No. 11-3636

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT GRIFFITHS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(Honorable Susan D. Wigenton)

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

JOSEPH F. WAYLAND
Acting Assistant Attorney General

SCOTT D. HAMMOND
Deputy Assistant Attorney General

HELEN CHRISTODOULOU
ELIZABETH PREWITT
Attorneys
U.S. Department of Justice
Antitrust Division
26 Federal Plaza, Room 3630
New York, NY 10278

JOHN J. POWERS III
JOHN P. FONTE
FINNUALA K. TESSIER
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW
Room 3224
Washington, DC 20530-0001
(202) 514-2435

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES AND RULES

MISCELLANEOUS

STATEMENT OF JURISDICTION

The district court's jurisdiction rested on 18 U.S.C. § 3231. This Court's jurisdiction rests on 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF ISSUE PRESENTED

Whether the district court imposed a procedurally correct and substantively reasonable sentence when it correctly calculated the advisory guideline range, granted the government's request for a downward departure based on substantial assistance, and imposed a sentence in the middle of the new guideline range after considering the 18 U.S.C. § 3553(a) factors.

STATEMENT OF RELATED CASES

This case has not previously been before this Court.

This appeal is from one (No. 09-CR-506, *United States v. Robert Griffiths*) of several cases brought in the United States District Court for the District of New Jersey that resulted from the United States Department of Justice's investigation into bid-rigging, fraud, and kickback schemes involving the environmental clean-up of two Superfund Sites in New Jersey: Federal Creosote in Manville, and Diamond Alkali in Newark.[1] Sevenson Environmental Services, Inc. ("Sevenson") was hired as the prime contractor by both the United States Environmental

[1] A "Superfund Site" is an abandoned area where hazardous waste is located that can possibly affect local ecosystems or people. Presentence Report ("PSR") ¶ 44.

Protection Agency ("EPA") to perform the clean-up at Federal Creosote, and by Tierra Solutions, Inc. ("Tierra"), whom the EPA had designated as the financially responsible party for remediation at Diamond Alkali, to perform the clean-up at that site. PSR ¶¶ 44-45, 49-50.

As developed more fully below, the instant appeal involves only kickbacks associated with the Federal Creosote remediation, and does not involve any crime committed at Diamond Alkali. In addition to the instant case, the government's investigation resulted in the following related prosecutions:[2]

- No. 08-CR-521, *United States v. Norman Stoerr*. Stoerr pled guilty to conspiring to rig bids and allocate contracts at Federal Creosote and Diamond Alkali, to participating in a kickback and fraud conspiracy at Federal Creosote and Diamond Alkali, and to aiding in the preparation of a fraudulent income tax return. On May 23, 2011, the court sentenced Stoerr to 60-months' probation that included 8 months' home confinement, a $25,000 fine, and to pay a total of $391,228.18 in restitution: $134,098.96 to the EPA for Federal Creosote, and $257,129.22 to Tierra for Diamond Alkali. Pursuant to 18 U.S.C. § 3664(j)(1), Sevenson had sought restitution from Stoerr but the court denied Sevenson's request. Sevenson thereafter appealed to this Court, No. 11-2787, and that appeal was submitted for disposition without oral argument on June 21, 2012.

[2] The related cases are discussed in paragraphs 6-34 of the PSR.

- No. 08-CR-522, *United States v. JMJ Environmental, Inc. and John Drimak, Jr*. JMJ and Drimak pled guilty to conspiring to restrain trade by rigging bids and allocating contracts. Drimak additionally pled guilty to participating in a kickback and fraud conspiracy with Sevenson employees Norman Stoerr and Gordon McDonald at Federal Creosote and Diamond Alkali, and filing false income tax returns. On April 6, 2011, the court sentenced Drimak to 18 months' imprisonment and a $30,000 fine. Additionally, the court ordered both Drimak and JMJ jointly and severally to pay a total of $283,241.61 in restitution: $232,129.22 to Tierra for losses it sustained at Diamond Alkali, and $51,049.39 to the EPA for losses it sustained at Federal Creosote.
- No. 09-CR-141, *United States v. National Industrial Supply and Victor Boski*. National Industrial Supply ("NIS") and Boski pled guilty to participating in a kickback and fraud conspiracy with Stoerr and McDonald involving Federal Creosote and Diamond Alkali. On April 26, 2011, the court sentenced Boski to a term of probation and a $25,000 fine, and NIS to a $32,000 fine. It further ordered both Boski and NIS jointly and severally to pay a total of $50,000 in restitution: $25,000 to the EPA for Federal Creosote, and $25,000 to Tierra for Diamond Alkali. Boski and NIS have paid the restitution to the EPA in full.
- No. 08-CR-534, *United States v. Bennett Environmental, Inc*. ("BEI"). BEI pled guilty to conspiring to defraud the EPA at Federal Creosote. On December

15, 2008, the court sentenced BEI to a $1,000,000 fine and to pay the EPA $1,662,000 in restitution. BEI has paid the restitution in full.

- No. 08-CR-912, *United States v. Zul Tejpar*. Tejpar pled guilty to participating in a kickback and fraud conspiracy at Federal Creosote. On March 30, 2011, the court sentenced him to a term of probation, a $15,000 fine, and to pay the EPA $300,000 in restitution. Tejpar has paid the restitution in full.
- No. 09-CR-134, *United States v. Christopher Tranchina*. Tranchina pled guilty to participating in a kickback and fraud conspiracy at Federal Creosote. On July 13, 2009, the court sentenced him to 20 months' imprisonment and to pay the EPA $154,597.28 in restitution.
- No. 09-CR-480, *United States v. Frederick Landgraber*. Landgraber pled guilty to participating in a kickback and fraud conspiracy at Federal Creosote. On October 28, 2009, the court sentenced him to 5 months' imprisonment followed by 5 months' home confinement, a $5,000 fine, and to pay the EPA $35,000 in restitution.
- No. 09-656, *United States v. Gordon McDonald, John Bennett, and James Haas*. (1) Bennett and McDonald are charged with participating in a kickback and fraud conspiracy and with Major Fraud Against the United States (18 U.S.C. § 1031(a)) at Federal Creosote. Bennett is a Canadian national residing in Canada; the United States has instituted proceedings to have him extradited.

(2) Haas and McDonald were charged with participating in a kickback and fraud conspiracy and with Major Fraud Against the United States at Federal Creosote. Haas pled guilty and, on February 23, 2010, the court sentenced him to 33 months' imprisonment, a $30,000 fine, and to pay the EPA $53,049.57 in restitution. (3) McDonald is further charged with conspiring to commit money laundering, conspiring to restrain trade by agreeing to rig bids and allocate contracts, participating in two separate kickback and fraud conspiracies (one with Drimak and Stoerr, and one with Boski and Stoerr), violating the Anti-Kickback Act, tax fraud, and obstruction of justice. McDonald pled not guilty at his arraignment in September 2009, but subsequently indicated his intention to plead guilty. A Change of Plea hearing has been scheduled and adjourned on several occasions due to a medical condition. Currently, McDonald's trial is scheduled to begin on October 1, 2012, although he has expressed an interest in pleading guilty by then.

STATEMENT OF THE CASE

On July 6, 2009, pursuant to a Fed. R. Crim. P. 11(c)(1)(B) plea agreement (A37), defendant-appellant Griffiths pled guilty to a three-count Information (A21) that charged him with conspiring to violate the Anti-Kickback Act and commit mail fraud (18 U.S.C. § 371), conspiring to commit money-laundering (18 U.S.C. § 1956(h)), and obstructing a United States Securities and Exchange Commission

("SEC") investigation (18 U.S.C. § 1512(c)(2)). At a sentencing hearing held on September 6, 2011, the court sentenced Griffiths to 50 months' imprisonment on each count, to be served concurrently, followed by 3 years supervised release, a $15,000 fine, and to pay the EPA $4,644,378.56 in restitution. A9. Judgment was entered on September 14, 2011 (A2), and Griffiths filed a timely notice of appeal on September 27, 2011. A1.[3] Griffiths currently is incarcerated.

STATEMENT OF THE FACTS

I. BACKGROUND

Remediation for the Diamond Alkali site began in 1983, and for Federal Creosote in 1999. The Army Corps of Engineers ("COE"), on behalf of the EPA, oversaw the process at Federal Creosote, while the EPA designated Tierra Solutions as the financially responsible entity for remediation at Diamond Alkali. Both the COE and Tierra hired Sevenson to be their prime contractor. Sevenson, in turn, hired subcontractors that provided the actual goods and services necessary for the clean-up efforts. One of those subcontractors was Bennett Environmental, Inc. ("BEI"), a Canadian corporation that treated and disposed of contaminated

[3] The court ordered Griffith's restitution joint and several with various individuals and companies. A8. On September 27, 2011, the court entered an amended judgment that eliminated those parties that had been erroneously included. A15.

soils. Griffiths, a Canadian citizen, held several sales positions with BEI during the relevant time frame. A21-23; PSR ¶¶ 36, 41, 44-49.[4]

The subcontractors invoiced Sevenson for the goods and services provided, and Sevenson passed those charges on to the EPA at Federal Creosote and to Tierra at Diamond Alkali. The EPA and Tierra reimbursed Sevenson for the invoiced charges plus a fixed fee, typically 4½– 6½ percent of invoiced charges at Federal Creosote. A23-26; PSR ¶¶ 44-51.

Sevenson's employee Gordon McDonald administered the subcontracts at both Superfund Sites. PSR ¶ 39. From as early as 2000, McDonald engaged in a multi-year kickback and fraud scheme at both sites involving subcontractors such as BEI (through Griffiths) who would pay kickbacks to McDonald in return for favorable treatment in the award of subcontracts. A27; PSR ¶¶ 39, 50-51. Each subcontractor engaged in its own conspiracy with McDonald; thus, none of the subcontractors were co-conspirators with each other.

McDonald and Griffiths each owned a shell company that they used in concealing kickback payments. A22; PSR ¶¶ 39, 41. McDonald received

[4] By pleading guilty to the Information, Griffiths admitted the discrete facts alleged in the Information that constitute his crimes. *See United States v. Broce*, 488 U.S. 563, 570 (1989). In addition, Griffiths did not object to the PSR, and the court adopted the PSR without change. Thus, the facts in the PSR are undisputed. *See* Statement of Reasons ¶ IA; Fed. R. Crim. P. 32(i)(3)(A).

kickbacks in the form of cash, payments to his shell company, entertainment, trips, wine, pharmaceuticals, and electronics. A27-28; PSR ¶¶ 59. The amounts of the kickbacks were included in the co-conspirators' invoices to Sevenson, which Sevenson in turn billed to the EPA and Tierra. A27; PSR ¶ 51.

McDonald and Griffiths also engaged in a bid-steering scheme whereby McDonald would provide Griffiths with BEI's competitors' bids prior to BEI submitting its bid, and then assist Griffiths in formulating the winning bid. A28; PSR ¶¶ 54, 60. Under one such contract, BEI charged $498.50 per ton to treat and dispose of soil at a secured facility and $418.50 for disposal at an unsecured facility. McDonald and Griffiths agreed to apportion $13.50 of each of those charged amounts as kickbacks to McDonald. PSR ¶ 55. Additionally, BEI stockpiled over 21,000 tons of treated soil at an unsecured facility but charged the $80 per ton more expensive secured facility rate for that tonnage. A28-29; PSR ¶ 57. Those two fraudulent endeavors resulted in losses to the EPA totaling $826,071.21 for the $13.50 per ton inflation on over 60,000 tons of soil, and $1,680,304 for the $80 per ton overbilling on more than 21,000 tons of soil. PSR ¶ 65. The PSR calculated the total losses to EPA from all of McDonald's and Griffiths' fraudulent schemes to be $4,644,378.56. *Id*.

Additionally, Griffiths and McDonald agreed that Griffiths would share in BEI's kickbacks to McDonald. Thus, between February 5, 2003 and August 28,

2004, McDonald's shell company (located in New Jersey) made seven payments to Griffiths' shell company (located in Canada) totaling $207,616. Griffiths' company performed no work for those payments. A31-33; PSR ¶ 67. Finally, when being interviewed by an SEC lawyer during an insider trading investigation of BEI officers, Griffiths falsely denied having ever received competitors' bid information from McDonald. A34-35; PSR ¶¶ 68-70.

II. SENTENCING

The PSR calculated Griffiths' total offense level as 31, producing a sentencing range of 108 to 135 months. PSR ¶ 104. Griffiths did not file any objections to the PSR (PSR p. 39; A109) or a sentencing memorandum, although he did submit several character references. Pursuant to U.S.S.G. § 5K1.1, the government requested a downward departure for his significant and substantial assistance. At the sentencing hearing, Griffiths did not request a variance. Rather, defense counsel explained that the government's § 5K1.1 request was "the centerpiece, from my perspective, of what is happening today." A109-10. Counsel also explained that the 39 year-old Griffiths was a single parent with primary responsibility for raising his seven-year-old daughter who lived with him in Canada. A111-12.

At the sentencing hearing, the court began by noting that it had sentenced a number of individuals in related cases that had arose from the government's

investigation.[5] The court then addressed the U.S.S.G. § 5K1.1(a) factors, and noted that Griffiths' assistance was "significant and useful," "truthful" and "timely." A115-16. The court therefore concluded that because the § 5K1.1 "requirements have in fact been met," it was "appropriate to depart downward as requested by the Government." A115-16.

The court then turned to an evaluation of the 18 U.S.C. § 3553(a) factors. While it found that some of those factors weighed in Griffiths' favor,[6] it also noted that Griffiths was "involved in a culture that this apparently seemed . . . acceptable," that he was the "point person" for BEI's kickbacks and fraudulent bids, and that his conduct resulted in overcharges to the EPA that were "unconscionable." A117-18. In fact, the court felt strongly that Griffiths' sentence needed "to communicate to the community and others that it is not acceptable, obviously, to engage in activity of this nature." A118.

Noting that Griffiths' offense level was 31, the court then turned to determining "an appropriate level to depart downward." A118. Explaining that it previously had given an 8-level departure in at least one related case, it concluded

---

[5] Prior to Griffiths' sentencing, Judge Wigenton had sentenced Griffiths' supervisor Zul Tejpar, in addition to John Drimak, Victor Boski and Norman Stoerr.

[6] For example, the court noted that Griffiths had "taken on the responsibility of being a single parent," had "no prior criminal history," and that it did not expect Griffiths to commit "any additional criminal activity." A117-18.

that "I do think in this case that an 8-level departure is appropriate. So I will depart downward 8 levels," "I will depart downward 8 levels to a level 23." A118-19.

The court then sentenced Griffiths to a term of 50 months in prison, a sentence near the middle of the new level 23 guidelines range.[7] At the close of the hearing defense counsel asked the court to clarify that it had "granted the Government's motion for an 8-level departure" and did "not deem any 3553 factor to warrant a downward variance from that? I'm not challenging it."[8] A124. The court responded: "that is correct." *Id*.

SUMMARY OF ARGUMENT

1. Griffiths has forfeited all claims of error. At the sentencing hearing, when the court confirmed that Griffiths' 50-month sentence was based on "an 8-level departure" and involved no "downward variance," defense counsel expressly stated "I'm not challenging it." A124. By expressly stating he was not challenging what the court did, Griffiths intentionally abandoned any claim of error in this case. *Puckett v. United States*, 556 U.S. 129, 135 (2009). Even if Griffiths has not forfeited all the arguments he makes in this Court, he failed to raise any objection

[7] The guidelines range for an offense level 23 with Griffiths' Criminal History Category I is 46 to 57 months. U.S.S.G. Sentencing Table.

[8] As previously noted, Griffiths never requested a variance.

to either his sentence or the sentencing procedure during his sentencing hearing. Accordingly, his challenge to his sentence is subject only to plain error review.

2. The court did not err when it sentenced Griffiths. In fact, the court made explicit the exact basis of its sentencing decision. Thus, after finding that the § 5K1.1 factors warranted a downward departure based on Griffiths' substantial assistance, the court expressly stated that it would "depart downward 8 levels to a level 23." A119. Then, based on its thorough analysis of the § 3553(a) factors, the court sentenced Griffiths near the middle of the resulting level 23 range of 46 to 57 months. And at the end of the sentencing hearing the court confirmed that Griffiths 50-month sentence was based "on an 8-level departure" and that the court did "not deem any 3553 factor to warrant a downward variance." A124. Therefore, this case differs dramatically from the cases Griffiths cites, in all of which this Court was left to wonder whether the defendant's sentence resulted from a departure, a variance, or a combination of the two. Thus, although the court did discuss the § 3553 (a) factors before announcing its 8-level departure, the sentencing transcript read as a whole shows that the court committed no error, plain or otherwise.

ARGUMENT

I. EVEN IF GRIFITHS DID NOT INTENTIONALLY RELINQUISH THE ARGUMENTS HE NOW MAKES, HIS APPEAL IS SUBJECT TO PLAIN ERROR REVIEW

Ordinarily, this Court first reviews a sentence to determine if the sentencing court committed procedural error and, if none is found, then for substantive reasonableness. "The abuse-of-discretion standard applies to both our procedural and substantive reasonableness inquiries." *United States v. Tomko*, 562 F.3d 558, 567 (3d Cir. 2009) (*en banc*).

However, whenever "an error is not properly preserved, appellate-court authority to remedy the error . . . is strictly circumscribed" to plain-error review. *Puckett v. United States*, 556 U.S. 129, 134-35 (2009) (citing *United States v. Olano*, 507 U.S. 725 (1993) and Fed. R. Crim. P. 52(b)). This circumscribed "plain-error" review applies to sentencing issues that the defendant failed to raise in the district court.[9] *E.g., United States v. Booker*, 543 U.S. 220, 268 (2005); *United States v. Russell*, 564 F.3d 200, 203 (3d Cir. 2009); *United States v.*

[9] *United States v. Sevilla*, 541 F.3d 226, 230-31(3d Cir. 2008), Br. 15, is irrelevant because the defendant in that case, unlike Griffiths, made "a colorable argument for a lower sentence under 18 U.S.C. § 3553(a)," which the district court in that case failed to address. 541 F.3d at 228. In contrast, Griffiths never raised any claim of error in the district court, and the only points he broached with the court – his substantial assistance and single-parent status – were squarely addressed by the court. *Compare* A109-13 *with* A115-19.

Vazquez-Lebron, 582 F.3d 443, 445 (3d Cir. 2009); *United States v. Watson*, 482 F.3d 269, 274 (3d Cir. 2007).

To establish plain error, an appellant must show (1) that there was an error that was not "'intentionally relinquished or abandoned,'" (2) that the error is "clear or obvious," and (3) that the error affected his "substantial rights." *Puckett*, 556 U.S. at 135 (quoting *Olano*, 507 U.S. at 732-33); *accord United States v. Lessner*, 498 F.3d 185, 192 (3d Cir. 2007). Finally, as this Court has noted, even if it finds plain error, "the decision to correct the error is discretionary [and the Court] should exercise its discretion only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id*. (quoting *United States v. Stevens*, 223 F.3d 239, 242 (3d Cir. 2000)). "Meeting all four prongs" of plain error review "is difficult, 'as it should be.'" *Puckett*, 556 U.S. at 135 (quoting *United States v. Benitez*, 542 U.S. 74, 83 n.9 (2004)).

In this case, at the end of the hearing, defense counsel asked the court to confirm that Griffiths' 50-month sentence was based on "an 8-level departure" and involved no "downward variance." As the court confirmed that understanding, counsel expressly noted: "I'm not challenging it." A124. Thus, counsel did more than simply stay silent when the court explained that it had not varied downward from the Guidelines. Rather, counsel expressly stated that he was not challenging

what the court did. Griffiths thus forfeited any claim of error in this case. *Puckett*, 556 U.S. at 135.

Even if this Court concludes that Griffiths has not forfeited his arguments in this case, any review should be limited to plain error. As noted above, in the district court Griffiths did not object to the PSR which calculated his total offense level at 31 with a sentencing range of 108 to 135 months. PSR ¶¶ 104, 130. Nor did he file a sentencing memorandum. Finally, at the sentencing hearing, Griffiths' counsel did not request a variance and, instead, supported the government's request for a departure based on substantial assistance. A109-10. In fact, in describing the allegedly "heavy price" Mr. Griffiths had already paid for his crime and the extent of his remorse, counsel "ask[ed] the Court to take those factors into consideration in engaging the extent of the departure, if the Court should grant the Government's motion, and also as 3551 [sic] variable factors for sentencing." A112-13. Thus, Griffiths offered no objection at all to his sentence.[10] A124. Under these circumstances, Griffiths' challenge to his sentence can only be reviewed for plain error.

[10] Additionally, Griffiths did not file a Rule 35(a) motion challenging his sentence, even though such motions may be used to challenge technical errors that might require a remand. *See United States v. Miller*, 594 F.3d 172, 182 (3d Cir. 2010).

II. THE COURT DID NOT PROCEDURALLY ERR AND GRIFFITHS' SENTENCE IS SUBTANTIVELY REASONABLE

As Griffiths correctly notes, Br. 22-23, this Court requires sentencing judges to follow a three-step sentencing process ("the *Gunter* process"): first, properly calculate the guidelines range; second, rule on any departure motions and state on the record how such ruling affects the guidelines range; and third, consider and apply the 18 U.S.C. § 3553(a) factors and respond to the parties non-frivolous arguments. *E.g., United States v. Friedman*, 658 F.3d 342, 359 (3d Cir. 2011) (citing *United States v. Gunter*, 462 F.3d 237, 247 (3d Cir. 2006)). The purpose of the *Gunter* process is to ensure that this Court can engage in meaningful review of the reasonableness of a sentence. *Friedman*, 658 F.3d at 361. As the Court has elaborated, "[t]he purpose of this three-step procedure is to create a record of the sentencing proceeding that clearly explains the rationale for the sentence that the district court imposes." *United States v. Swift*, 357 F. App'x 489, 493 (3d Cir. 2009) (citing *United States v. Lychock*, 578 F.3d 214, 218 (3d Cir. 2009)). "The process ensures that the district court explains its sentence in a manner sufficient to allow us to ascertain whether the defendant received a substantively reasonable sentence in a procedurally reasonable manner." *Id.* (citing *United States v. Levinson*, 543 F.3d 190, 197 (3d Cir. 2008)).

In this case, the district court explicitly stated that it was granting an 8-level downward departure for substantial assistance. The court also stated that it did not

find that any of the § 3553(a) factors warranted a variance, and it sentenced Griffiths in the middle of resulting guidelines range. Thus, the court "clearly explain[ed] the rationale" for its sentence, allowing this Court to ascertain whether the defendant received a reasonable sentence. *Lychock*, 578 F.3d at 218. Because the court followed both the letter and the spirit of *Gunter*, it committed no error, plain or otherwise.

A recent case from this Court, *United States v. Azan*, __ F. App'x __, No. 10-2997 (3d Cir. May 16, 2012), is instructive. Azan's guidelines range was 78 to 97 months, and the government filed a § 5Kl.1 motion seeking "a downward departure to 24 to 30 months." Slip op. 3. As this Court noted, "[t]he District Court granted the Government's motion for a downward departure but did not specify how that motion would affect Azan's sentence." *Id*. The sentencing court then went on to consider the § 3553(a) factors and ultimately sentenced Azan to 24 months. *Id*. at 3-4. On appeal, "Azan argue[d] that that sentencing court should have stated specifically which portion of the downward sentencing adjustment was attributed to the requested departure and which was attributable, if any, to the requested variance." *Id*. at 5.

This Court affirmed even though the sentencing court failed to "specify the new Guidelines range before assessing the § 3553(a) factors." Slip op. 6. It explained that Azan's case was "distinguishable" from *United States v. Lofink*, 564

F.3d 232, 239-40 (3d Cir. 2009), relied on by Griffiths, Br. 24, 26, 30, because "once the [sentencing] Court granted the Government's motion, the Court understood the new advisory Sentencing Guidelines range to be 24 to 30 months. In turn, the Court's choice of a sentence at the lowest end of that range was clearly determined by its consideration of the applicable § 3553(a) factors." Slip op. 6.

Griffith's case is even clearer because, prior to announcing its sentence, his sentencing court expressly noted how its departure ruling affected the guidelines range when it stated that "I will depart downward 8 levels to a level 23." A119. Thus, as in *Azan*, the court below fully "understood the new advisory Sentencing Guidelines range to be [46 to 57] months."[11] *Azan*, slip op. 6.

Moreover, the 50 months that Griffiths subsequently received, A120, is near the middle of that sentencing range. Significantly, the court expressly advised Griffiths that it did "not deem any 3553 factor to warrant a downward departure from that [range]." A124. In fact, the court made clear that its sentence "take[s] into consideration all of the things that are involved in the case."[12] A119. Thus, as

[11] As previously noted, an offense level 23 and Griffiths' criminal history carries a sentencing range of 46 to 57 months. *See supra* note 7.

[12] While assessing the § 3553(a) factors, the court expressly told Griffiths: (1) "I've read each letter" Griffiths submitted; (2) "It is very clear that you have taken on the responsibility of being a single parent for your daughter;" (3) "I do understand the remorse that you have exhibited towards the Court [and] the fact that you have cooperated;" and (4) "It does not appear that they'll [sic] be any additional criminal activity on your part." A117-18. But it also told Griffiths that "you were involved

in *Azan*, "the Court's choice of a sentence [near the middle of Griffiths' sentencing] range was clearly determined by its consideration of the applicable § 3553(a) factors."[13] Slip op. 6.

Griffiths wrongly claims that the court erroneously conflated *Gunter* steps 2 and 3. Br. 22-30. As noted above, the court began by addressing the only motion before it, the government's motion for a § 5Kl.l departure based on substantial assistance. After finding that all of the stated § 5K1.1 factors – the usefulness, truthfulness, completeness, reliability, timelines, and extent of Griffiths' assistance – weighed in favor of a departure, the court concluded that "it is appropriate to depart downward as requested by the government." A115-16.

Although the court did then discuss the § 3553(a) factors before announcing how many levels it would depart, *see* A117-18, there is no merit to Griffiths' claim that the court based its departure on the § 3553(a) factors. In fact, when the court announced that it was departing 8 levels, it explained that it had decided that

---

in a culture that this apparently seemed to be something that was acceptable"; that he was "the point person"; and that "charging the Government, the EPA in particular, extra money for kickbacks, it is just unconscionable." A117-18. The court also explained that Griffiths' sentence for "three counts to which you have in fact entered a plea of guilty . . . understanding what the potential exposure is and would be," A119, needed "to communicate to the community and others that it is not acceptable, obviously, to engage in activity of this nature." A118.

[13] Thus, there is no merit to Griffiths' claim that his sentence was "unreasonable as warranted based upon Griffiths unique individual facts and circumstances." Br. 30-35.

Griffiths' assistance was entitled to "the greatest [level] departure" that the court had previously given in related cases.[14] A118. The court elaborated (A118-19):

> I tried to determine what's an appropriate level to depart downward from. And looking at all the other individuals that have been involved, the greatest departure that I've given has been an 8-level departure . . . . so I do think in this case that an 8-level departure is appropriate. So I will depart downward 8 levels.[15]

Thus, while the court most likely mis-spoke when it said "[a]nd so that brings me to the 3553(a) factors, when I try to determine what's the appropriate amount for the Court to depart downward, how far the Court should depart downward," A117, that misstatement does not warrant a remand. When the court's sentencing is viewed in its entirety, it is apparent that its consideration of the § 3553(a) factors was in the context of whether it should vary from the resulting guidelines range. In any event, because Griffiths counsel invited the court to consider the § 3553(a) factors "in engaging the extent of the departure, if

---

[14] Griffiths wrongly claims that the district court "was using the wrong population of cases to make its comparative analysis," Br. 12, when it considered defendants in the other related cases who were not Griffiths' co-conspirators. *See* Br. 9-12. In fact, the court correctly considered Griffiths' sentence in relation to those of "similarly situated individuals." *United States v. Lychock*, 578 F.3d 214, 219 (3d Cir. 2009). In this case, those "similarly situated individuals" included others that engaged in similar fraudulent schemes against the EPA and Tierra with McDonald.

[15] The court was mistaken that its greatest departure in these cases had been 8 levels, as it had granted Tejpar a 10-level departure. Transcript of Sentencing Hearing at 22-23, *United States v. Tejpar*, No. 08-912 (D.N.J. Mar. 30, 2011), ECF No. 12.

the Court should grant the government's motion," A112-13, the district court's decision fully permits this Court to review the sentencing decision for reasonableness. *See United States v. Jackson*, 467 F.3d 834, 842 & n.8 (3d Cir. 2006).

In short, this is not a case in which this Court is being asked to affirm a sentence by "having to infer the District Court's thinking." *Jackson*, 467 F.3d at 840; *see also Azan*, slip op. 6; *Swift*, 357 F. App'x at 493. Rather, the record in this case establishes that Griffiths' sentence was the result of an 8-level departure and involved no variance. Thus, no inference is necessary to conclude that "there was no error at step two" of the sentencing. *Jackson*, 467 F.3d at 840. And even if there was error, "[b]ecause the District Court did in fact touch all the bases required," this Court should nonetheless affirm because there is "nothing to be gained by remanding so that the District Court can articulate that which is already clear." *United States v. King*, 454 F.3d 187, 196 (3d Cir. 2006); *see also Lessner*, 498 F.3d at 192 (Court should exercise discretion to correct error only if error affects the fairness of the proceedings).

None of the cases Griffiths cites, Br. 23-30, requires a different result. In most of them, this Court concluded that, based on the record before it, "we are left to guess how the court arrived at its sentence." *Lofink*, 564 F.3d at 241 (district court failed to rule on departure motion); *accord United States v. Friedman*, 658

F.3d 342, 361 (3d Cir. 2011) ("the record does not contain an explanation of how a Guideline's calculation of [level] 19 or 20 was reached"); *United States v. Fumo*, 655 F.3d 288, 319 (3d Cir. 2011) (Court could not discern whether sentencing court granted a departure or a variance); *United States v. Brown*, 578 F.3d 221, 226 (3d Cir. 2009) (same); *Swift*, 357 F. App'x at 493 (same); *United States v. Carthens*, 427 F. App'x 216, 221-22 (3d Cir. 2011) (sentencing court's conflicting statements made it impossible to understand why 2-level departure for acceptance of responsibility not given). In the remaining cases, the sentencing court made a reversible technical error when applying the guidelines. *See Vazquez-Lebron*, 582 F.3d at 446 (plain error for court to grant a departure but then impose a sentence that was within the original guidelines range); *United States v. Smalley*, 517 F.3d 208, 212 (3d Cir. 2008) (court mistakenly used a 4-level enhancement instead of 3-level; error not harmless). No guess work is required in this case and there was no technical error requiring reversal.

Finally, to the extent Griffiths might be suggesting that he may have received ineffective assistance of counsel, *see* Br. 35-36, "[a] litany of cases in this circuit firmly establish [its] general policy against entertaining ineffective assistance of counsel claims on direct appeal. . . . [Rather,] the better course is for the accused to pursue his objections in an appropriate collateral proceeding, *see*

e.g., 28 U.S.C. § 2255." *United States v. Gambino*, 788 F.2d 938, 950 (3d Cir. 1986).

CONCLUSION

For the above stated reasons this Court should affirm the judgment and sentence of the district court.

Respectfully submitted.

/s/ John P. Fonte

JOSEPH F. WAYLAND
Acting Assistant Attorney General

SCOTT D. HAMMOND
Deputy Assistant Attorney General

JOHN J. POWERS III
JOHN P. FONTE
FINNUALA K. TESSIER
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW
Room 3224
Washington, DC 20530-0001

HELEN CHRISTODOULOU
ELIZABETH PREWITT
Attorneys
U.S. Department of Justice
Antitrust Division

July 11, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 5,461 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point Times New Roman font.

3. This brief complies with Local Appellate Rule 31.1(c) because the text of this electronic brief is identical to the paper copies, and Symantec Endpoint Protection Version 11.0.6300.803 has been run on the file of this electronic brief and no virus was detected.

July 11, 2012

/s/ John P. Fonte
Attorney

CERTIFICATE OF SERVICE

I, John P. Fonte, hereby certify that on July 11, 2012, I electronically filed the foregoing brief for appellee the United States of America with the Clerk of the Court of the United States Court of Appeals for the Third 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.

July 11, 2012

/s/ John P. Fonte
Attorney