IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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No. 21-7048

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**UNITED STATES OF AMERICA,**
***Plaintiff/Appellee*,**

**v.**

**JIMCY McGIRT,**
***Defendant/Appellant*.**

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
THE HONORABLE JOHN F. HEIL, III, UNITED STATES DISTRICT JUDGE
CASE NO. CR-20-50-JFH

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# BRIEF OF PLAINTIFF/APPELLEE

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ORAL ARGUMENT IS REQUESTED

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May 25, 2022

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## PRIOR OR RELATED APPEALS

Defendant filed two pro se cases with this Court. In appeal number 21-7013, Defendant McGirt sought a writ of prohibition, which this Court denied on April 29, 2021. In appeal number 21-7019, Defendant McGirt filed an interlocutory appeal which, this Court dismissed on June 4, 2021. Both filings were efforts by Mr. McGirt to stop the federal criminal case which is the subject of the current appeal.

## STATEMENT OF JURISDICTION

Pursuant to 18 U.S.C. § 3231, the district court had subject matter jurisdiction over the charges because Defendant committed his offense on Indian Country within the Eastern District of Oklahoma. (Vol. I, *Indictment*, ROA at 22-23).[1]

Pursuant to 28 U.S.C. § 1291, courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." The

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[1] References to the record on appeal ("ROA") will be made as follows:

*Volume I – Pleadings*: by document title, followed by the page number(s) where the cited material appears in the consecutively paginated record, e.g. "Vol. I, *Motion*, ROA at 10."

*Volume II –Sealed Pleadings & PSR Materials*: by paragraph number, followed by the page of the sealed record as it appears on the electronic file stamp, e.g. as "Vol. II, *PSR* ¶4, Sealed ROA at 2."

*Volume III –Restricted Transcripts*: by the page number(s) where the cited material appears in the consecutively paginated transcript volume at bottom right of each page, e.g. "Tr. 7" -

*Volume IV – Sealed Restricted Transcripts*: by the page number(s) where the cited material appears in the consecutively paginated transcript volume at bottom right of each page, e.g. "Sealed Tr. 7."

Defendant/Appellant's brief will be referenced as "*Def. Brf.*"

district court sentenced Defendant on August 25, 2021, and entered its written judgment on August 27, 2021. (Vol. I, *Judgment*, ROA at 579-585). Defendant/Appellant timely filed his notice of appeal on September 2, 2021. (Vol. I, *Notice of Appeal*, ROA at 586). *See* Fed. R. App. P. 4(b)(1)(A) providing that notice of appeal must be filed within 14 days of the entry of judgment.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Where Prior Inconsistent Testimony Possessed No Real Substantive Value, was a Jury Instruction Limiting Use of the Evidence to Impeachment Erroneous and, if so, was Any Such Error Harmless?

2. If the District Court Miscalculated the Total Offense Level as 36 instead of 35, Has Defendant Failed to Show Such Error Was Plain When the District Court Varied Above Any Guideline Range to Impose a Life Sentence?

## COMBINED STATEMENT OF THE CASE AND FACTS

### *A.* *Procedural Backdrop to the Current Federal Case*

Jimcy McGirt was found guilty by a state jury in 1997 "of molesting, raping, and forcibly sodomizing a four-year-old girl, his wife's granddaughter." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020)(Roberts, C.J., dissenting). The State of Oklahoma sentenced McGirt "to 1,000 years plus life in prison." *Id*.[2]

More than two decades later, the United States Supreme Court reversed the

[2] McGirt was previously sentenced to five years in state prison for forcibly sodomizing two boys, age 5 and age 8, who lived in an Oklahoma City apartment complex where McGirt worked as a maintenance man. McGirt was discharged from the Oklahoma Department of Corrections in 1991. (Vol. II, *PSR* ¶62, Sealed ROA at 47-48).

1997 Oklahoma conviction in the landmark case *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). In *McGirt*, the Supreme Court held the Creek reservation had never been disestablished, thereby agreeing with McGirt's argument that "the State lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation of Oklahoma and his crimes took place on the Creek Reservation." *Id*. at 2459.

*B.* *Defendant is Charged in Federal Court*

After the Supreme Court decision, an Eastern District of Oklahoma grand jury returned a three-count Superseding Indictment charging Jimcy McGirt ("Defendant") with:

Count 1: Aggravated Sexual Abuse in Indian Country, in violation of 18 U.S.C. §§ 1151, 1153, 2241(c) and 2246(2)(C), for penetrating B.B.'s genital opening with his finger;

Count 2: Aggravated Sexual Abuse in Indian Country, in violation of 18 U.S.C. §§ 1151, 1153, 2241(c) and 2246(2)(B); for intentionally placing his mouth on B.B.'s vulva; and

Count 3: Abusive Sexual Contact in Indian Country, in violation of 18 U.S.C. §§ 1151, 1153, 2241(c), and 2246(3), for making B.B. touch his bare genitals with her hand.

(Vol. I, *Superseding Indictment,* ROA at 144-145). After extensive pretrial litigation, the case proceeded to jury trial in November 2021.

*C.* *Factual Summary of the November 4 - 6, 2021 Jury Trial*

The government's case was presented through testimony from B.C., her mother, and her grandmother. (Tr. 209-476). In addition, a pediatrician who discussed B.C.'s medical records from the time of the 1997 assaults. (Tr. 131-202).

Defendant married Norma Blackburn in January 1992. (Tr. 299-301, 409). At the time she married, Norma Blackburn had three children who lived in her Broken Arrow home. (Tr. 296-298). She had two daughters - De Etta Kuswane, who was then pregnant with the victim in this case, B.C.[3], and Norma Hickman, who had two children, C.H. and S.H. (Tr. 297). Ms. Blackburn's son, Matt Blackburn also stayed at the home sometimes. (Tr. 298).

By the summer of 1996, the two sisters and their children were no longer living at the house. (Tr. 299-305). Ms. Kuswane arranged for her daughter B.C. to stay with her grandmother, Ms. Blackburn, and Defendant while Ms. Kuswane went on a week-long vacation to Mexico. (Tr. 302-305). From August 8-15, 1996, B.C. stayed at her grandmother's house and celebrated her fourth birthday during her stay on August 13, 1996.

[3] To maintain consistency with Defendant's briefing terminology, this brief also refers to the victim as B.C., although she is occasionally referenced as "B.B." in the record.

Ms. Blackburn worked as a nurse at St. Francis Hospital's neonatal unit in Tulsa from 7:00 a.m. until 7:00 p.m., but was supposed to be off work during the vacation week. (Tr. 303-305, 414-415). Yet, Ms. Blackburn agreed to go in for overtime hours when the hospital called shortly after Ms. Kuswane left for Mexico. (Tr. 304-305). Defendant was to watch B.C. while Ms. Blackburn was working. (Tr. 305, 416-417). He worked from the home sometimes detailing cars. (Tr. 416).

Ms. Blackburn testified B.C. had nightmares during that week where B.C. would shake and cry so hard that the child's hair would become wet. (Tr. 418-419). She thought B.C. just missed her mother since they were close. (Tr. 419). When Ms. Kuswane called her daughter by phone on the second day of her trip, B.C. kept asking when she was coming home. (Tr. 306). She could tell her daughter was upset, but thought it was just because they had never been apart for so long. (Tr. 306). B.C. was very eager to go when Ms. Kuswane arrived at the end of the week to take her home. (Tr. 307).

A few days after Ms. Kuswane returned from Mexico, B.C. approached her mother and told her she had a secret. B.C. then told her mother about what Defendant did to her. (Tr. 310).[4] Ms. Kuswane did not want to push B.C., so she

[4] While Defendant did not recite the detail of the abuse in his opening brief (Def. Br. at 4, n.4), the details are important in assessing both the proof supporting the conviction and the sentence imposed. The PSR describes the disclosure to Ms. Kuswane as follows:

did not ask any more questions.

Approximately one week later, B.C. spent the night with S.H. (B.C.'s cousin and her aunt Norma Hickman's daughter) on a Saturday night. (Tr. 314). While the two girls were getting ready for church on Sunday morning, B.C. told S.H. about Defendant touching her. (Tr. 315, 371).[5] S.H. was upset and immediately woke her mother, Norma Hickman, to tell her. (Tr. 315). Her aunt sat a tape recorder next to her as she began to fix B.C.'s hair for church. (Tr. 315). Ms. Hickman asked B.C. if she had fun when she stayed at her grandma's. (Vol. II, *PSR* ¶14, Sealed ROA at 42). B.C. then disclosed the abuse to her aunt. (Tr. 227). Ms. Hickman asked B.C. where grandma was when grandpa touched her, and B.C. said her grandma was at work. (Vol. II, *PSR* ¶14, Sealed ROA at 42). Ms. Hickman asked B.C. how many times it happened, and B.C. told her aunt, "every day, every day". (Id.).

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> B.B. told her mother that Jimcy McGirt had placed his finger on her "private," which was a word she taught B.B. for her vaginal area. B.B. also informed DeEtte that Jimcy McGirt placed his finger inside her private and that it hurt, but B.B. was worried that if she told her mother much more "he would go to jail". DeEtte indicated that a few days later, B.B. told her that Jimcy McGirt placed his tongue on her vagina and that she (B.B.) touched Jimcy McGirt' s "private" but that it was "yucky because it had hair". DeEtte explained that since the incidents occurred, B.B.'s behavior changed substantially, as she had a lot of anger and was suffering from low self-esteem. Additionally, DeEtte testified that B.B. told her that Jimcy McGirt had inappropriately touched her while B.B. was on the couch in the living room, in one of the bedrooms, and in Jimcy McGirt' s truck.

(Vol. II, *PSR* ¶ 9, Sealed ROA at 41).

[5] Ms. Hickman was deceased by the time this case was tried in federal court. (Tr. 227).

Ms. Hickman told her sister, Ms. Kuswane about the disclosure and the sisters contacted the police to make a report. (Tr. 319). B.C. was then examined by a pediatrician and told him "Grandpa put his finger inside my private parts" and "Grandpa asked me to touch his private parts with my hand." (Tr. 150).

After the police report, Ms. Kuswane tried not to question her daughter too much. (Tr. 319). Instead, she listened as B.B. disclosed details as she was able and when she was ready. (Tr. 320). Ms. Kuswane described the changes she observed in B.C. after her week at her grandmother's house. (Tr. 312-313). Ms. Kuswane testified her daughter was angry and suffered from low self-esteem. (Tr. 328-329).

Despite the allegations, Ms. Blackburn supported Defendant and the couple remained married during the Defendant's state jury trial and after his state conviction. (Tr. 323,421-423). While he was in state prison, Defendant sent his wife a letter wherein he apologized for the sexual abuse of B.B. and claimed that he had not been in his right mind and that the devil made him do it. (Tr. 388, 430-431). The letter was a turning point for her, and Ms. Blackburn initiated divorce proceedings. (Tr. 430-431 ).

At the time she received it, Ms. Blackburn shared the letter with her daughter, Ms. Kuswane. B.C.'s mother read the contents of the original letter and she likewise recalled the Defendant apologized and blamed his actions on the devil. (Tr. 325-326, 388, 431). By the time of the federal trial, the letter could not be located.

(Tr. 389). The family believes it was removed from the home by a relative when he moved the furniture it was kept in out of state. (Tr. 432, 470-473).

Just as she did years before in state court, now 28-year-old B.C. took the stand and described what Defendant did to her the week she turned four years old. (Tr. 216). She stayed with her grandmother and Defendant when her mother went to Cancun, Mexico. (Tr. 218-219). Defendant, who she thought of as her grandfather, kept her while her grandmother was at work. (Tr. 219). With the passage of years, B.C. was now able to describe more clearly what Defendant did to her. (Tr. 220).

Defendant touched and penetrated her vagina with both his hand and his tongue on more than one occasion. (Tr. 220-221). These events happened on the living room couch and in the bedroom. (Tr. 225). Once, while they were in Defendant's truck, he made her touch his naked penis with her hand, and it scared her. (Tr. 224). He told her not to tell anyone what had happened or he would get in trouble and would go to jail. (Tr. 225-226). Defendant said if she told anyone, her grandmother would not love her anymore. (Tr. 225). She later told her mother and her cousin. (Tr. 226).

After explaining she tries not to think about what Defendant did to her, B.C. stated that she did not review any prior testimony or reports to prepare for her testimony. (Tr. 251, 231). She knows no one told her what to say – even at four

years of age – because "I have the memories in my head of what happened." (Tr. 282). While she may not have understood the concept of days or time at that young age, she has no doubt what happened because, "I can still see the stuff in my head." (Tr. 229-230; 255, 281). B.C. explained at the end of her testimony:

> Q. (BY MS. MCAMIS:) Tell us your strongest independent recollection of what happened to you.
>
> A. Like a memory of what he did?
>
> Q. Yes.
>
> A. I remember he was mowing the back yard and then he came in, and he sat me on the ledge of the couch in the living room. I remember it was a blue couch. And he put his mouth on my vagina.
>
> Q. And to this day can you picture that and remember that?
>
> A. Yes. Since I live there still, I have to kind of . . .
>
> Q. Have you tried to forget about all of this?
>
> A. Yeah.
>
> Q. Have you ever been able to forget about all of this?
>
> A. Not really.

(Tr. 282-283).

Despite having sent the apology letter, Defendant maintained his innocence during the federal trial. The defense repeatedly claimed B.C., her mother, and her grandmother were all lying about Defendant's abuse. Each of the witnesses faced

extensive cross-examination based on transcripts from the state preliminary hearing and state jury trial as the defense attacked their credibility.[6] Additionally, while Defendant did not testify at trial, Terry Staber, another of Ms. Blackburn's adult children, was called by the defense to state that he moved a dresser and other furniture out of his mother's house to a storage unit. (Tr. 493-494). He swore he never removed anything from the dresser. (Tr. 494). He was, however, aware Defendant wrote letters to his mother from prison and that she kept those letters in a dresser in her bedroom. (Tr. 495, 497). He never read any of the letters. (Tr. 498).

The jury found Defendant guilty on all three counts. (Vol. I, *Verdict Forms*, ROA at 445-447). The jury deliberated for just over an hour. (Vol. I, *Minute Sheet – Jury Trial*, ROA at 413).

*D.* *Defendant is Sentenced to Life*

The Pre-Sentence Report ("PSR") calculated Defendant's advisory sentencing range under the 1995 Guidelines. (Vol. II, *PSR* ¶27, Sealed ROA at 44). All three offenses, while each calculated separately, were subjected to the same initial adjusted offense level:

[6] The details of these alleged inconsistencies are discussed in the first section of the argument herein.

| | |
|---|---|
| Base offense level for an offense under 18 U.S.C. § 2241(c) involving criminal sexual abuse. *See* U.S.S.G. § 2A3.1 and 2A3.1(a). (*Id*., at ¶29, 37, 44, Sealed ROA at 45). | 27 |
| Four-level enhancement for a victim under the age of 12. *See* U.S.S.G. § 2A3.1(b)(2)(A). (*Id*., at ¶230, 38, 45, Sealed ROA at 45-46). | +4 |
| Two-level enhancement where victim was under the care, custody and control of the defendant. *See* U.S.S.G. § 2A3.1(b)(3)(A). (*Id*., at ¶31, 39, 46, Sealed ROA at 45-46). | +2 |
| Adjusted Offense Level. (*Id*., at ¶35, 43, 50, Sealed ROA at 45-46). | 33 |

Each count was assigned a unit under the multiple count adjustment, and each counted as one unit. (*Id*., at ¶51, Sealed ROA at 46). The three units increased the adjusted offense level by three points under U.S.S.G. § 3D1.4. (*Id*., at ¶53, Sealed ROA at 46). Accordingly, the Combined Adjusted Offense Level and Total Offense Level was 36. (*Id*., at ¶54, 57, Sealed ROA at 46). Defendant had three criminal history points, resulting in a Category II criminal history. (*Id*., at ¶60-64, Sealed ROA at 47-48). An offense level of 36, combined with a Category II criminal history, yielded an advisory guideline imprisonment range of 210-262 months. (*Id*., at ¶90, Sealed ROA at 53).

In addition to the normal objections and responses, the government filed a motion for upward departure or variance to the statutory limit of life. (Vol. II, *Gov. Motion for Departure/Variance*, ROA at 498-521).

At the sentencing hearing, the trial court granted the government's request for

a variance and sentenced Defendant to a life term. (Vol. I, *Judgment,* ROA at 579-585). The trial court made extensive, comprehensive, and detailed findings of fact supporting the variance. (Vol. II, *Statement of Reasons*, Sealed ROA at 65, 67-68). The reasons encompassed the nature and circumstances of the offense, the history and characteristics of the Defendant (including a pattern of similar criminal conduct and a lack of remorse), the seriousness of the offense and the need to promote respect for the law and provide just punishment for the offense, the need to afford adequate deterrence, a desire to protect the public, and to avoid unwarranted sentencing disparities. (Id., Sealed ROA at 65). (Vol. III, Sent. Tr. at 1-53).[7]

This appeal followed.

## SUMMARY OF THE ARGUMENT

More than two decades ago, a preschool-aged girl faced the Defendant, who she knew as her grandpa, and described to an Oklahoma state jury how he sexually molested her while her mother was on a week-long vacation in Mexico. Now, after the landmark Supreme Court decision in *McGirt v. Oklahoma*, that same girl – now a 28-year-old woman - had to face the Defendant again in a federal court. The main defense strategy in the federal trial was to impeach the victim, her mother, and her grandmother with any perceived variations from their prior testimony from the 1997

[7] The sentencing transcript, while located at the end of Vol. III of the restricted transcripts record, does not appear to follow the prior consecutively-paginated transcripts. Therefore, any references to the sentencing will be to the upper-right number of that specific transcript.

state preliminary and trial transcripts. As the transcript excerpts had little, if any, inherent substantive value, the district court instructed the jury such prior testimony was to be considered for impeachment purposes only. While limited evidence admitted under FRE 801(d)(1)(A) would usually be erroneous, under these facts such a determination is not ironclad. When the prior testimony is examined, the lack of substantive value sufficient to challenge the jury's verdicts is clear. The only viable use for the testimony was as impeachment evidence. Any error arising from the jury instruction was harmless.

Likewise, even if the district court erred in calculating the sentencing guideline for Count Three, the minor error's impact of the life sentence imposed is non-existent. Even if the guidelines had been calculated in the manner urged by Defendant, his total offense level would only have dropped from a 36 to a 35, lowering his hefty guideline range by only a few months. Where, as here, the district court drafted an extensive statement of reasons to explain why even a level 36 guideline range of 210-262 months was wholly inadequate for this Defendant, there is no likelihood a different sentence would be imposed on remand. Defendant failed to meet the plain error standard in challenging his sentence.

## ARGUMENT AND AUTHORITIES

I. WHERE PRIOR INCONSISTENT TESTIMONY POSSESSED NO REAL SUBSTANTIVE VALUE, A JURY INSTRUCTION LIMITING USE OF THE EVIDENCE TO IMPEACHMENT WAS NOT ERRONEOUS AND, IF ERRONEOUS, ANY SUCH ERROR WAS HARMLESS.

### A. Standard of Review

> A district court's evidentiary decisions are reviewed for abuse of discretion. *United States v. Iverson*, 818 F.3d 1015, 1019 (10th Cir. 2016); *see also United States v. Phillips*, 543 F.3d 1197, 1203–04 (10th Cir. 2008) (reviewing appellants' challenge to district court's admission of evidence, brought pursuant to best-evidence rule, for abuse of discretion). "Because evidentiary rulings are within the sound discretion of the district court, this court will reverse only upon a 'definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.' " *United States v. Samaniego*, 187 F.3d 1222, 1223 (10th Cir. 1999) (quoting *Gilbert v. Cosco, Inc.*, 989 F.2d 399, 402 (10th Cir. 1993)). Notably, "[a] district court abuses its discretion if its decision is based upon an error of law." *United States v. Tan*, 254 F.3d 1204, 1207 (10th Cir. 2001) (quoting *United States v. Cherry*, 217 F.3d 811, 814 (10th Cir. 2000)).

*United States v. Chavez*, 976 F.3d 1178, 1193 (10th Cir. 2020). However, this Court will not reverse where instructional error is harmless. "In reviewing a challenge to jury instructions, however, they must be read in their entirety. *United States v. Denny,* 939 F.2d 1449, 1454 (10th Cir.1991). We will reverse 'only when such error is prejudicial in light of the entire record.'" *United States v. Reddeck*, 22 F.3d 1504, 1510 (1994)(internal citations omitted).

**B. The Limiting Instruction, if erroneous, was harmless.**

*1. The "statements" drawn from the 1997 state preliminary hearing and state jury trial transcripts.*

To assess the applicable law (discussed below) and whether the jury instruction was erroneous, an examination of the "statements" from the state transcripts used at trial is essential. It is not sufficient to simply note that defense counsel read "28 pages of favorable prior testimony" during this two- and one-half-day trial and dump the record citations into a footnote. (Def. Bef. at 6, n.5). The use of prior testimony during cross-examination was extensive and, at times, employed problematically.

For example, during the cross-examination of the victim, B.C., each use generated confusion because the defense was using an independently obtained, non-official transcript which did not track with the page numbering of the official transcript. (Tr. 236-237, 261-263, 267-268, 270, 273, 275). This confusion culminated in a lengthy discussion where it was revealed the transcript defense counsel purchased from the court reporter "had changes in it" and "was a different version" that, at a minimum, printed on different page numbers. (Tr. 275-276). Additionally, at times, defense counsel used the transcript in an attempt to refresh B.C.'s memory or impeach her memory – not as a proper admission of a prior inconsistent statement. (Tr. 254-256, 259-260).

As to B.C., the following excerpts were read into the record at the federal trial:

- "Did you ever tell your momma that Bill Gray touched you?" "Maybe." (Tr. 235-237).
- "Did you ever tell your mommy that Bill Gray touched you?" "Uh-huh." (Tr. 238-239).
- "Did your mom tell you what to say here in court today?" "And your answer, you nod your head up and down. The question this is, 'Yes?' "Is that a yes? And you answer "yes." (Tr. 240). [8]
- "Did your mom tell you to say that Jimcy did these things to you? And your answer, again you nod your head up and down. And the question is, 'Is that a yes, Baby?' "Yes." (Tr. 241).
- "Earlier you told me your Mom did tell you to say that. And your answer, 'She didn't.' She didn't? So you are changing your mind? And you nod your head up and down. And the question is, 'Do you change your mind a lot?' And your answer is you nod your head up and down." (Tr. 286-287).
- "Uncle Matt, where was he when you were staying at grandma's house?" "Um, um, oh, that was on the couch." "Okay, who was on the couch?" "I was." "Okay. Where was Uncle Matt?" "In the bedroom sleeping."

[8] On redirect, it was revealed that B.C. later at the state trial denied her aunt told her what to say, denied her mom told her what to say and stated that "nobody" told her what to say. (Tr. 264-266). She also said, when asked about the finger penetration, that her mother did not tell her to say that, "I just said it by myself." (Tr. 266)."

(Tr. 290).

- "Okay. Was anybody else at home when he touched you?" "Grandma." (Tr. 291).
- " "Did he [Matt] stay there the time while you stayed with your grandma?' And you nod your head up and down." (Tr. 293).
- "Where was grandma when Jimcy touched you?" "Um, at work." (Tr. 293).
- "Okay. Was anybody else at home when he touched you?" "Grandma." "All the time?" "Nods head up and down." "Sometimes?" "Nods head up and down." (Tr. 294).

By the time Ms. Kuswane faced cross-examination, the government had printed out copies of the Bates-stamped transcript so that, at least, her cross was undertaken with an official recording of the state testimony. (Tr. 332-338). The following excerpts were read into the record from Ms. Kuswane's prior state testimony:

- "Now you're telling me that you're not really sure about that?" "She was supposed to be at my mother's house. This is where she is staying, but on her birthday, she got to go to her father's. She didn't spend the night there." "Are you sure about that?" "I didn't give her permission to go over there, so I don't know." "Are you sure she didn't spend the night with her natural father?" " I'm pretty sure." (Tr. 356-357).

- "How long after you returned from your trip did you learn this from [B.C]?" "It was approximately about two weeks after I came back that she had told me that she had a secret." (Tr. 370).
- "Did anyone from DHS talk to her? "No. She went to OU Medical, a doctor." (Tr. 273).
- "Now, was [B.C.] able to tell you when these events took place?" "Yes." What did she say?" "She said that - - she told me that it happened when I was in Mexico. She said it happened every day." (Tr. 380).
- "How many times have you discussed with your child these accusations?" "What she told me has happened about how this is going right now?" "Yes, ma'am." "I don't discuss it. Unless she brings it up on her own, its discussed." "How many times have you discussed it?" "I can't count. It's spontaneous. She brings it up, we discuss it." "More than 20?" "I don't count the number of times." "More than 10?" "Well, I guess." "You just can't tell me?" "Maybe more than 10. What I'm saying is I don't count every time that she decides to bring the issue up with me." (Tr. 384).

The grandmother, Ms. Blackburn, stood by Defendant during the state proceedings because he denied he abused B.C. when Ms. Blackburn confronted her husband about the allegation. (Tr. 421-423). After she got the letter from Defendant in which he admitted "the devil made him do it" to B.C., she initiated divorce

proceedings and changed her view of the case. (Tr. 430-431). She was very angry with herself for testifying on his behalf. (Tr. 433). As a result, her testimony about B.C.'s believability and her observations of the child's demeanor differed on some details at the federal trial.

As to Ms. Blackburn, the following excerpts from the state proceedings were used on cross-examination:

- "How did De Ette [Ms. Kuswame] feel about Mr. McGirt?" "Hostile." "How would you describe 'hostile'?" "She had informed him that he was not her father and that she didn't have to live by the house rules, that sort of thing." (Tr. 444).
- "How long did De Ette stay with you?" "Let's see. De Ette stayed shorter than that [shorter than her sister Ms. Hickman]." "Okay. Was she happy about leaving?" "No." "Was she upset about it?" "Yes." "Did she blame it on anyone for having to leave?" "Yes." "Who did she blame it on?" (Tr. 443).
- "Okay. Has she ever asked you to leave Mr. McGirt?" "Yes." "How often?" "Too many times to count." "How did [Ms. Hickman] feel about Mr. McGirt?" "The very same way." (Tr. 444).
- "Okay. Was this from – were these hostilities towards Mr. McGirt prior to these allegations that [B.C.] made?" "Oh yes, from the start and prior to the

marriage." (Tr. 446).

- "What were your work hours?" "7:00 to 7:00." "Okay. Seven in the morning to seven in the evening?" "Yes." (Tr. 448).
- "So, she [B.C.] liked being around him?" "Uh-huh." "Did you ever witness her being afraid of him?" "I have never witnessed her being afraid of him." (Tr. 450).
- "Okay. Any of the time that she was staying with you during this time, did she have nightmares?" "Yes." "How severe were they?" "She would wake up and her hair would be wet from crying and she has done this before when she stayed other times. And she would be crying and sometimes she couldn't tell us what she had a nightmare about and she would be shaking, and I would move her sometimes from one bedroom to another or some other area thinking that might help." "So, prior to August 8th you were personally aware that she had these nightmares?" " Yes, I am." "To your knowledge, how long were they going on?" "About a year that I know of that she had nightmares." (Tr. 452).
- "So, during the weekdays in that time frame you were not at home from just about 6:00 --?" "Yeah. About three times during that week I come home later because I went over to pick up [B.C.]. She was at her father's house, so we got home later." (Tr. 453).

- "What kind of characteristics would you look for that might indicate abuse?" "Withdrawal, crying, tantrum, bad dreams, bad behavior that is unusual for them." "And you observed none of these characteristics with regard to [B.C.]?" "No. Only she had been having nightmares but she had been having them for a year." (Tr. 456).
- "Mrs. McGirt, when [B.C.] was staying with you for that week did she stay at any other place?" "Yes. She went over to her father's and she stayed one night with him, about three different days because I stated yesterday that I picked her up from there. I was – several times we got home late." "Okay. So some of the days while you were at work, she was with her father?" "Yeah, about three days and one night." (Tr. 457).
- "What is the reason for that being?" "For one thing I took care of her. I saw nothing physical about her. I saw nothing different in her actions there at the house. She didn't act scared of him. She didn't cry. The only thing that she was asking is when her mommy was coming home because she wasn't used to being away from her mother for so long." (Tr. 467).

*2. The Law on Fed. R. Evid. 801(d)(1)(A) does not require a finding of error on these facts.*

Federal Rule of Evidence 801(d)(1)(A) provides that "[a] statement is not hearsay if ... [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... inconsistent with the

declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding." *United States v. Knox*, 124 F.3d 1360, 1364 (10th Cir. 1997). "Such non-hearsay statements are admissible as substantive evidence." *Id.,* quoting *United States v. Orr,* 864 F.2d 1505, 1509 (10th Cir.1988). Where a "prior inconsistent statement was originally given under oath and the witness was subject to cross-examination concerning the statement, the prior inconsistent statement itself was admissible as substantive evidence under Fed. R. Evid. 801(d)(1)(A)." *United States v. Smith*, 776 F.2d 892, 897 (10th Cir. 1985). Thus, to the extent the prior statements here were truly inconsistent and were properly recorded as being under oath, those statements should have been allowed as substantive proof.

The question is not so clear cut here, however. First, there is some question as to the reliability of the transcript used to impeach B.C. since it was not an official transcript and differed, at least to some degree, from the official transcript. In short, there is some doubt as to whether a proper prior statement was ever introduced against B.C.

Second, as to B.C. and her mother, Ms. Kuswame, the state testimony does not appear to be inconsistent with the testimony offered at trial in any material manner. Even if the testimony of the grandmother – whose view of events changed after Defendant's letter of confession – was plainly inconsistent on some points, the

proposed jury instruction offered by the defense made no effort to identify or limit those truly "inconsistent" statements which might be validly considered as substantive proof. (Vol. I, *Second Supplemental Proposed Instruction*, ROA at 404-405). Allowing the jury to consider the entirety of the transcript excerpts would not be correct under these facts and failing to limit or identity those statements would have only confused the jury.

Finally, none of the statements were exculpatory – the only true use for any of the statements was for impeachment purposes. Under these circumstances, the trial court, despite the usual use of Rule 801(d)(1)(A) to compel testimony from "turncoat" government witnesses[9] and the case law supporting such statements as substantive proof, did not err in giving the instruction limiting the use to impeachment only. This court has held that an erroneous jury instruction will not warrant reversal unless there is "substantial doubt that the jury was fairly guided." *United States v. Sorenson*, 801 F.3d 1217, 1229 (2015).

*3. Any instructional error in limiting the use of the state transcripts to impeachment purposes was harmless.*

"As the Supreme Court confirmed in *Neder v. United States,* the conclusion

[9] *See* 4 Federal Evidence § 8:35 (4th ed.)( "While the ACN and congressional reports make no reference to this situation (speaking only generally about helping parties whose witnesses waffle between pretrial interviews and trial), many pre-Rules cases dealt with turncoat government witnesses.").

that a jury instruction was erroneous does not necessarily end the inquiry. 527 U.S. 1, 7, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)." *United States v. Holly*, 488 F3d 1298, 1304 (10th Cir. 2007)(Even "an instructional error on an element of the offense is generally subject to harmless error review"). "A constitutional error is harmless and may be disregarded if "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id*. at 1307, quoting *Neder,* 527 U.S. at 15.[10] The burden of proving harmless error rests with the government. *Id*. "Harmless errors are not reversible." *United States v. Benvie*, 18 F.4th 665, 670 (2021), citing *Neder v. United States*, 527 U.S. at 7.

This Court has not hesitated to find harmless error in the Rule 801(d)(1)(A) context where a trial court erroneously limited the admission or use of prior inconsistent testimony as substantive evidence. In *United States v. Plum*, 558 F.2d 568 (10th Cir. 1977), this Court held, when a trial court limited the jury's use of prior testimony about stolen silver bars to impeachment, such error was harmless. As here, the use of the prior testimony seemed to be for impeachment purposes and any substantive value was difficult to discern:

> [W]e are not convinced that there was any real

[10] Should this Court determine the alleged error here to be a non-constitutional error, the government would only need to prove harmless error by a preponderance of the evidence. *United States v. Andasola*, 13 F.4th 1011, 1017 (10th Cir. 2021), citing *United States v. Glover*, 413 F.3d 1206, 1210 (10th Cir. 2005) (explaining that for non-constitutional errors, "the government bears the burden of demonstrating, by a preponderance of the evidence, that the substantial rights of the defendant were not affected").

> prejudice to the defendant. The actual benefit which the defendant stood to gain from the portions of the testimony of Rick Young in the preliminary hearing transcript which were read to the jury . . was to damage the credibility of Young, the key Government witness. Such impeachment was clearly allowed by the court's instructions, but apparently was not convincing to the jury. . . . We cannot see that use of the transcript of Young's preliminary hearing testimony as substantive proof would have been of real value.

*Id*., at 575-76.

In *United States v. Smith*, an involuntary manslaughter case arising from an automobile accident, this Court similarly found harmless error when evidence regarding prior inconsistent testimony was excluded. 776 F.2d at 893, 896-98. First, this Court determined the record was unclear as to whether defense counsel intended to use a witness's prior inconsistent testimony as impeachment or to present a substantive version of the accident which would exonerate Mr. Smith. *Id*. at 896-97. After finding the exclusion was error, this Court nonetheless determined the testimony held no substantive value for Mr. Smith as the excluded prior testimony "would neither have corroborated nor refuted the idea that Smith had swerved to the left in order to avoid the oncoming motorcycle." *Id*. at 898.

Similarly, the copious excerpts of state preliminary and state trial testimony of B.C., her mother, and her grandmother held no substantive value for Defendant here. This was not a case where the prior testimony established an ironclad alibi or proved another shooter pulled the trigger or provided an admission that an insider

actually committed a financial crime. Even if the jury had been allowed to consider the prior testimony of the three women as substantive proof, the evidence would not have undermined the guilty verdicts.

Although Defendant seems to suggest the pure quantity of transcript excerpts supports Defendant's argument of prejudice, all of the evidence limited by the challenged jury instruction actually falls into one of six categories. None of these categories of testimony, even if allowed as substantive proof, undermine the guilty verdicts.

1) B.C.'s mother told her to say the Defendant did things to her;

Even if Ms. Kuswane told her daughter to testify against Defendant, which both B.C. and Ms. Kuswane deny, such directions would not prove Defendant did not actually molest B.C. She could have simply told her daughter to be strong on the days she was set to testify in 1997 and they were going to the courthouse for her to testify against her grandfather. Moreover, the language used by B.C. in 1997 was the language of a pre-schooler – not memorized lines from the script of an adult. Even if her mother told her what to say as a child, the jury could reasonably find her testimony as a 28-year-old and the memories she still carries were more compelling and credible.

2) B.C. claimed another man, Bill Gray, molested her

Defense counsel just prior to trial informed the trial judge that "the truth or falsity [of B.C.'s alleged accusation against Bill Gray] is immaterial for our purposes." (Vol. IV, Sealed PreTrial Motions Tr. at 6). Moreover, the two questions about Bill Gray were answered by the four-year-old B.C. with a "Maybe" and an "Uh-huh". (Tr. 235-239). The trial judge noted, "we know how un-huh and huh-uh can be and we all know how unclear that can be." (Vol. IV, Sealed PreTrial Motions, Tr. 7). Such a limited response would not have convinced the jury she had identified the wrong assailant. Additionally, the fact B.C. might have been abused by Bill Gray does not negate the fact that she was also molested by Defendant. This is not the victim of a shooting who misidentified the lone gunman who fired the bullet. Sexual abuse can, sadly, occur repeatedly at the hands of multiple perpetrators.

3) B.C.'s uncle Matt lived in the home and was present

None of the three women claimed B.C.'s Uncle Matt did not live in the home. None of the three women claimed Matt was never at home during the week B.C. stayed with her grandmother and Defendant. Yet, the fact that Matt may have been in the home at times during the week does not prove he was present, day and night, in the same room with Defendant and B.C. In short, Matt living at the house does not eliminate the opportunity for Defendant to have found another room in the house – whether Matt was home or not – where Defendant could molest B.C. There was

no claim Matt was ever in Defendant's truck where B.C. testified Defendant made her touch his naked penis.

4) B.C. spent one night at her father's house

Even if Defendant did spend one night at her father's house, such substantive proof does not eliminate Defendant's access to B.C. during the other days and nights while her mother was in Mexico.

5) B.C.'s mother was hostile to the Defendant

The jury certainly heard testimony Ms. Kuswane was "hostile" to Defendant. They also heard testimony Ms. Kuswane had, at least initially, encouraged her mother to date Defendant. (Tr. 445). In fact, she introduced Defendant to her mother. (Id.). Even if she was hostile to Defendant, such hostility does not disprove that Defendant sexually assaulted her daughter.

6) B.C. did not show fear or other behavioral indications of abuse

Finally, any substantive value from Ms. Blackburn's 1997 testimony - when she was still supportive of Defendant and believed his denial of the charges – is severely undercut by observations of B.C.'s changing behavior by her mother, Ms. Kuswane. Ms. Blackburn's descriptions of B.C.'s nightmares mirrored the descriptions of those nightmares in the federal trial, differing only as to the time of their onset. Yet, even if she did not observe behavioral changes, others may have. Or, B.C. may have tried to hide any reaction from her grandmother based on

Defendant's threat that, if she found out what Defendant had done, B.C.'s grandmother would not love her anymore.

The ability to give substantive weight to the prior testimony would not have undermined the verdict which was supported by overwhelming evidence. Not surprisingly, B.C.'s testimony in the federal trial was more persuasive, detailed and understandable than her testimony as a preschool-aged child. Ms. Kuswame gave compelling testimony of the "secret" her daughter disclosed upon her return from Mexico. And Ms. Blackburn vividly described the regret she feels at not believing her granddaughter back in 1997 and her testimony at the federal trial supported the allegations made by B.C. Both the mother and the grandmother described a letter written years after the molestation in which Defendant confessed his guilt and claimed "the devil made him do it." Additionally, a pediatrician who reviewed B.C.'s medical records explained why it is not unusual to see an absence of physical findings when a child is subjected to sexual assault. (Tr. 144-148).

In light of all the evidence presented, the jury would not have been swayed from its verdicts even if allowed to consider the prior allegedly-inconsistent state testimony as substantive evidence. An error in restricting the jurors' use of the contested evidence for its impeachment value only was, beyond a reasonable doubt, harmless to the guilty verdicts.

## II. IF THE DISTRICT COURT MISCALCULATED THE TOTAL OFFENSE LEVEL AS 36 INSTEAD OF 35, DEFENDANT HAS FAILED TO SHOW SUCH ERROR WAS PLAIN WHEN THE DISTRICT COURT VARIED ABOVE ANY GUIDELINE RANGE TO IMPOSE A LIFE SENTENCE.

### A. Standard of Review

Defendant admits plain error is the applicable standard of review. (Def. Brf. at 22). Because he did not raise his argument regarding an erroneous guideline computation on Count Three before the district court, appellate review of that argument is limited to plain error. *United States v. Mendiola*, 696 F.3d 1033, 1036 (10th Cir. 2012). As this Court recently explained, the plain error test is difficult for a defendant to satisfy on appeal:

> "Rule 52(b) provides: 'A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.' " *Id*. (quoting Fed. R. Crim. P. 52(b)). Under Rule 52(b)'s plain-error standard, "a defendant must satisfy three threshold requirements" in order "[t]o establish eligibility for plain-error relief." *Id*. "*First*, there must be an error." *Id*. (italics in original). "*Second*, the error must be plain." *Id*. (italics in original). "*Third*, the error must affect 'substantial rights,' which generally means that there must be 'a reasonable probability that, but for the error, the outcome of the proceeding would have been different.' " *Id*. (italics in original) (quoting *Rosales-Mireles v. United States*, ––– U.S. ––––, 138 S. Ct. 1897, 1904–05, 201 L.Ed.2d 376 (2018)). "If those three requirements are met, an appellate court may grant relief if it concludes that the error had a serious effect on the fairness, integrity or public reputation of judicial proceedings." *Id*. (quotation marks omitted).
> A defendant "has the burden of establishing entitlement to relief for plain error." *Id*. (quotation marks omitted). "That means that the defendant has the burden of establishing

> each of the four requirements for plain-error relief." *Id*. "Satisfying all four prongs of the plain-error test is difficult." *Id*. (quotation marks omitted).

*United States v. Benally*, 19 F.4th 1250, 1256 (10th Cir. 2021).

**B. Discussion**

While not admitting error, the government asserts Defendant has not demonstrated that any alleged error is plain error because he cannot show any mistake in calculating the guideline for Count Three which affected his substantial rights or had a serious effect on the fairness, integrity, or public reputation of judicial proceedings.

"An error only affects substantial rights when it is prejudicial, meaning that there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." *United States v. Chatburn*, 505 Fed.Appx. 713, 717 (10th Cir. 2012), quoting *United States v. Penn,* 601 F.3d 1007, 1012 (10th Cir. 2010). In *Chatburn*, this Court determined, "[n]othing indicates that the result of the proceeding would have been different." *Id*. Here, by Defendant's own assessment, the guideline would have changed by only one offense level – from a total offense level 36 to a level 35. (Def. Brf. at 29). The resulting guideline would only have changed from 210-262 months to 188-125 months. (Def. Brf. at 30).

While it is obviously preferable to have a properly calculated guideline range, this is rare case where any such failure had no impact on the sentence imposed. Here,

the trial court varied upward to a life sentence (which even under Defendant's argument would still be appropriate for Counts One and Two). (Def. Brf. at 24, n. 11). Defendant complains the trial court relied on a "scripted sentence" at the end of the sentencing to justify the life sentence imposed. (Def. Brf. at 31-33). Yet, in this case, the trial court drafted a very long, case-specific statement of reasons for the sentence imposed:

> The Court considered the case of *Gall vs US*, 552 U.S. 38, 128 S.Ct. 586 (2007), in which the Supreme Court noted that a District Court should begin all sentencing proceedings by correctly calculating the applicable guideline range. The Court did that in this case. The guidelines should be a starting point and the initial benchmark. The guidelines, however, are not the only consideration. After giving both parties an opportunity to argue for whatever sentence they deem appropriate, the Court should then consider all of the factors of 18 U.S.C. §3553(a) to determine whether they support the sentence requested by either party. In doing so, the Court may not presume the guideline range is reasonable but must make an individualized assessment based upon the facts presented. If the Court determines that an outside the guidelines sentence is warranted, the Court must then consider the extent of the deviation and ensure the justification is sufficiently compelling to support the degree of the variance.
>
> In establishing an appropriate sentence in this case, the Court took into consideration the totality of the nature and circumstances of the instant offense, as well as the characteristics and criminal history of the defendant, including his prior criminal history. The Court considered the combination of the 3553(a) factors, as well as the advisory nature of the applicable guidelines.
>
> The nature and circumstances of these offenses are very serious. Despite having been convicted of sexually

abusing two minor boys and being imprisoned for those offenses, less than six years after his release, the Defendant repeatedly victimized his wife's four-year-old granddaughter, which formed the basis of the instant offenses in this case. The Defendant did so by digitally penetrating her vagina, sodomizing her, and having her touch his penis all for Defendant's own sexual gratification. The victim viewed Defendant as a grandfather figure. Nevertheless, the Defendant violated the victim's trust and the victim's body, abusing her over a multi-day period. Defendant threatened the victim by telling her that if she disclosed the abuse to her grandmother, her grandmother would be mad at her and he would go to jail.

The Defendant imparted unimaginable pain and suffering on the victim. Her family testified at the trial that, after the abuse by Defendant, she went from a happy, loving child to a "destructive, angry and defiant" child. Over the years, the victim has suffered from intense nightmares and self-harm. The victim has also had to seek counseling to cope with the trauma of the events. When she testified in this case, even 24 years later as an adult, the pain, hurt, and trauma was still very apparent to this Court.

The Court specifically considered the Defendant's history and characteristics. The Defendant has exhibited a pattern of perpetrating sexual abuse against minor children. In his first convictions for sexual offenses, the Defendant sexually abused two small boys, ages 5 and 8, on two separate occasions. The Defendant bribed each of the boys to allow him to sexually abuse them by paying them money. He served approximately two years of his five-year term of imprisonment imposed in that matter. The Defendant has demonstrated a repetitive sexual predation of young children. His criminal sexual acts progressed from one-time events with young residents of an apartment complex where he was employed in maintenance, to repeatedly abusing his wife's young granddaughter who was temporarily staying in the Defendant's home, while under the Defendant's care. The

Court found by a preponderance of the evidence that the Defendant is a child sexual predator with a high risk of recidivism.

Further, as demonstrated by the Presentence Report and the extensive information the Defendant requested to be included in the Report, the Defendant has a substantial concern for himself and does not indicate any real sense of remorse for his actions or concern for any of his victims whatsoever.

In fashioning a sentence, the Court should avoid unwarranted sentence disparities among similarly situated defendants. Section 3553(a)(6) requires a district court to consider disparities nationwide among defendants with similar records and Guideline calculations. However, disparate sentences are allowed where the disparity is explicable by the facts on the record. Here, the Defendant's guideline range does not reflect the severity of the conduct or the Defendant's status as a repeat and dangerous child sex offender. Since Defendant's offense in 1996, the Sentencing Guidelines have been revised. Under the current guidelines, Defendant would receive a 5-level enhancement pursuant to USSG §4B1.5(b)(2) as a repeat and dangerous sex offender against minor children, rendering his base offense level 41 with a guideline range of imprisonment from 360 months to life. The Defendant is in fact a repeat and dangerous sex offender against minor children.

The Court also noted that after an Oklahoma jury heard the facts and circumstances of this case, it was compelled to render a verdict against the Defendant which included two 500-year terms of imprisonment and a term of life without parole. The Court was mindful of the U.S. Supreme Court's decision which held that the State of Oklahoma did not have jurisdiction to prosecute the Defendant. Accordingly, the Court observed that the underlying jury verdict in state court did not bind this Court's sentencing decision. And the Court noted that it did not look to that jury verdict to determine an appropriate sentence in this case. With that said, the Court observed that the jury verdict was indicative of the severity

> of the Defendant's conduct and did shed some light on the sentence disparity issue, as least as far as an Oklahoma jury was concerned.
>
> Finally, the Court considered the types of sentences available. Based on the nature of the instant offenses and Defendant's history and characteristics, the Court was convinced there was not a sentence within the guideline range that could be fashioned to protect the public from this Defendant. While the United States Sentencing Guidelines provide for an advisory guideline imprisonment range of 210 to 262 months, Federal Statutes provide for imprisonment of any term of years up to life. 18 U.S.C. § 2241(c).
>
> For the reasons articulated, and to reflect the seriousness of this offense, promote respect for the law, provide just punishment for the offense, and protect the public from further crimes of this Defendant by ensuring that no other child is victimized for the sexual gratification of this Defendant, the Court found that an upward variance was warranted in this case. A sentence greater than the imprisonment range identified by the advisory guideline calculations was reasonable and sufficient, but not greater than necessary to comply with the sentencing objectives set forth in 18 U.S.C. §3553(a). An upward variance in this matter adequately reflects the seriousness of the offense, provides just punishment, affords deterrence to further criminal conduct, and protects the public from further crimes of this Defendant. Therefore, the Government's Motion was granted in part. The Court further noted the Defendant is a three-time convicted child abuser, and the Court was compelled to pose the question: At what point does the Court stand between this Defendant and any other child who might come into contact with him were he to be released to the public? At what point, if not now? This Court in good conscience could not subject another child to the Defendant's predatory ways.

(Vol. II, *Statement of Reasons*, Sealed ROA at 67-68). Nothing in this exhaustive statement of reasons indicates a one-level decrease in the total offense level would

sway or undermine the sentencing court's belief that only a life sentence is warranted in this case. This is one of those "rare" and "exceptional" cases where any procedural error in calculating the guideline range is overcome by the "thorough" and "cogent" explanation given by the district court for its above-guide sentence. See, *United States v. Burris*, 29 F.4th 1232, 1238-39 (10th Cir. 2022), quoting *United States v. Gieswein*, 887 F.3d 1054, 1061,1063 (10th Cir. 2018).

Where the alleged error did not impact the sentence imposed, concerns of fairness, integrity and reputation are not logically implicated. The unique history of this case necessitated causing this victim to face her abuser again - through no fault of her own. Here, the integrity and reputation of the legal system would be damaged only if this Court were to reverse or remand to correct a technical error which would have no impact on the life sentences this Defendant so richly deserves.

## CONCLUSION

Based upon the foregoing arguments and authorities, the United States urges this Court to affirm Defendant's conviction and sentence.

## STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully suggests that oral argument would materially aid this Court in the resolution of this case given the factual intricacies of the case.

Respectfully submitted,

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## CERTIFICATE OF WORD COUNT COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to MS Word 2016, this brief contains 9,174 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

*/s/Linda A. Epperley*

## CERTIFICATE OF DIGITAL SUBMISSION

I certify that:

- all required privacy redactions have been made;

- that with the exception of those redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the Clerk;

-that the ECF submission was scanned for viruses using McAfee Endpoint Security 10.5.3.3178, updated continuously, and according to the program is free of viruses.

*/s/Linda A. Epperley*

## CERTIFICATE OF ECF FILING & DELIVERY

I hereby certify that on May 25, 2022, I electronically transmitted the attached documents to the Clerk of Court using the CM/ECF System for filing. A Notice of Electronic Filing will be sent via the Court's CM/ECF filing system to counsel for Defendant/Appellant:

Josh Lee josh.lee@fd.org

*/s/Linda A. Epperley*