, "The exercise of decision making authority;
8 the nature of participation in the commission of the offense;
9 the recruitment of accomplices; the claimed right to a larger
10 share of the fruits of the crime; the degree of participation
11 in planning or organizing the offense; the nature and scope
12 of the illegal activity; and the degree of control and
13 authority exercised over others."

14 To begin with, as described in paragraph 41 of the
15 presentence report and as the government demonstrated today,
16 Mr. Moreira was working with a number of co-conspirators to
17 accomplish a fraudulent scheme that he's acknowledged
18 involved numerous victims, and he's again acknowledged \$4
19 million in losses.

20 The government also put on evidence today that --
21 I'll put it in my words -- that in some ways, all roads led
22 to Mr. Moreira; that a lot of these co-conspirators did not
23 know each other. He was the central link in the chain. He
24 was the one who was making this happen.

25 We also had direct testimony from the government's

1 witness that he directed his co-conspirators on where and how
2 money should be sent by victims, troubleshooting issues with
3 victims and telling them how to deal with victims, in
4 addition to operating and maintaining these accounts.

5 We also have Mr. Moreira's admission of everything
6 he did after the money was deposited in his accounts, which I
7 detailed earlier; that he was the one who was largely
8 involved in using these trade-based money laundering
9 techniques for the group.

10 So as you know, Ms. Benson, the Fifth Circuit has
11 said that proof that the defendant supervised only one other
12 culpable participant is sufficient to make the defendant
13 eligible for the enhancement. That's *United States v. Cooper*
14 from the Fifth Circuit. I think Mr. Moreira plainly meets
15 the applicable standard for a manager or supervisor and that
16 particular enhancement. And so I think for the reasons I've
17 just described, his role plainly meets that enhancement, and
18 I'll overrule the objection.

19 Your objection 5 is to paragraph 138 of the
20 presentence report which identifies grounds for an upward
21 departure. And if you want to add anything to your argument
22 on that point, Ms. Benson.

23 MS. BENSON: No, Your Honor. I understand it's in
24 the Court's discretion; however, I believe that the
25 guidelines did take into consideration all of the aggravating

1 excused.

2 THE COURT SECURITY OFFICER: All rise.

3 (Adjourned 6:15 p.m.)

4 * * * * *

5

6 CERTIFICATION OF OFFICIAL REPORTER

7

8

9 I, Gayle Wear, Federal Official Court Reporter, in
10 and for the United States District Court for the Eastern
11 District of Texas, do hereby certify that pursuant to Section
12 753, Title 28 United States Code, that the foregoing is a
13 true and correct transcript of the stenographically reported
14 proceedings held in the above-entitled matter and that the
15 transcript page format is in conformance with the regulations
16 of the Judicial Conference of the United States.

17

18

Dated 10th day of December 2021.

19

20

21

/s/ Gayle Wear
GAYLE WEAR, RPR, CRR
FEDERAL OFFICIAL COURT REPORTER

22

23

24

25

United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part II. Criminal Procedure

Chapter 227. Sentences (Refs & Annos)

Subchapter A. General Provisions (Refs & Annos)

18 U.S.C.A. § 3553

§ 3553. Imposition of a sentence

Effective: December 21, 2018

Currentness

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

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

(2) the need for the sentence imposed--

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

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

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

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

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

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to [section 994\(a\)\(3\)](#) of title 28, [United States Code](#), taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\)](#) of title 28);

(5) any pertinent policy statement--

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

(B) that, except as provided in [section 3742\(g\)](#), is in effect on the date the defendant is sentenced.¹

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

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

(b) Application of guidelines in imposing a sentence.--

(1) **In general.**--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) ² **Sentencing.**--In sentencing a defendant convicted of an offense under [section 1201](#) involving a minor victim, an offense under [section 1591](#), or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under [section 994\(a\) of title 28](#), taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) **Statement of reasons for imposing a sentence.**--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under [section 994\(w\)\(1\)\(B\) of title 28](#), except to the extent that the court relies upon statements received in camera in accordance with [Federal Rule of Criminal Procedure 32](#). In the event that the court relies upon statements received in camera in accordance with [Federal Rule of Criminal Procedure 32](#) the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the

order of judgment and commitment, to the Probation System and to the Sentencing Commission,³ and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to [section 3555](#), the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to [section 994 of title 28, United States Code](#).

(f) Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act ([21 U.S.C. 841, 844, 846](#)), section 1010 or 1013 of the Controlled Substances Import and Export Act ([21 U.S.C. 960, 963](#)), or [section 70503 or 70506 of title 46](#), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under [section 994 of title 28](#) without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have--

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(g) Definition of violent offense.--As used in this section, the term “violent offense” means a crime of violence, as defined in section 16, that is punishable by imprisonment.

CREDIT(S)

(Added [Pub.L. 98-473](#), Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989; amended [Pub.L. 99-570](#), Title I, § 1007(a), Oct. 27, 1986, 100 Stat. 3207-7; [Pub.L. 99-646](#), §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; [Pub.L. 100-182](#), §§ 3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; [Pub.L. 100-690](#), Title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416; [Pub.L. 103-322](#), Title VIII, § 80001(a), Title XXVIII, § 280001, Sept. 13, 1994, 108 Stat. 1985, 2095; [Pub.L. 104-294](#), Title VI, § 601(b)(5), (6), (h), Oct. 11, 1996, 110 Stat. 3499, 3500; [Pub.L. 107-273](#), Div. B, Title IV, § 4002(a)(8), Nov. 2, 2002, 116 Stat. 1807; [Pub.L. 108-21](#), Title IV, § 401(a), (c), (j)(5), Apr. 30, 2003, 117 Stat. 667, 669, 673; [Pub.L. 111-174](#), § 4, May 27, 2010, 124 Stat. 1216; [Pub.L. 115-391](#), Title IV, § 402(a), Dec. 21, 2018, 132 Stat. 5221.)

VALIDITY

<Mandatory aspect of subsec. (b)(1) of this section held unconstitutional by [United States v. Booker](#), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).>

Notes of Decisions (3135)

Footnotes

- 1 So in original. The period probably should be a semicolon.
- 2 So in original. No subpar. (B) has been enacted.
- 3 So in original. The second comma probably should not appear.

18 U.S.C.A. § 3553, 18 USCA § 3553

Current through P.L. 118-21. Some statute sections may be more current, see credits for details.

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[United States Code Annotated](#)
[Federal Sentencing Guidelines \(Refs & Annos\)](#)
[Chapter Three. Adjustments \(Refs & Annos\)](#)
[Part B. Role in the Offense \(Refs & Annos\)](#)

USSG, § 3B1.1, 18 U.S.C.A.

§ 3B1.1. Aggravating Role

Currentness

Based on the defendant's role in the offense, increase the offense level as follows:

- (a)** If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
- (b)** If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.
- (c)** If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

CREDIT(S)

(Effective November 1, 1987; amended effective November 1, 1991; November 1, 1993.)

COMMENTARY

<Application Notes:>

<1. A “participant” is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.>

<2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.>

<3. In assessing whether an organization is “otherwise extensive,” all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.>

<4. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as “kingpin” or “boss” are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.>

<**Background:** This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (i.e., the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.>

<In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of § 3B1.1(c).>

Notes of Decisions (1071)

Federal Sentencing Guidelines, § 3B1.1, 18 U.S.C.A., FSG § 3B1.1

As amended to 3-15-22.

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