

No. 21-60382

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

DARREN NICKEY
Defendant-Appellant

Appeal from the United States District Court
For the Southern District of Mississippi
Cause No. 3:18CR258-HTW-FKB

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PARTIES

The undersigned certifies that the following persons have an interest in the outcome of this case:

1. Darren Nickey, Defendant-Appellant;
2. Darren J. LaMarca, Acting United States Attorney, Southern District of Mississippi, Jackson, Mississippi;
3. Gregory Layne Kennedy, Assistant United States Attorney, Southern District of Mississippi, Jackson, Mississippi;
4. Theodore Mark Cooperstein, Assistant United States Attorney, Southern District of Mississippi, Jackson, Mississippi;
5. Omodare B. Jupiter, Federal Public Defender, Northern and Southern Districts of Mississippi, Jackson, Mississippi;
6. Abby Brumley Edwards, Assistant Federal Public Defender, Southern District of Mississippi, Jackson, Mississippi; and
7. Honorable Henry T. Wingate, United States District Judge, Jackson, Mississippi.

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

s/ Abby Brumley Edwards
Abby Brumley Edwards
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested in this case. By refraining from requesting oral argument, the undersigned is not minimizing the validity and importance of Mr. Nickey's argument on appeal. The undersigned, however, recognizes the value of the Court's time and believes that the issue can be resolved on the written briefs.

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I. JURISDICTIONAL STATEMENT

This appeal arises from a final order of the district court sentencing Mr. Nickey to 36 months in prison for violating 18 U.S.C. § 1168(b), which makes it a crime for an employee of a gaming establishment on Indian Lands to embezzle money from the gaming establishment. Judgment, ROA.56; *see also* Indictment, ROA.70-71. The court entered a Judgment on April 30, 2021. Judgment, ROA.54-61. Mr. Nickey filed a timely Notice of Appeal on May 3, 2021, pursuant to Rule 4 of the Federal Rules of Appellate Procedure. Notice of Appeal, ROA.62-63. Jurisdiction is vested in this Court under 28 U.S.C. § 1291.

II. STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the district court ordered a substantively unreasonable 36-month prison sentence.

III. STATEMENT OF THE CASE

A. Relief sought on appeal.

The issue on appeal focuses on the substantively unreasonable prison term ordered after Mr. Nickey admitted guilt to the subject charges. The range under the United States Sentencing Guidelines (hereinafter “Guidelines” or “Sentencing Guidelines”) was 10 to 16 months in prison, after the court applied the prosecution’s requested departure. Sentencing Hearing Transcript (hereinafter “Sen. Hr’g Tr.”), ROA.220. The prosecution argued that a prison sentence in that range would be appropriate. Sen. Hr’g Tr., ROA.180-81. Nevertheless, the court ordered a substantively unreasonable 36-month prison term of imprisonment. *Id.* at ROA.224; Judgment, ROA.56.

If this Court agrees that the district court ordered an unreasonable sentence, then Mr. Nickey’s sentence must be vacated. Further, if the Court agrees that a within-Guidelines sentence should have been ordered, then Mr. Mickey must be immediately release from prison because he has already served over 16 months in prison.

B. Procedural history.

A Federal Grand Jury for the Southern District of Mississippi indicted Mr. Nickey for three counts of embezzlement by an employee of a gaming establishment on Indian Lands, in violation of 18 U.S.C. § 1168(b). Indictment,

ROA.70-71. Mr. Nickey accepted full responsibility for his wrongdoing by pleading guilty to the three charges on February 19, 2019. Plea Hearing Transcript (hereinafter “Plea Hr’g Tr.”), ROA.73, 116.

The district court conducted two sentencing hearings, the first on May 17, 2019, and the second over a year and ten months later on March 19, 2021. Sen. Hr’g Tr., ROA.123, 149. It sentenced Mr. Nickey to serve 36 months in prison, even though the sentencing range under the Guidelines was only 10 to 16 months. Sen. Hr’g Tr., ROA.220, 224; Judgment, ROA.56. It also ordered him to serve three years of supervised release after serving the prison sentence. Sen. Hr’g Tr., ROA.225; Judgment, ROA.56. The court entered a Judgment reflecting this sentence on April 30, 2021, which was 43 days after the final sentencing hearing on March 19. Judgment, ROA.54-61. Mr. Nickey filed his Notice of Appeal in a timely manner on May 3, 2021. Notice of Appeal, ROA.62-63.

C. Statement of facts.

1. Facts about Mr. Nickey’s background.

Mr. Nickey is a 31-year old Native American. Presentence Investigation Report (hereinafter “PSR”), ROA.245. His parents divorced when Mr. Nickey was only 13 years old. *Id.* at ROA.256, ¶ 51. They divorced because of alcohol abuse and domestic violence, primarily on the part of Mr. Nickey’s father, Darren Nickey. *Id.* at ROA.256, ¶¶ 51, 52. Mr. Nickey testified that there was “drama

between my mother and my father[.]” Plea Hr’g Tr., ROA.79. In fact, Mr. Nickey went to counseling at the age of four or five “due to issues between his parents.” PSR, ROA.257, ¶ 59.

After the divorce, Mr. Nickey was raised solely by his mother, Shanda Lewis. PSR, ROA.256, ¶¶ 51, 52. Mr. Nickey no longer has a relationship with his father. *Id.* at ROA.256, ¶ 51. That is probably because his father verbally abused him. *Id.* at ROA.256, ¶ 52.

Records from the Choctaw Behavioral Health Center state that Mr. Nickey “was a victim of verbal and sexual abuse at the hand of his mother and cousin.” PSR, ROA.257, ¶ 60. The records state that he “has a history of trauma[.]” *Id.* at ROA.257, ¶ 60. As an example, “at the age of five[, Mr. Nickey] witnessed people being stabbed, choked and beat up.” *Id.* at ROA.257, ¶ 60. As a result, he “suffered from panic attacks, poor concentration, visual hallucination[s] and delusional thoughts.” *Id.* at ROA.257, ¶ 60.

Mr. Nickey admits that he has a problem with alcohol abuse and anger management. PSR, ROA.257, ¶ 61 (admitting to alcohol abuse); Sen. Hr’g Tr., ROA.219 (admitting to anger issues). In fact, as the probation officer and the court recognized, most of his “prior arrests stem from alcohol abuse[.]” *Id.* at ROA.257, ¶ 61; *see also* Plea Hr’g Tr., ROA.81; Sen. Hr’g Tr., ROA.128. The probation officer opined, “alcohol is also a factor in family issues.” PSR, ROA.257, ¶ 61.

Mr. Nickey's alcohol issues can be attributed to his Native American culture, at least in part. As recognized by the American Addiction Centers, "Native Americans have historically experienced a high prevalence of alcoholism." Alcohol Recovery for Native Americans, at <https://www.recovery.org/alcohol-addiction/native-americans/> (last updated May 13, 2021). "Economic issues, cultural loss, domestic abuse, and physical and mental health issues may put Native Americans at higher risk of alcoholism." *Id.* "[T]he brutality and loss experienced by Native Americans, including loss of family members and tribes, land, and traditions, led to historical trauma." *Id.* "This unresolved grief has been transmitted across generations from parents to children, which has led to the development of negative coping mechanisms such as drinking." *Id.* In fact, "[a]ccording to the National Survey on Drug Use and Health, nearly 9.2% of Native Americans ages 12 and older were current heavy alcohol users, the highest rate of any ethnic group." *Id.*

Notwithstanding his admitted problems with alcohol abuse and anger, Mr. Nickey is making progress on those issues. For example, when he was on home detention as a condition of bond, Mr. Nickey called his probation officer and asked to leave the residence because he and his girlfriend were arguing. PSR, ROA.257, ¶ 61. This indicates that he was trying to avoid conflict. Also, he stopped using marijuana and cocaine after his daughter's birth. *Id.* at ROA.258, ¶ 64. Mr.

Nickey tested negative for intoxicants at his pretrial interview on January 17, 2019, and he tested negative for intoxicants at the presentence interview on March 15, 2019. *Id.* at ROA.258, ¶ 65. These are indicators that he is dealing with substantive abuse issues. Further, he bettered himself by achieving a GED in April 2019. *Id.* at ROA.258, ¶ 68.

We admit that the court revoked Mr. Nickey's bond in July 2019, about two years ago, because of alcohol related issues. Sen. Hr'g Tr., ROA.180, 195, 210-11. Nevertheless, he admits he has a problem with alcohol, and is ready to get help to resolve the issue. PSR, ROA.257, ¶ 61; Sen. Hr'g Tr., ROA.195-96, 202.

We do not bring up these background facts to make excuses for Mr. Nickey's admitted wrongdoing. Rather, his background is brought to the Court's attention to put the crimes in proper context.

2. Facts about Mr. Nickey's admitted crimes.

The prosecution charged Mr. Nickey with three counts of embezzlement by an employee of a gaming establishment on Indian Lands. Indictment, ROA.70-71. Mr. Nickey accepted full responsibility for his actions by pleading guilty to the three charges. Plea Hr'g Tr., ROA.73, 116.

Mr. Nickey was a cashier at Silver Star Hotel & Casino on the Choctaw Indian Reservation in Mississippi. Plea Hr'g Tr., ROA.107. Over a five-month period in 2015 and 2016, he "used his own password and those of coworkers to

take approximately \$18,000 in aggregate from the cash recycles in the casino facility.” *Id.* at ROA.107-08. He then converted the money for personal use. *Id.* at ROA.109.

Mr. Nickey never denied converting the money. He met with law enforcement on May 23, 2016, and admitted taking the money. Plea Hr’g Tr., ROA.107. He met with law enforcement on September 9, 2016, and again admitted to taking the money. *Id.* at ROA.107-08. Also, he admitted to the probation officer that he took the money. PSR, ROA.248, ¶ 16. In short, Mr. Nickey never denied his wrongdoing.

3. Facts about the sentencing hearing.

The district court conducted two sentencing hearings. The first was on May 17, 2019. Sen. Hr’g Tr., ROA.123. At that hearing, the court stated that it was going to sentence under the statute rather than under the Sentencing Guidelines, even though it had not seen any physical evidence, it had heard no testimony, and only heard very limited argument.¹ *Id.* at ROA.144 (court stating, “I’m going to the statute” and asking if defense counsel “need[s] some time to prepare for a court sentence under the statute”). After announcing its intent to sentence under the statute rather than under the range recommended under the Sentencing Guidelines,

¹ The statutory maximum term of imprisonment was 20 years per count. PSR, ROA.260, ¶ 80.

the court adjourned the hearing to a later date to allow defense counsel additional time to prepare. *Id.* at ROA.147.

The second sentencing hearing occurred on March 19, 2021. Sen Hr’g Tr., ROA.149. For inexplicable reasons, the second sentencing hearing occurred over one year and ten months after the first hearing, which was on May 17, 2019. *See id.* at ROA.123, 149 (stating the dates of the two sentencing hearings). All the while, Mr. Nickey languished in jail from the date of his bond revocation in July 2019 until the final sentencing hearing in March 2021. *See* Order of Revocation and Detention, ROA.29.

In fact, by the time the district court conducted the final sentencing hearing, Mr. Nickey had already served jail time over and above the amount of time the prosecution intended to request. Sen. Hr’g Tr., ROA.180 (stating the 17 to 18 months that Mr. Nickey had already served was over the prosecution’s prison sentence recommendation); *Id.* at 220-21 (stating a Guidelines sentencing range of 10 to 16 months in prison after granting the prosecution’s request for a departure). And as further discussed below, the government’s sentence recommendation was over and above the probation officer’s final recommendation under the Sentencing Guidelines, which was eight to 14 months in prison. Sen Hr’g Tr., ROA.198.

The probation officer’s initial sentencing recommendation was four to 10 months in prison. PSR, ROA.260, ¶ 81. This was based on a Criminal History

Category of I, and an Offense Level of nine. *Id.* at ROA.260, ¶ 81. However, because Mr. Nickey violated bond after the probation officer's initial sentence calculation, two points were added to the Offense Level because the probation officer opined that he was no longer qualified to receive credit for acceptance of responsibility.² Sen. Hr'g Tr., ROA.197-98. This increased Mr. Nickey's Offense Level from nine to 11, which correspondingly increased his sentence range under the Guidelines from four to 10 months in prison, to eight to 14 months in prison. *Id.* at ROA.198; *see also*, Guidelines Sentencing Table. As stated above, Mr. Nickey has already served 17 to 18 months in jail by the time the district court conducted the final sentencing hearing. Sen. Hr'g Tr., ROA.180.

The district court granted the prosecution's request for an upward departure from the eight to 14 month prison range recommended by the probation officer under the Sentencing Guidelines' calculation. Sen. Hr'g Tr., ROA.220. The court granted the departure because it opined that Mr. Nickey's criminal history was "undercounted."³ *Id.* at ROA.220. This increased the Criminal History Category from I to II. *Id.* at ROA.220. At an Offense Level of 11 and a Criminal History

² Credit for acceptance of responsibility is included in paragraph 27 of the PSR, which is at ROA.248.

³ An upward departure based on Tribal Court convictions is allowed under the combined provisions of U.S.S.G. §§4A1.2(i) and 4A1.3.

Category of II, the Guidelines range adopted by the court was 10 to 16 months in prison. *Id.* at ROA.220-21; *see also*, Guidelines Sentencing Table.

When the court asked the prosecution for a sentence recommendation, the prosecutor recognized that Mr. Nickey had already spent 17 to 18 months in federal custody. Sen. Hr’g Tr., ROA.180. With that in mind, the prosecution recommended time served plus three years of supervised release. *Id.* at ROA.181. The prosecution noted that it “initially calculated a guidelines range of about 10 to 16 months, so we’ve already gone beyond the upper limit of the guideline range[.]” *Id.* at ROA.181. Specifically, the prosecutor recommended a sentence under the Guidelines, and not under the statute. *Id.* at ROA.181.

Dissatisfied with the prosecution’s recommendation for a sentence under the Guidelines, the court grilled two separate prosecutors about their recommendation over no less than 11 pages of the sentencing transcript. *See* Sen. Hr’g Tr., ROA.182-92. This particular judge has arguably developed a reputation for cross-examination-like questioning. For example, another district judge in Southern District of Mississippi characterized questioning of a criminal defendant by the judge in this case as “cross-examination.” *See United States v. Donald Ray Quinn*, Criminal No. 3:92cr121-DPJ-FKB, in the United States District Court for the Southern District of Mississippi. The other judge stated:

I do want to say for the record – I meant to say it early on – that I obviously read the order of recusal and, Ms. Stewart, your motion to try to get some context of what was going on.

I started to read the first transcript. And as *I sort of got into what sounded like a cross-examination*, I decided to stop reading it. And this may be overly cautious, but I didn't want – *I didn't want there to be any suggestion that any bias for recusal by the prior judge might taint my review of the case so I elected not to read that*, I guess it was a 95-page transcript. I read your motion, but I tried to separate my thought process from that of the original judge. I did want to put that on the record.

Hearing Transcript, pp. 21-22 (emphasis added). The hearing transcript is available for this Court's review under docket entry number 31 in *Quinn*, Case No. 3:92cr121, in the Southern District of Mississippi.

Apparently dissatisfied with the prosecution's recommendation for a sentence within the 10 to 16 month Guidelines range, the court sentenced Mr. Nickey to serve 36 months in prison, followed by three years of supervised release. Sen. Hr'g Tr., ROA.224-25; Judgment, ROA.56-57. The court based its significantly above-Guidelines sentence on Mr. Nickey's criminal history. Sen. Hr'g Tr., ROA.220-22. It also ordered restitution totaling \$18,340, and participation in substance abuse treatment. Sen. Hr'g Tr., ROA.224, 226; Judgment, ROA.57, 59, 60. At the conclusion of sentencing, the defense objected to the sentence as unreasonable. Sen. Hr'g Tr., ROA.228.

4. Summary of changes to the applicable Guidelines sentencing range.

As indicated above, the applicable Guidelines calculation changed over the course of this case. The changes can be a bit confusing, so the defense provides the following summary in hopes of simplifying the issue.

- The initial recommended Guidelines range was four to ten months in prison, based on an Offense Level of nine and a Criminal History Category of I. PSR, ROA.260, ¶ 81.
- After the court revoked Mr. Nickey's bond, the probation officer opined that Mr. Nickey should loose credit for acceptance of responsibility. Sen. Hr'g Tr., ROA.197-98. This resulted in a two-point increase in the Offense Level – from nine to 11. *Id.* at ROA.198. At an Offense Level of 11 and a Criminal History Category of I, the probation officers final Guidelines sentence recommendation was eight to 14 months in prison. *Id.* at ROA.198.
- The court granted the prosecution's request for a departure from the Guidelines based on purported underrepresentation of Mr. Nickey's criminal history. Sen. Hr'g Tr., ROA.220. This increased the Criminal History Category from I to II. *Id.* at ROA.220. At an offense level of 11 and a Criminal History Category of II, the final recommended sentence under the Guidelines was 10 to 16 months in prison. *Id.* at ROA.221.

- Notwithstanding all of the increases to the recommended sentence range under the Sentencing Guidelines, and notwithstanding the prosecution's recommendation for a Guidelines sentence (*see* ROA.181), the district court ordered a significantly above-Guidelines sentence of 36 months in prison (ROA.224).

IV. SUMMARY OF ARGUMENT

The district court ordered a substantively unreasonable 36-month sentence in this case. The sentence range under the Guidelines, after applying the prosecution's request for an upward departure, was 10 to 16 months in prison. Sen. Hr'g Tr., ROA.220. After grilling by the district court about why it did not recommend an above-Guidelines sentence (*see id.* at ROA.182-92), the prosecution stood by its recommendation of a within-Guidelines sentence (*id.* at ROA.181). Also, the § 3553(a) factors support a within-Guidelines sentence. Therefore, this Court should vacate the district court's 36-month prison sentence as substantively unreasonable.

V. ARGUMENT:

The district court ordered a substantively unreasonable 36-month prison sentence.

A. Standard of review.

Pursuant to *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007), we engage in a bifurcated review of the sentence imposed by the district court. *United States v. Delgado–Martinez*, 564 F.3d 750, 752 (5th Cir. 2009). First, we consider whether the district court committed a “significant procedural error,” such as miscalculating the advisory guidelines range. *Id.* If there is no error or the error is harmless, we may proceed to the second step and review the substantive reasonableness of the sentence for an abuse of discretion. *Id.* at 751–53. We review the district court’s factual findings for clear error and its interpretation and application of the guidelines, including any cross-reference provisions, *de novo*. *United States v. Arturo Garcia*, 590 F.3d 308, 312 (5th Cir. 2009).

United States v. Griego, 837 F.3d 520, 522 (5th Cir. 2016). The issue in Mr.

Nickey’s case focuses on substantive reasonableness of the sentence.⁴ Therefore, an abuse of discretion standard of review applies.

B. Legal tests to measure the substantive reasonableness of a sentence.

An above-Guidelines sentence is substantively unreasonable if it “(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error

⁴ As stated above, the district court granted the prosecution’s request for a departure from the recommended sentence under the Sentencing Guidelines. Sen. Hr’g Tr., ROA.220. The defense does not agree that a departure was legally warranted. However, Mr. Nickey had already served more time in jail than the upper-end of the Guidelines range after applying the departure. Therefore, that issue is not argued on appeal because any such argument would be pointless from a practical standpoint.

of judgment in balancing the sentencing factors.” *United States v. Churchwell*, 807 F.3d 107, 123 (5th Cir. 2015) (emphasis added; citation omitted).

Mr. Nickey’s sentence is substantively unreasonable under the third factor – balancing the sentencing factors under 18 U.S.C. § 3553(a) indicates that a within-Guidelines sentence should have been ordered.

This Court considers “the totality of the circumstances” when it analyzes substantive reasonableness. *United States v. Gerezano-Rosales*, 692 F.3d 393, 398 (5th Cir. 2012) (citations omitted). The starting point for the totality of the circumstances analysis is 18 U.S.C. § 3553, titled “Imposition of a sentence.” Under § 3553(a), “[t]he court shall impose a sentence sufficient, but not greater than necessary” to meet the ends of justice. Section 3553(a) requires judges to consider a number of factors when they craft appropriate punishments for offenses. The primary factors are:

- “the nature and circumstances of the offense” (§ 3553(a)(1));
- “the history and characteristics of the defendant” (*id.*);
- “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense” (§ 3553(a)(2)(A));
- “to afford adequate deterrence to criminal conduct” (§ 3553(a)(2)(B));
- “to protect the public from further crimes of the defendant” (§ 3553(a)(2)(C));

- “to provide a defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner” (§ 3553(a)(2)(D));
- “the kinds of sentences available” (§ 3553(a)(3));
- “the sentencing range established for ... the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines” (§ 3553(a)(4)(A)); and
- “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct” (§ 3553(a)(6)).

Each of these factors is considered below.

1. The nature and circumstances of the offense under § 3553(a)(1).

Mr. Nickey’s admitted crime does not present facts that are unusual or egregious. He embezzled money, which involved no violence at all. He did nothing aggressive toward the arresting officers, and never denied the charges. In fact, confessed the crimes to law enforcement officers on no less than three occasions. *See* Plea Hr’g Tr., ROA.107-08 (admitting the crimes to law enforcement officers on two occasions); PSR, ROA.248, ¶ 16 (admitting the crimes to the probation officer). Further, he pled guilty to the crimes. Plea Hr’g

Tr., ROA.73, 116. These facts support a ruling that the district court ordered an unreasonably high sentence.

2. The history and characteristics of the defendant under § 3553(a)(1).

The primary reasons stated by the district court for ordering a well above-Guidelines sentence was Mr. Nickey’s uncounted criminal history in Tribal Court. Under U.S.S.G. § 4A1.2(i), “[s]entences resulting from tribal court convictions are not counted [in the criminal history calculation], but may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).” One of the factors a court should consider when it determines whether to depart based on uncounted Tribal Court convictions is whether “[t]he defendant was represented by a lawyer” during the Tribal Court proceeding or whether the defendant “received other due process protections consistent with those provided to criminal defendants under the United States Constitution.” U.S.S.G. § 4A1.3, Commentary, Application Note 2(C)(i).⁵

The district court relied on Mr. Nickey’s uncounted Tribal Court convictions not only when it granted the prosecution’s request for an upward departure, but also when it decided to order an above-Guidelines variance sentence. Sen. Hr’g

⁵ As described in footnote 4 above, Mr. Nickey is not contesting the departure aspect of the sentence. At issue is the above-Guidelines variance sentence ordered by the court. While Application Note 2(C)(i) to § 4A1.3 deals specifically with departure sentences, its provision can and should be used when analyzing a variance sentence.

Tr., ROA.220. As defense counsel pointed out at sentencing, there is no evidence as to whether Mr. Nickey had legal representation during the Tribal Court proceedings or whether he was afforded due process protections guaranteed by the Constitution. Sen. Hr'g Tr., ROA.129, 199. This supports a conclusion that the district court ordered a substantively unreasonable variance sentence.

The age of Mr. Nickey's Tribal Court convictions also supports his argument. The last Tribal Court conviction that would be a countable conviction, had it not been in Tribal Court, occurred in October 2016. PSR, ROA.251, ¶ 36. That was about four and one half years before the final sentencing hearing on March 19, 2021. The age of Mr. Nickey's criminal convictions supports a conclusion that he is working to better himself. It also supports a conclusion that the sentence was substantively unreasonable.

3. Just punishment for the offense and adequate deterrence to criminal conduct under § 3553(a)(2)(A) and (B).

The subject statute carries no required minimum sentence. 18 U.S.C. § 1168(b). The statutory maximum sentence is 20 years. *Id.*

In addition to the statute, we consider the Sentencing Guidelines, which are adopted by the Sentencing Commission. The stated purpose of the Sentencing Commission "is to establish sentencing policies and practices for the federal criminal justice system that will assure the *ends of justice* by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal

crimes.” Sentencing Guidelines, Ch. 1, Pt. A.1.1. (emphasis added). Also, the Guidelines are meant to “combat crime through an effective, *fair* sentencing system.” *Id.* at Ch. 1, Pt. A.1.3. (emphasis added).

After the court granted the prosecutions motion for a departure, Mr. Nickey’s Guidelines sentence range 10 to 16 months in prison. Sen. Hr’g Tr., ROA.221. A sentence within this range was adequate to meet the ends of justice and provide a fair sentence.

Further, even the prosecutor believed that a sentence within the Guidelines range was appropriate. Sen. Hr’g Tr., ROA.181. Even after grilling two prosecutors for an extended period of time about why they would not recommend an above-Guidelines sentence, the prosecutors refused to change their recommendation. *See* Sen. Hr’g Tr., ROA.182-92. Under these facts, this Court should vacate the 36-month sentence as substantively unreasonable.

4. Protection of the public from further crimes of the defendant under § 3553(a)(2)(C).

Mr. Nickey did nothing violent against the arresting officers and he confessed the subject crimes to law enforcement officers on three occasions. *See* Plea Hr’g Tr., ROA.107-08 (admitting the crimes to law enforcement officers on two occasions); PSR, ROA.248, ¶ 16 (admitting the crimes to the probation officer). His last conviction involving any form of violence was in October 2016, about four and one half years before the final sentencing hearing on March 19,

2021. PSR, ROA.251, ¶ 36. These facts support a conclusion that the public would be adequately protected by sentencing Mr. Nickey to a Guidelines sentence.

Another relevant fact is Mr. Nickey's reaction when faced with an argument with his girlfriend. When he was on home detention as a condition of bond, Mr. Nickey called his probation officer and asked to leave the residence because he and his girlfriend were arguing. PSR, ROA.257, ¶ 61. This conflict avoidance action taken by Mr. Nickey further supports a conclusion that he is not a danger to the public.

Finally, we again must consider the prosecution's recommendation for a within-Guidelines sentence. *See* Sen. Hr'g Tr., ROA.181. Members of the very institution that is charged with seeing that justice is done obviously believed that the public would be adequately protected through a Guidelines sentence. This further supports a ruling that the subject sentence is unreasonably long.

5. The need for educational or vocational training, medical care, or other correctional treatment under § 3553(a)(2)(D).

Mr. Nickey admittedly has a problem with substance abuse, just like a disproportionate number of other Native Americans. *See* Alcohol Recovery for Native Americans, at <https://www.recovery.org/alcohol-addiction/native-americans/>. The court addressed this problem by ordering him to participate in substance abuse treatment as a special condition of supervision. Sen. Hr'g Tr., ROA.226; Judgment, Special Condition No. 3, ROA.59. Because this issue can be

addressed while Mr. Nickey is on supervised release, the provisions of § 3553(a)(2)(D) do not support an above-Guidelines sentence.

6. The kinds of sentences available under § 3553(a)(3).

This factor does not come into play in the subject analysis.

7. The Guidelines sentencing range under § 3553(a)(4)(A).

As this Court is aware, the Sentencing Commission goes to great lengths to study and provide guidance regarding what constitutes fair sentences for all federal crimes. As the prosecution agreed, a sentence within Sentencing Commission's recommended range would meet the § 3553(a) considerations in this case. *See* Sen. Hr'g Tr., ROA.181.

8. Conclusion: § 3553(a) analysis.

The § 3553(a) factors support a finding that Mr. Nickey should have been sentenced within the 10 to 16-month Guidelines range. Mr. Nickey therefore asks this Court to vacate his sentence as substantively unreasonable.

VI. CONCLUSION

For all of the reasons analyzed above, Mr. Nickey asks this Court to vacate the substantively unreasonable sentence ordered by the district court. If this Court agrees that a within-Guidelines sentence should have been ordered, then Mr. Nickey must be immediately released from prison. This is true because he has already served more than 16 months in prison, which was the top end of the range under the Sentencing Guidelines.

Submitted July 15, 2021.

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CERTIFICATE OF SERVICE

I, Abby Brumley Edwards, certify that on July 15, 2021, a copy of the Brief for Appellant was filed via this Court's electronic case filing system, which in turn forwarded electronic copies of the Brief to all counsel of record in this case. A copy of the Brief for Appellant was emailed directly to the government's lead counsel on the appeal of this case – Assistant United States Attorney Gregory Layne Kennedy – at gregg.kennedy@usdoj.gov. Also, a copy of the Brief for Appellant was delivered via United States Mail, postage prepaid to appellant Darren Nickey.

s/ Abby Brumley Edwards
Abby Brumley Edwards
Assistant Federal Public Defender

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