

21-60382

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

DARREN NICKEY

Defendant-Appellant

FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION
3:18cr258HTW

BRIEF OF APPELLEE

DARREN J. LAMARCA
*Acting United States Attorney
Southern District of Mississippi*

GREGORY KENNEDY
Mississippi Bar Number 9389

THEODORE M. COOPERSTEIN
Mississippi Bar Number 106208

KEVIN J. PAYNE
Mississippi Bar Number 100104
Assistant United States Attorneys
501 East Court Street, Suite 4.430
Jackson, Mississippi 39201
Telephone: (601) 965-4480

STATEMENT REGARDING ORAL ARGUMENT

The United States does not request oral argument. The sole issue on appeal—an objection to the reasonableness of a sentence—can be fully considered by relying on the record and the briefs. *See* FED. R. APP. P.

34(a)(2)(C); FIFTH CIR. R. 28.2.3

TABLE OF CONTENTS

	PAGE
STATEMENT REGARDING ORAL ARGUMENT.....	ii
TABLE OF AUTHORITIES.....	v
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUE	2
STATEMENT OF THE CASE.....	2
A. Course of Proceedings and Disposition in the Court Below.....	2
B. The Open Guilty Plea and its Factual Basis.....	3
1. The Criminal Conduct that Led to the Guilty Plea	3
2. The Plea Advice about the Court’s Sentencing Authority	5
C. The Sentencing Proceedings	6
1. The Initial Sentencing Hearing and the Court’s Announced Intention to Consider a Variance	6
2. The Renewed Hearing and the Court’s Consideration of Nickey’s Undercounted Tribal Court Record	8
a. The Tribal Court Record	8
i. February 2013 Incident	8
ii. The February 2015 Incident	9
iii. The July 2016 Incident.....	11
b. The Upward Variance.....	11

TABLE OF CONTENTS (<i>Continued</i>)	PAGE
SUMMARY OF THE ARGUMENT.....	14
ARGUMENT.....	14
The District Court Properly Exercised Its Discretion to Sentence Nickey to a Total of 36 Months of Imprisonment	14
A. Standard of Review	14
B. Applicable Law	15
C. Discussion.....	17
CONCLUSION.....	22
CERTIFICATE OF SERVICE.....	23
CERTIFICATE OF COMPLIANCE.....	24

TABLE OF AUTHORITIES

Cases	PAGE
<i>Betterman v. Montana</i> , 136 S.Ct. 1609 (2016)	8
<i>Gall v. United States</i> , 552 U.S. 38 (2007)	14-18
<i>Government of the Canal Zone v. Burjan</i> , 596 F.2d 690 (5th Cir. 1979)	8
<i>Irizarry v. United States</i> , 553 U.S. 708 (2008)	17
<i>United States v. Ayala-Ura</i> , 544 Fed.Appx. 341 (5th Cir. 2013)	15
<i>United States v. Delgado-Martinez</i> , 564 F.3d 750 (5th Cir. 2009).....	16
<i>United States v. Diehl</i> , 775 F.3d 714 (5th Cir. 2015)	16-18
<i>United States v. Groce</i> , 784 F.3d 291 (5th Cir. 2015)	15
<i>United States v. Hardy</i> , 421 Fed.Appx. 450 (5th Cir. 2011)	19
<i>United States v. Hernandez</i> , 633 F.3d 370 (5th Cir. 2011).....	15, 16
<i>United States v. Herrera-Ochoa</i> , 245 F.3d 495 (5th Cir. 2001)	8
<i>United States v. Pillault</i> , 783 F.3d 282 (5th Cir. 2015)	16
<i>United States v. Reyna-Aragon</i> , 992 F.3d 381 (5th Cir. 2021).....	21

TABLE OF AUTHORITIES (*Continued*)

Cases (<i>Continued</i>)	PAGE
<i>United States v. Rodriguez-Mantos</i> , 748 Fed.Appx. 591 (5th Cir. 2018)	16, 17
<i>United States v. Smith</i> , 440 F.3d 704 (5th Cir. 2006)	19
Statutes and Rules	
18 U.S.C. § 1168	2, 3, 5
18 U.S.C. § 3231	2
18 U.S.C. § 3553	21
18 U.S.C. § 3553(a)	<i>passim</i>
18 U.S.C. § 3553(a)(1)	19
18 U.S.C. § 3553(a)(2)(A)-(C)	19
18 U.S.C. § 3742	2
28 U.S.C. § 1291	2
FED. R. APP. P. 32	24
FED. R. APP. P. 34	ii
FED. R. EVID. 201(f)	8
FIFTH CIR. R. 28.2.3	ii

21-60382

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

DARREN NICKEY

Defendant-Appellant

FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION
3:18CR258HTW

BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

Darren Nickey appeals from a judgment of conviction entered on April 30, 2021, in the United States District Court for the Southern District of Mississippi, following an open guilty plea before the Honorable Henry

T. Wingate, United States District Judge. ROA.54, R.E.4.¹ Nickey timely filed his notice of appeal on May 3, 2021. ROA.62, R.E.2. The district court had jurisdiction under Title 18, United States Code, Section 3231. The jurisdiction of this Court is properly invoked pursuant to Title 28, United States Code, Section 1291, and Title 18, United States Code, Section 3742.

STATEMENT OF THE ISSUE

Whether the district court appropriately exercised its discretion to sentence appellant to a statutory sentence totaling 36 months of imprisonment.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

The grand jury indicted Darren Nickey in December 2018 for theft and embezzlement by an employee of a gaming establishment operated by or for or licensed by an Indian tribe, in violation of Title 18, United States Code, Section 1168(b). ROA.70-71, R.E.3. The indictment charged Nickey

¹ “ROA.54” refers to page 54 of the electronic Record on appeal; “R.E.” to Record Excerpts cited by tab; “PSR” to the Presentence Investigation Report; “Br.” to Nickey’s brief on appeal.

with embezzlement of more than \$1,000 on each of three different occasions in 2016. ROA.70. Each charge carried a maximum term of twenty years of imprisonment. 18 U.S.C. § 1168(b).

In February 2019, Nickey entered his plea of guilty to all three counts of the indictment. ROA.4 (2/19/2019 docket entry); R.E.1 (docket sheet). There was no plea agreement. ROA.105-06. In April 2021, the district court sentenced Nickey to a term of 36 months of incarceration on each count, to run concurrently, to be followed by three years of supervised release, restitution in the amount of \$18,340, and a \$300 mandatory special assessment. ROA.54-61, R.E.4. This appeal followed.

B. The Open Guilty Plea and its Factual Basis

1. The Criminal Conduct that Led to the Guilty Plea

As described in the factual basis for the guilty plea, Darren Nickey worked at the Silver Star Hotel & Casino in the Pearl River Resort. ROA.107. The Pearl River Resort is a gaming establishment operated by the Mississippi Band of Choctaw Indians, pursuant to an ordinance or resolution approved by the National Indian Gaming Commission.

ROA.107. Between December 2015 and May 2016, Nickey used his own password and those of coworkers to take approximately \$18,000, in the aggregate, from the cash recyclers that are used to help manage cash in the casino facility. ROA.107.

Casino management discovered the discrepancy in accounting and on video surveillance of the cash recycler area; they then reported Nickey to law enforcement. ROA.107. Choctaw Police Department Investigator Nicky Charlie interviewed Nickey in May 2016. ROA.107. The officer advised Nickey of his *Miranda* rights and obtained a signed *Miranda* waiver. ROA.107. Nickey signed a written statement admitting to taking money from the casino. ROA.107. Later, Nickey admitted taking money over the entire five-month period in question between 2015 and 2016. ROA.107-08.

Nickey had no objection to the Government's factual proffer.

ROA.108-09. Nickey confirmed in his own words, his criminal conduct as charged:

I used the individual ID I was given from the Gaming Commission and took money myself, put it in my pocket,

walked back to my register with a separate amount for the cash register. After I had set up my bank, I would walk out to the car and put the money back in my truck and walk back in and proceed with the day, as I've done on the other two counts as well.

ROA.109.

2. The Plea Advice about the Court's Sentencing Authority

As part of the guilty plea, Judge Wingate set out for Nickey the court's statutory authority to sentence him under 18 U.S.C. § 1168, to include the sentence components of prison, fine, restitution, supervised release, and special assessment upon conviction. ROA.93-95. The court further explained the difference between sentencing under the statutory limits, versus sentencing under the United States Sentencing Guidelines.

ROA.96-99.

Judge Wingate specifically advised Nickey that he was "not without power to go outside the guidelines." ROA.99. The court warned Nickey there may be circumstances not contemplated by the Guidelines that would justify going "beyond the maximum submitted by the guidelines."

ROA.99-100. The court confirmed that Nickey understood that it could

sentence him “under the statute” or vary from the Guidelines in appropriate circumstances. ROA.100.

C. The Sentencing Proceedings

In the course of two sessions of a continued sentencing hearing, the district court considered the advisory Sentencing Guidelines range as well as the statutory factors under 18 U.S.C. § 3553(a). After hearing evidence, the court granted a Government motion to take into account that Nickey’s criminal history guidelines calculations underrepresented his criminal history.

1. The Initial Sentencing Hearing and the Court’s Announced Intention to Consider a Variance

At the outset of the initial sentencing hearing, neither Nickey nor the Government objected to the facts as set forth in the PSR. ROA.124-25. The Government called the court’s attention to the underrepresentation of Nickey’s criminal history under the Sentencing Guidelines, given that all of Nickey’s prior conduct had been adjudicated in tribal court. ROA.125. Accordingly, the Government moved the court for the sentence to better reflect the serious nature of Nickey’s past violent crimes. ROA.126.

In discussing the Government's motion, Judge Wingate reviewed the past criminal history. The judge noted underrepresentation, "inasmuch as this defendant's record is abominable and yet he has never been held to task for these episodes of criminality." ROA.127-28. The court reviewed in detail Nickey's "history of criminality" (ROA.130), going through each detailed instance as set forth in the PSR. ROA.130-34. *See* ROA.249-55 (PSR ¶¶ 30-49). The judge continued to discuss Nickey's personal and family data (ROA.134-42), concluding by reiterating that "this defendant has an abominable record of criminality." ROA.135.

The district court next advised Nickey and his counsel that the court was considering sentencing Nickey outside the Sentencing Guidelines range and within the statutory maximum. ROA.139 (Judge Wingate: "[W]ith all of that, the court asks why shouldn't the court apply the statute?"); ROA.143 ("So then what have you to say about why I should not impose a sentence under the statute?"). With that in mind, the court offered Nickey a continuance to prepare a defense argument against a statutory sentence. ROA.144 ("I'm going to the statute. Now, do you need

some more time to prepare for a court sentence under the statute?”).

Nickey and his counsel accepted the offer of the continuance and the court adjourned the sentencing hearing. ROA.145.

2. The Renewed Hearing and the Court’s Consideration of Nickey’s Undercounted Tribal Court Record

The sentencing hearing resumed in March 2021.² As the district court had requested at the adjournment of the May 2019 sentencing hearing (ROA.146), the Government presented witnesses to address the circumstances of Nickey’s prior tribal court conduct. ROA.152.

a. The Tribal Court Record

i. The February 2013 Incident

Tim Pauls, an officer with the Choctaw Police Department, testified about an incident he investigated in February 2013. ROA.154. Officer Pauls

² On appeal, Nickey decries the delay as unexcused and for “inexplicable reasons.” Br. at 9. Nickey failed to object or preserve this issue in the lower court. There is no clear error in the delay between sentencing hearings. *Betterman v. Montana*, 136 S.Ct. 1609, 1613 (2016) (14-month delay between conviction and sentencing permissible under Sixth Amendment Speedy Trial Clause). This Court may take judicial notice of the intervening 2020 pandemic and its effects upon judicial process. FED. R. EVID. 201(f) (“Judicial notice may be taken at any stage of the proceeding.”); *Government of the Canal Zone v. Burjan*, 596 F.2d 690, 694 (5th Cir. 1979); *United States v. Herrera-Ochoa*, 245 F.3d 495, 501 (5th Cir. 2001).

told how he responded to a domestic disturbance at Nickey and his mother's residence, where Pauls found Nickey with blood on his face and hands. ROA.156. Nickey was charged in Choctaw tribal court with intoxication and criminal damage to property, domestic. ROA.156. Both parties agreed that this incident was properly reflected in the PSR, and defense counsel agreed to the submission of confirming tribal court documents into the record. ROA.158-59, ROA.253 (PSR ¶ 44). Because no conviction resulted, the incident was listed under "Other Arrests" and was not counted in the calculation of criminal history points. *See* ROA.253 (PSR ¶ 44)

ii. The February 2015 Incident

The Government also called as a witness Adam Johnson, who had been a Choctaw Police Department Officer serving in February 2015. ROA.168. Officer Johnson responded to a medical call at the Dancing Rabbit Inn, part of the Pearl River Resort on the Choctaw Indian reservation. ROA.168. Johnson followed a visible blood trail into the entry of the resort, up to the reception counter, where Nickey's mother worked.

ROA.169. Nickey's mother was in an agitated state of disarray, and she told Johnson how Nickey had struggled with her, striking her and pulling her hair. ROA.169.

Johnson also met Nickey's sister, who "had blood all over her clothes." ROA.170. She told Johnson of a violent incident at their shared residence, where Nickey had stomped on the dresser and punched mirrors and the radio. ROA.170. She told Johnson that Nickey pushed her down onto the bed and, when she tried to get up, he body slammed her.

ROA.171. Nickey cut his hands while punching the mirror, then he tried to force his sister to drink his blood. ROA.171. Johnson drove to the residence and confirmed the report when he found blood in the bedroom and "a pool of blood on the box spring." ROA.170-71. Nickey was found later that night and arrested while walking along the highway. ROA.172. Johnson charged Nickey with two counts of "battery domestic[]"—one for the mother as well as one for the sister"—and criminal damage to property.

ROA.172. *See* ROA.254-55 (PSR ¶ 47). As with the February 2013 conduct,

the incident was not counted in the calculation of criminal history points.

See ROA.254 (PSR ¶ 47).

iii. The July 2016 Incident

Choctaw Police Department Officer Craig Willis testified about events that took place in July 2016. ROA.162. Again, a domestic disturbance call came from the residence of Nickey's mother. ROA.162. Nickey's then-girlfriend complained that Nickey had broken the window in her car; Nickey had fled the home, but was found hiding in the nearby woods. ROA.163. Officer Willis arrested Nickey and charged him with public drunkenness and damage to property. ROA.164. *See* ROA.255 (PSR ¶ 48). As with the other incidents, this conduct carried no criminal history points. ROA.255 (PSR ¶ 48).

b. The Upward Variance

After the witnesses testified, the court accepted the findings of the PSR, without objection. ROA.178. Both the Government and the defense counsel agreed with the court that Nickey had forfeited the adjustment downward for acceptance of responsibility because he had violated the

conditions of his release on bond in the interim following the first sentencing hearing. ROA.197. The parties agreed with the probation officer's calculation of Nickey's offense level as a level 11. ROA.198. With a criminal history category of I, Nickey was subject to a Sentencing Guidelines imprisonment range of four to ten months. ROA.260 (PSR ¶ 81).

The Government renewed its motion to increase Nickey's criminal history category to reflect the Guidelines underrepresentation of his criminal history. ROA.178. *See* ROA.198-99. When Nickey opposed increasing his criminal history to a category II (ROA.199), the probation officer noted that the revised PSR indicated that a departure may be warranted based on the criminal history calculation's underrepresentation of Nickey's criminal past. ROA.199. *See* ROA.262 (PSR ¶ 96) (Part E, "Factors That May Warrant Departure").

After hearing argument, Judge Wingate concluded: "The Court has opted to sentence this defendant under the statute, so the Court need not concern itself with the criminal history category as it pertains to the guidelines." ROA.200. Judge Wingate said that, insofar as the Guidelines

calculation credited no history points for Nickey's prior conduct addressed in the referenced tribal court proceedings, "the guidelines, in that regard, have been faithfully followed." ROA.201. But, as the Government argued, Nickey's criminal history was "grossly understated," and the court regarded that as "a dominant factor as to why this Court has determined to sentence this defendant under the statute." ROA.201-02.

Having declared its intent to sentence Nickey under the statute, the court considered the advisory Guidelines computations and the statutory sentencing factors under 18 U.S.C. § 3553(a). ROA.224. Recognizing the choice between imposing a sentence within the Guidelines range departing from the Guidelines, or varying from the Guidelines, Judge Wingate chose to vary from the Guidelines and sentence Nickey under the statute.

ROA.224. The court imposed a sentence of 36 months as to each of his three counts, to be served concurrently. ROA.224. Nickey's sentence also included concurrent terms of supervised release of three years each, restitution in the amount of \$18,340, and a special assessment of \$300.

ROA.224-27, R.E.4.

Nickey objected to the “substantively unreasonable sentence under the facts of the case.” ROA.228. Nickey also objected “to the procedural reasonableness of the sentence based on the balancing of the 3553 factors and explanation of the sentence given by the Court.” ROA.228.

SUMMARY OF THE ARGUMENT

The district court appropriately exercised its discretion to sentence Nickey to a total term of 36 months of imprisonment. The district court considered the applicable § 3553(a) factors supporting its reasons for varying upward to impose a sentence greater than the correctly calculated Sentencing Guidelines range.

ARGUMENT

The District Court Properly Exercised Its Discretion to Sentence Nickey to a Total of 36 Months of Imprisonment.

A. Standard of Review

Federal “courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse of discretion standard.” *Gall v. United States*, 552 U.S. 38, 41 (2007). *See also id.* at 51 (“Regardless of whether the sentence imposed is

inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard.”); *United States v.*

Hernandez, 633 F.3d 370, 375 (5th Cir. 2011). The Court “reviews the substantive reasonableness of a sentence for abuse of discretion.” *United States v. Groce*, 784 F.3d 291, 297 (5th Cir. 2015). “That [this Court] might reasonably conclude that a different sentence was appropriate is not a sufficient reason to justify reversal.” *United States v. Ayala-Ura*, 544 Fed.Appx. 341, 343 (5th Cir. 2013) (*per curiam*).

B. Applicable Law

This Court reviews sentencing decisions for reasonableness. *Groce*, 784 F.3d at 294 (citing *Gall*, 552 U.S. at 51). The Court first “determines whether the district court committed any significant procedural error.” *Groce*, 784 F.3d at 294.

“Under the first step, this court reviews the district court’s interpretation or application of the sentencing guidelines *de novo*, and its factual findings for clear error.” *Groce*, 784 F.3d at 294 (internal quotes and citation omitted). “If there is no procedural error or the error is harmless,

this court then reviews the substantive reasonableness of the sentence imposed for abuse of discretion.” *Id.* (citing *Gall*, 552 U.S. at 51; *United States v. Delgado-Martinez*, 564 F.3d 750, 754 (5th Cir. 2009)); *see also United States v. Rodriguez-Mantos*, 748 Fed.Appx. 591, 593 (5th Cir. 2018) (*per curiam*); *United States v. Diehl*, 775 F.3d 714, 722 (5th Cir. 2015) (“our process of reviewing a sentence is bifurcated”).

“Appellate review for substantive reasonableness is ‘highly deferential,’ because the sentencing court is in a better position to find facts and judge their import under the § 3553(a) factors with respect to a particular defendant.” *United States v. Pillault*, 783 F.3d 282, 288 (5th Cir. 2015) (quoting *United States v. Hernandez*, 633 F.3d 370, 375 (5th Cir. 2011)).

“When a sentence is outside the Guidelines range, this court ‘may consider the extent of the deviation, but must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.’” *Pillault*, 783 F.3d at 288 (quoting *Gall*, 552 U.S. at 51).

“For a sentence that departs or varies from the Guidelines to be procedurally sound, the district court must consider all of the 18 U.S.C.

§ 3553(a) factors and provide an adequate explanation for the sentence.”

Rodriguez-Mantos, 748 Fed.Appx. at 594 (citing *Gall*, 552 U.S. at 49-50).

On reviewing the “substantive reasonableness of the district court’s variance from the Guidelines, [this Court] consider[s] the totality of the circumstances, including the extent of the variance, to determine if the § 3553(a) factors support the sentence.” *Rodriguez-Mantos*, 748 Fed.Appx. at 595 (citing *Gall*, 552 U.S. at 50); *Diehl*, 775 F.3d at 723. “A sentence outside the Guidelines carries no presumption of unreasonableness.” *Irizarry v. United States*, 553 U.S. 708, 714 (2008); *Gall*, 552 U.S. at 38.

C. Discussion

The district court’s sentence of Nickey was both procedurally and substantially reasonable. The sentencing court first reviewed and adopted the Guidelines calculation in the PSR without objection by the defense. ROA.198. With the agreed Guidelines sentencing range as its starting point, the district court then proceeded to evaluate and cite the factors under 18 U.S.C. § 3553(a) which compelled it to vary upward and impose a total sentence of 36 months of imprisonment. ROA.224.

There is no dispute that the district court followed the correct procedure. No party objected to the PSR calculation of the Guidelines sentence range, which the court accepted. ROA.198. The court considered all of the § 3553(a) factors and explained their significance to the decision to vary from a Guidelines sentence. ROA.189, ROA.22 (nature and circumstances of the offense); ROA.130, ROA.203-210, ROA.212-16 (history and characteristics of the defendant); ROA.217 (seriousness of offense and respect for the law); ROA.217 (deterrence); ROA.202-16 (protecting the public). The record shows the court's procedure met accepted standards and was reasonable.

The record also supports the substantive reasonableness of the district court's sentence. *Diehl*, 775 F.3d at 724 ("Even a significant variance from the Guidelines does not constitute an abuse of discretion if it is commensurate with the individualized, case-specific reasons provided by the district court."). The district court referenced the arguments of both defense and Government counsel. ROA.220-21. In referring to his decision to sentence Nickey "under the statute," it was evident that Judge Wingate

fully understood his authority to grant an upward variance that was appropriate under the circumstances. *See United States v. Smith*, 440 F.3d 704, 706-07 (5th Cir. 2006) (sentencing court's options include a non-Guidelines sentence, also called a "variance" outside the Guidelines range); *United States v. Hardy*, 421 Fed.Appx. 450, 458 (5th Cir. 2011) (district court's use of the phrase "sentence under the statute" understood to refer to a variance).

The district court specified factors that may be considered in imposing a sentence varying from the Guidelines: The nature and circumstances of the offense and the history and characteristics of the defendant, under 18 U.S.C. § 3553(a)(1); and the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; and to protect the public from further crimes of the defendant, under 18 U.S.C. § 3553(a)(2)(A)-(C). ROA.217-18. The probation officer specifically referred the court to the section of the report addressing corresponding grounds for a departure. ROA.199. *See*

ROA.262 (PSR ¶ 96) (Part E, “Factors That May Warrant Departure”). And the district court incorporated all those factors by reference into its sentence. ROA.201-02.

The district court elaborated on each of the § 3553(a) factors. ROA.220-24. The nature and circumstances of the offense, and the history and characteristics of the defendant, revealed “prior dispositions in a court where he received very little, if any, punishment for his past transgressions, where his conduct clearly shows that he is violent; where he has shown no inclination to address his serious drinking problem; and where he has been violent towards a number of people.” ROA.222; *see also* ROA.130. The PSR as adopted by the district court describes Nickey’s past episodes of violence. ROA.249-55 (PSR ¶¶ 30-49).

The promotion of respect for the law called for a significant sentence where “this defendant has not shown any” respect for societal laws. ROA.217. And, finally, the personal history and characteristics of Nickey in his criminal history, and the details of his past offenses, join with the

current offense, to determine a proper level of protection for the public from Nickey's violence.

Importantly, Judge Wingate stated that he would have imposed the same sentence, even if there were an error in the calculations of the Sentencing Guidelines, "based on the defendant's offense conduct in this case, a variance, if the Court had applied the guidelines, *et cetera*, the characteristics of the defendant, and other factors found at 18 U.S.C. Section 3553." ROA.226-27. Here, it is evident "the district court would have imposed a sentence outside the properly calculated Guidelines range for the same reasons it provided at the sentencing hearing." *United States v. Reyna-Aragon*, 992 F.3d 381, 388 (5th Cir. 2021). Judge Wingate also demonstrated that Nickey's sentence was based on the court's own independent assessment of what was called for by the circumstances. *Id.* Accordingly, any error in the determination of Nickey's sentence is harmless given all the facts.

CONCLUSION

For the foregoing reasons, the judgment of conviction and sentencing should be affirmed.

Respectfully submitted,

DARREN J. LAMARCA
*Acting United States Attorney
Southern District of Mississippi*

By: /s/ Theodore M. Cooperstein
THEODORE M. COOPERSTEIN
Mississippi Bar Number 106208
Assistant United States Attorney

KEVIN J. PAYNE
Mississippi Bar Number 100104
Assistant United States Attorney

GREGORY KENNEDY
Mississippi Bar Number 9389
Assistant United States Attorneys
501 East Court Street, Suite 4.430
Jackson, Mississippi 39201
Telephone: (601) 965-4480

Dated: August 16, 2021

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day, he caused to be electronically filed a copy of the Brief for Appellee United States of America with the Clerk of the Court using the ECF system, which caused the brief to be served on counsel of record.

CERTIFIED, this the 16th day of August 2021.

/s/ Theodore M. Cooperstein
THEODORE M. COOPERSTEIN
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 3,559 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. 32(a)(6) because the brief has been prepared using Palatino Linotype 14-point font produced by MS Word 365 software; the footnotes are in 12-point type.

3. Privacy redactions required by FIFTH CIR. R. 25.2.13 have been made to this brief.

4. The electronic submission of this brief is an exact copy of the paper document as required by FIFTH CIR. R. 25.2.1.

5. This brief has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

CERTIFIED, this the 16th day of August 2021.

/s/ Theodore M. Cooperstein
THEODORE M. COOPERSTEIN
Assistant United States Attorney