IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

USCA No. 23-1295

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

IAN TODD GOOD LEFT,

Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION
HONORABLE DANIEL M. TRAYNOR
UNITED STATES DISTRICT COURT JUDGE

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The district court abused its discretion by implementing a substantial upward sentencing departure pursuant to USSG § 4A1.3 without considering or explaining why intermediate criminal history categories were inadequate and without considering whether Ian was represented by counsel during the proceedings leading to his tribal convictions.

Mr. Ian Good Left argued in his initial brief that the district court committed significant procedural error by rotely adding probation's suggested six points to his criminal history score without exercising discretion to consider a lesser departure. SH, 5-7, 14-21. Relatedly, Ian argued that significant procedural error occurred because the court departed from the initial guideline range without considering that there was no evidence that Ian was represented by counsel during any of the tribal proceedings or that due process was followed during those proceedings. SH, 5-7, 14-21. These factors, along with others, are noted in the guidelines as factors that a court may consider prior to upwardly departing based on tribal convictions. USSG § 4A1.3, comment. (n.2(C)(i)). Contrary to the guidelines, the district court here exercised no true discretion and merely rotely applied probation's calculations as to how the tribal convictions would have been scored in an imaginary scenario where tribal convictions are automatically treated equally to nontribal convictions.

a. This Court should reject the government's invitation to review the issue as plain error.

The government argues that "[p]lain error review arguably applies" because Ian's argument "challenging how the district court facilitated the upward departure was not presented to the district court." Appellee's Br., p. 8. However, the record shows that Ian's counsel repeatedly objected to an upward departure based on Ian's tribal convictions and specifically objected to the lack of consideration given to the lack of evidence that Ian was represented by counsel or that due process was followed during the tribal court proceedings. PSR, pp. 23-24; R. Doc. 30, at 2, 5-6; SH, p. 4-6.

Ian reached a plea agreement with the government with an expected offense level of 21, expected criminal history category of IV, and an expected guideline range of 57 to 71 months in prison. R. Doc. 23, at 2, 9; PH, p. 7. The government also agreed to recommend a sentence at the low end of the guideline range, being 57 months. R. Doc. 23, at 9; R. Doc. 32, at 1. Thereafter, the probation officer opined that a departure based on a purported inadequate criminal history category could be warranted pursuant to USSG § 4A1.3 due to Ian's uncounted tribal convictions. PSR ¶¶ 93-95. From this point forward, Ian's trial counsel repeatedly objected to any departure based on tribal convictions.

Trial counsel informed probation that the defense objected to any departure based upon tribal convictions "not simply because they occurred in tribal court." USSG § 4A1.3; PSR, p. 23. Counsel also objected due to the age and the relatively

minor nature of the tribal convictions. USSG § 4A1.3; PSR, p. 23. Counsel objected to "the application of this departure." USSG § 4A1.3; PSR, p. 23.

The probation officer's response was to not change the PSR; USSG § 4A1.3. PSR, p. 24. Additionally, the probation officer wrote that had the tribal convictions been scored as nontribal convictions, Ian's criminal history category would move from IV to a VI, and the guidelines range would move from a range of 57 to 71 months to 77 to 96 months. USSG § 4A1.3; PSR, p. 24.

Defense counsel's response was to object "to the application of U.S.S.G. § 4A1.3" in Ian's sentencing memorandum. R. Doc. 30, at 2.[1] Indeed, counsel's objection was noted in an entire subsection of the sentencing memorandum. R. Doc. 30, at 5-6. Counsel's objection included a citation to factors a court should consider as reflected in USSG § 4A1.3, comment. (n.2(C)). R. Doc. 30, at 5. At this point, counsel's objection put the court on notice that the court should consider these factors and that Ian objected to any failure to do so. Counsel asserted that the PSR contains insufficient information to conclude that Ian received the assistance of counsel and adequate due process protections during the tribal court proceedings, and this "should weigh against applying this departure." R. Doc. 30, at 6. In other words, counsel put the court on notice that it must weigh the USSG § 4A1.3, comment.

[1] As was noted in Ian's initial brief, counsel mistakenly cited to Application Note 3(C) rather than Application Note 2(C), and the briefs presume the objection was in fact based on Application Note 2(C).

(n.2(C)) factors and that the defense was objecting to an upward departure because the record did not demonstrate that the tribal court proceedings met some of the factors. Moreover, counsel noted that the factors also required the court to consider whether the tribal convictions would otherwise be counted had they been nontribal convictions. USSG § 4A1.3, comment. (n.2(C)); R. Doc. 30, at 6. In this regard, counsel noted that certain tribal convictions were too old and not serious enough to be counted. R. Doc. 30, at 6. Counsel concluded the objections by stating that "Mr. Good Left's Criminal History Category calculations fairly reflects his criminal history, and a departure has not been requested and is not appropriate." R. Doc. 30, at 6. Again, this put the court on notice that the guidelines require more than simply ascertaining what tribal convictions would score if they had been nontribal convictions and that all of the USSG § 4A1.3, comment. (n.2(C)) factors should be considered.

Ian's counsel continued these objections at the sentencing hearing. SH, p. 4. Counsel specifically informed the court that it had filed an objection in Ian's sentencing memorandum to probation's proposed departure. SH, p. 4. The probation officer said that she had nothing to add and referred the court to the addendum to the PSR which addressed its reasons supporting a potential upward departure. SH, p. 4. The government stated that it was not asking for a departure. SH, p. 5. The court recognized that the defense "objected to paragraph 93," wherein "Section 4A1.3 [was]

applied to provide a departure." SH, p. 6. Without discussing the USSG § 4A1.3, comment. (n.2(C)) factors apart from how the tribal convictions would be scored if they were nontribal convictions, the court overruled the objections from the defense. SH, p. 7. After sentencing Ian, the court asked counsel if there was "[a]nything else." SH, p. 21. Counsel replied, "No, Your Honor. Just to reiterate for the record the objections that we made previously." SH, p. 21. The court stated that the "objections are noted for the record." SH, p. 21. Thus, counsel clearly reiterated the objections *previously* made, which included the objections that the USSG § 4A1.3, comment. (n.2(C)) factors should be considered.

Despite counsel's repeated objections, the government argues that Ian's arguments should be reviewed as plain error because they purportedly were not specifically raised in the district court. Appellee's Br., pp. 8-10. This Court should reject this invitation. As detailed above, Ian's counsel objected in the PSR, in Ian's sentencing memorandum, and at Ian's sentencing hearing to the upward departure based on tribal convictions. Ian's sentencing memorandum made it clear that the defense was objecting in part because probation did not adequately weigh the USSG § 4A1.3, comment. (n.2(C)) factors, including whether Ian was represented by counsel during the tribal court proceedings and whether those proceedings afforded Ian adequate due process protections. R. Doc. 30, at 5-6. These objections were renewed at Ian's sentencing hearing. SH, pp. 4, 21. These objections adequately put the district

court and the prosecution on notice of the grounds on which Ian meant to object. *See United States v. Sorrells*, 432 F.3d 836, 838-39 (8th Cir. 2005) (holding that factual objections that were confusingly intermingled with other objections were sufficient to put the government and the court on notice of his objections where they were made in writing before the sentencing hearing and reiterated at the sentencing hearing); *See also United States v. Boyce*, 507 F.3d 1101, 1101-02 (8th Cir. 2007) (same); *United States v. Litson*, No. 22-3013, 2023 WL 3410591, at *1-3 (8th Cir. May 12, 2023) (per curium) (unpublished) (plain error review not applicable because government was put on adequate notice of the facts it had to prove at sentencing by defendant's objections denying more than one sexual assault occurred both to probation and at the sentencing hearing).

b. Assuming, *arguendo*, that plain error review applies, Ian should nevertheless prevail.

But even assuming, *arguendo*, this Court deems the objections insufficient and plain error review applicable, this Court should grant relief under plain error review. *See United States v. Lovelace*, 565 F.3d 1080, 1087 (8th Cir. 2009) (setting out standard for plain error review). Under this standard, the Court will reverse if it finds (1) an error, (2) the error is plain, (3) the error affected the defendant's substantial rights (i.e., it was prejudicial), and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Id.* To show a substantial rights infringement, a

defendant must show a reasonable probability that the sentence would have been lesser but for the error. *United States v. Vargas*, 421 F.3d 681, 683 (8th Cir. 2005).

Here, the parties agreed that a sentence substantially less than the one imposed by the court was adequate. The sole basis for the court's upward departure was factoring in Ian's tribal convictions. Had the court considered that tribal convictions often are not obtained while the defendant is represented by counsel and with other due process concerns, the court likely would not have given them the same value as nontribal convictions and there is a substantial probability that, but for the error, it would have imposed a less severe sentence upon Ian. Such being the case, the error seriously affects the fairness, integrity or public reputation of sentencing hearings. *See United States v. Ryder*, 414 F.3d 908, 920 (8th Cir. 2005) (finding that the fairness, integrity, or public reputation of judicial proceedings was seriously affected when the district court wrongly believed it could not consider 18 U.S.C. § 3553(a) factors while sentencing the defendant); *United States v. Betterton*, 417 F.3d 826, 833 (8th Cir. 2005) (finding that the fairness, integrity, or public reputation of judicial proceedings was seriously affected when the refusal to resentence a defendant would result in him serving a longer prison sentence). Thus, plain error has been established.

c. This Court should reject the government's argument that Ian's claim of error is meritless.

On the merits, the government argues that the upward departure here is permissible because it "departed only two criminal history categories" as opposed to the four and five category upward departures at issue in *United States v. Sullivan*, 853 F.3d 475 (8th Cir. 2017) (per curiam) and *United States v. Azure*, 536 F.3d 922 (8th Cir. 2008). Appellee's Br., pp. 19-20. However, just because the upward departures in *Sullivan* and *Azure* were more severe does not mean that a district court has *carte blanche* to not abide by proper sentencing procedure. Implicit in the government's argument here is that this Court should affirm sentences regardless of any procedural error whenever the upward departure at issue is less than four categories. This position lacks both common sense and legal authority. *Sullivan* and *Azure* are not limited to upward departures of four or more categories, and the government points to no case that limits procedural error reversals to departures of four or more criminal history categories.

Here, the government agreed that a 57-month sentence, being the lower end of the expected guideline range of 57 to 71 months in prison, was appropriate and did not ask for an upward departure. R. Doc. 23, at 2, 9; PH, p. 7; SH, pp. 5, 7-8. The upward departure resulted in a guideline range of 77 to 96 months. USSG § 4A1.3; PSR, p. 24. The sentence imposed was 90 months in prison. R. Doc. 34. Thus, the upward departure resulted in a guideline range that enabled the court to sentence Ian

to 19 months more in prison than the maximum under the initial guideline range. Even a single unwarranted day in prison is significant to the person serving that sentence. *CF Robinson v. California*, 370 U.S. 660, 667 (1962) (Observing, "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."). Contrary to the government's argument, the upward departure here was meaningful and significant.

The government points to *United States v. Jackson*, 740 F. App'x 856, 858 (8th Cir. 2018) (per curiam) (unpublished) for the proposition that the case at bar is distinguishable from *Sullivan* and *Azure* because those two cases involved uncharged or irrelevant conduct as opposed to tribal court convictions. Appellee's Br., p. 20. But Ian's argument is not that a court can never rely on tribal court convictions as a basis for an upward departure. Nor does Ian argue that *Sullivan* and *Azure* involved tribal court convictions. Rather, Ian's point is that the district court erred by not considering the USSG § 4A1.3, comment. (n.2(C)) factors and rotely applying probation's calculations regarding an upward departure. The alleged improper disregard of pertinent factors was not at issue in *Jackson*. For the same reason, *United States v. Harlan*, 368 F.3d 870 (8th Cir. 2004), another case cited by the government, is likewise distinguishable. Appellee's Br., p. 21. Indeed, both of these cases preceded the effective date of the USSG § 4A1.3, comment. (n.2(C)) factors. *See* Appellant's Br., p. 14.

Ian argued in his initial brief that "it is notable that the district court did not explain why an intermediate criminal history category was not appropriate because it in fact did not consider an intermediate criminal history category; rather, it just rotely moved Ian from criminal history category IV to VI by applying probation's calculations." Appellant's Br., p. 18. In other words, the fact that the court did not discuss the pertinent factors is evidence that the court in fact did not consider those factors. The government tries to recharacterize Ian's argument by claiming that the argument that the district court rotely adopted probation's calculations is "[i]n essence . . . arguing the district court failed to adequately explain its analysis." Appellee's Br., p. 22. This simply is not true. Ian's counsel made specific reference to the USSG § 4A1.3, comment. (n.2(C)) factors and objected to the upward departure on the basis that there was no evidence that the tribal court proceedings complied with due process or that Ian was represented by counsel. Ian's counsel noted that the calculation of how the tribal convictions would have scored was just one of the USSG § 4A1.3, comment. (n.2(C)) factors to consider. There was no evidence before the court that Ian was represented by counsel during the tribal court proceedings or that those proceedings otherwise complied with due process.

The government incorrectly asserts that Ian ignores certain comments made by the district court. Appellee's Br., p. 23. The government notes that the district court considered Ian's criminal history and history of violent behaviors. Appellee's Br., pp.

23-24. According to the government, "These statements by the district court adequately explain its upward departure." Appellee's Br., p. 24. Essentially, it is the government's position that it was not error for the court to upwardly depart based on tribal convictions, even if the court disregarded other USSG § 4A1.3, comment. (n.2(C)) factors. It is the government's position that it is proper for a court to consider tribal convictions to the same extent it considers nontribal convictions despite objections concerning the proceedings underlying the tribal convictions. Ian maintains that the USSG § 4A1.3, comment. (n.2(C)) factors are pertinent factors to consider where, as here, an objection was made concerning the lack of consideration of those factors. The fact of the matter is the reason for the upward departure was Ian's tribal convictions, and Ian's position is that the court abused its discretion by upwardly departing based on tribal convictions because it rotely scored Ian's tribal convictions as if they were nontribal convictions without considering pertinent factors. Ian's criminal history and history of violent behaviors have nothing to do with this point.

The cases cited by the government that it claims support its position that the district court's explanation of Ian's background support the upward departure are inapposite. Neither *Jackson*, 740 F. App'x at 858, *United States v. Shillingstad*, 632 F.3d 1031, 1038 (8th Cir. 2011), nor *United States v. Walking Eagle*, 553 F.3d 654, 657 (8th Cir. 2009) involved alleged misapplication of the USSG § 4A1.3, comment. (n.2(C)) factors.

The government also argues that the district court did not have to consider the complained of USSG § 4A1.3, comment. (n.2(C)) factors. Appellee's Br., p. 26. According to the government, there was no error because the USSG § 4A1.3, comment. (n.2(C)) factors are not required to be considered but "may" be considered. Appellee's Br., p. 26. However, none of the guidelines are mandatory. *United States v. Williams*, 41 F.4th 979, 986 (8th Cir. 2022). Thus, even where the guidelines use directory words such as "shall," they are advisory. *Id.* Moreover, as was argued in Ian's opening brief, the list was implemented to provide "appropriate guidance and a more structured analytical framework under §4A1.3." USSG App. C. Sup., Amend. 805 (2018). Appellant's Br., pp. 15-16. Ian's initial brief discussed that the sentencing commission wished to provide appropriate guidance in part because defendants in tribal court are oftentimes either underrepresented or represented by a lay advocate, and the differences in rights make it difficult for a federal court to determine how to weigh tribal court convictions. Appellant's Br., pp. 15-16.

The government would like this Court to essentially hold that the USSG § 4A1.3, comment. (n.2(C)) factors were merely added by the sentencing commission for no apparent reason. Ian maintains that the that the USSG § 4A1.3, comment. (n.2(C)) factors were included in the guidelines for good reason, and that a court cannot simply disregard those factors. Where, as here, a party objects to an upward departure based on tribal convictions due to one or more of the USSG § 4A1.3,

comment. (n.2(C)) factors, it is not reasonable for a court to disregard the objection. This is particularly true as the applicable guideline is applicable if *reliable* information indicates the defendant's criminal history category substantially underrepresents the defendant's criminal history. USSG § 4A1.3(a)(1). Whether the tribal court proceedings that led to Ian's tribal court convictions stemmed from proceedings with due process concerns or lack of representation by counsel is something that certainly impacts the reliability of the tribal convictions.

Additionally, the application note asserts that in determining whether to upwardly depart based on tribal convictions, the court may consider "relevant factors such as the following." USSG § 4A1.3, comment. (n.2(C)). Thus, the sentencing commission concluded that the listed factors are "relevant" to an upward departure. Here, the district court relied on only one of the relevant factors (the tribal court convictions are for offenses that otherwise would be counted) as calculated by probation. USSG § 4A1.3, comment. (n.2(C)(vi)). The court did not address the other relevant factors raised by defense counsel (whether the defendant was represented by a lawyer and received other due process protections). USSG § 4A1.3, comment. (n.2(C)(i)). The district court erred by rotely considering one relevant factor while failing to consider other relevant factors despite the objection by defense counsel.

Finally, the government argues "there is nothing in the record to show the district court failed to consider the objections." Appellee Br., p. 27. Ian does not

doubt that the court was aware of Ian's objections. SH, p. 4. However, this fact does not mean that the court gave meaningful consideration to the objections. When the district court ruled on the objections, it specifically referenced to counsel's other objections, such as the age and less serious nature of some of the tribal convictions. SH, p. 6. These objections were noted in the PSR. PSR, p. 23. Although counsel made it clear that the objections were set forth in Ian's sentencing memorandum, the court did not mention the objection to failure to consider various USSG § 4A1.3, comment. (n.2(C)) factors contained in the memorandum. R. Doc. 30, at 2, 5-6. This indicates that the court did not give due consideration to these objections. Moreover, had the district court truly considered counsel's objections regarding the lack of proof that various USSG § 4A1.3, comment. (n.2(C)) factors had been established, the court would have addressed the issue. The court would have explained why the lack of evidence of representation by counsel and lack or proof of due process compliance did not impact its decision to treat the tribal convictions as if they were nontribal convictions. It did not. The fact that the court did not address counsel's objection and discussed only the factors cutting against Ian (certain offenses would otherwise be counted) but not the factors in favor of Ian (no evidence of representation by counsel or compliance with due process) is evidence that the court rotely accepted probation's scoring of Ian's tribal convictions as nontribal convictions and upwardly departed in accord with that calculation.

II. The court's significant, *sua sponte* upward departure resulted in a substantively unreasonable sentence.

For the reasons detailed in Argument I, the court committed procedural error when it departed from the guideline criminal history category IV calculation and sentenced him under criminal history category VI. But even if the court did not commit procedural error, given Ian's background and the nature of the tribal convictions, it was substantively unreasonable to sentence Ian to 90 months of prison.

The government minimizes Ian's claim by arguing that it is "simply a disagreement over the weight the district court afforded the different 3553(a) factors." Appellee Br., p. 31. However, a sentence is substantively unreasonable if a district court considers appropriate factors but commits a clear error of judgment in weighing them. *United States v. Smith*, 39 F.4th 1012, 1017 (8th Cir. 2022). Thus, the weight a district court affords the various factors is properly subject to this Court's review.

Where, as here, the court departs outside the recommended range of the guidelines, it must state the reasons for the imposed sentence. *United States v. Outlaw*, 720 F.3d 990, 993 (8th Cir. 2013). Here, the sole stated reason for the departure was Ian's criminal history being underrepresented due to his tribal convictions not being counted into his criminal history score. SH, pp. 5-7 Without this departure, the maximum category IV criminal history sentence for an offense level of 21 is 71 months, being 19 months less than the imposed 90-month sentence. USSG § 5A (Sentencing Table). As the court's sentence was based on the departure and was not

based on a variance, the issue is whether the court abused its discretion by imposing such a severe sentence in light of Ian's tribal convictions. It did.

The three scored tribal convictions considered to enhance Ian's sentence do not justify the unnecessarily harsh sentence. The court imposed a sentence 19 months above the maximum guideline sentence for a category IV criminal history and 33 months above the 57-month sentence requested by the government. It did so based on three tribal convictions scored by probation of which probation did not detail the facts and which had an aggregate sentence of less than nine months. In assessing the substantive reasonableness of the sentence imposed, this Court should "take into account the totality of the circumstances, including the extent of any [departure or variance] from the Guidelines range." *Gall v. United States*, 552 U.S. 38, 51 (2007). Under the facts of this case, such a severe sentence and drastic departure from both the initial guideline range and the recommendations of the parties constituted a clear error of judgment by the court after weighing the tribal convictions.

CONCLUSION

The district committed a procedural error, and imposed a substantively unreasonable sentence. For each of these independent reasons, the Court should remand Mr. Good Left's case for resentencing.

Dated this 14th day of July, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of July, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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/s/ Darren E. Miller
Darren E. Miller, Assistant Federal Public Defender
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CERTIFICATE OF COMPLIANCE

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Dated this 14th day of July, 2023.

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