No. 08-60755

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MACEO SIMMONS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose defendant's request for oral argument.

TABLE OF CONTENTS

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

SENTENCING GUIDELINES: **PAGE**

MISCELLANEOUS:

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BRIEF FOR THE UNITED STATES AS APPELLEE

This is the second appeal in this case. In the previous appeal, a panel consisting of Judges Barksdale, Benavides, and Owen affirmed Maceo Simmons' conviction but vacated his sentence and remanded the case to the district court for resentencing. 2.R.222-255[1]; *United States* v. *Simmons*, 470 F.3d 1115 (5th Cir.

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[1] The record on appeal contains two unlabeled volumes relating to the proceedings on remand, plus Volumes 2 through 10 from the previous appeal, Fifth Circuit Docket No. 05-60419. To be consistent with the format used by appellant, this brief treats the smaller unlabeled volume as Volume 1 and the larger unlabeled volume as Volume 2. For the unlabeled volumes, this brief uses

(continued...)

2006) (No. 05-60419) (*Simmons I*), cert. denied, 127 S. Ct. 3002 (2007). This second appeal comes to the Court after Simmons' resentencing.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment on August 11, 2008. 2.R.287; Doc. 84. Defendant filed a timely notice of appeal on August 12, 2008. 2.R.289; Doc. 85. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742.

STATEMENT OF THE ISSUE

Whether the district court committed reversible error under a plain-error standard when it resentenced Simmons to life imprisonment.

STATEMENT OF THE CASE

On March 1, 2005, a federal jury found Maceo Simmons guilty of violating 18 U.S.C. 242 by sexually assaulting 19-year-old Syreeta Robinson while on duty as a police officer for the City of Jackson, Mississippi. 2.R.114. The jury further determined that Simmons' offense involved aggravated sexual abuse and resulted in bodily injury to his victim. 2.R.114. The jury acquitted Simmons of a related

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[1](...continued)
the following citation format: The number before the "R." is the volume number and numbers after the "R." are pages in that volume. This brief labels the record in No. 05-60419 as "R(05)." The number before the "R(05)." is the volume number and numbers after the "R(05)." are pages in that volume. "Doc. __" is the number of the entry on the district court docket sheet. "Br. __" indicates the page number of defendant's opening brief.

firearms charge. 2.R.114. The district court sentenced Simmons to 240 months' imprisonment and a five-year term of supervised release, and ordered him to pay an assessment of $100. 2.R.198-203.

Simmons appealed his conviction to this Court and the government appealed his sentence. 2.R.165, 216. On November 21, 2006, this Court upheld Simmons' conviction, vacated his sentence, and remanded the case to the district court for resentencing. 2.R.254; *Simmons I*, 470 F.3d at 1131.

On August 4, 2008, the district court resentenced Simmons to life imprisonment. 2.R.321-322.

STATEMENT OF FACTS

2. Offense Conduct

While he was on duty as a Jackson police officer, Maceo Simmons took 19-year-old Syreeta Robinson into custody, drove her to an isolated wooded area in the middle of the night, and then raped her anally, vaginally, and orally while another officer served as a lookout.

During a traffic stop in September 1999, Simmons arrested Robinson (then age 19), handcuffed her, and placed her in the back of his patrol car. 4.R(05).236-239; 5.R(05).377, 385, 390; 7.R(05).761-762. The arrest was for possession of marijuana. 5.R(05).382. Robinson's boyfriend, Towaski Bell, was also arrested

and placed in the back of Officer Thomas Catchings' patrol car. 5.R(05).386, 511-514.

While Catchings booked Bell at the city jail, Simmons waited outside in his car with Robinson. 4.R(05).251-254; 5.R(05).350, 387; 6.R(05).684-685. When Catchings emerged from the jail, Simmons radioed him and said "[f]ollow me." 4.R(05).262-263; 5.R(05).350, 388.

After driving for awhile, Simmons stopped his car, uncuffed Robinson, and put her in the front seat. 5.R(05).388-389. At first, Robinson thought Simmons was taking her home. 5.R(05).388-389. But when Simmons drove past Robinson's neighborhood without stopping, she became nervous. 5.R(05).390-391.

As he was driving, Simmons asked Robinson: "Have you ever sucked a dick before?" 5.R(05).391. When she said "no," Simmons told her: "Stop lying. You look like a little freak anyway." 5.R(05).391.

Simmons pulled off the road into a dark, wooded area sometime between 2 and 2:30 a.m. It was an isolated area, without any homes, businesses, streetlights, or traffic nearby. 4.R(05).265-269; 5.R(05).283-284, 292-297, 397-403, 490. Catchings backed his car in behind Simmons' vehicle, facing the road in order to act as a lookout and prevent anyone from interfering with Simmons while he had sex with Robinson. 5.R(05).285, 297-301, 357.

Once they were in the dark, wooded location, Simmons began raping Robinson. He unzipped his pants and exposed his penis to her. 5.R(05).403-405. Simmons then grabbed her head, put pressure on her neck, forced his penis into her mouth, and made her perform oral sex on him. 5.R(05).404-405. Robinson started crying. 5.R(05).405. Simmons told Robinson that she "wasn't doing it right," and made her get out of the car. 5.R(05).405. He physically forced her to perform oral sex on him again. 5.R(05).405-406, 442.

Simmons then made Robinson stand up, bent her over the trunk of his patrol car, and forced his penis into her from behind, raping her both anally and vaginally as he pinned her against the vehicle. 5.R(05).405, 407-409, 446, 493-494, 530. Robinson was crying as Simmons raped her. 5.R(05).409. She suffered pain, especially from the anal rape. 5.R(05).408-409, 412.

Robinson testified that the sexual contact with Simmons was against her will. 5.R(05).405-407, 534-535. She explained that she feared for her life during the ordeal, believing that she might be shot so that she would not report what happened. 5.R(05).407-408, 410-411. Simmons was wearing his firearm when he raped her. 5.R(05).301-302, 391, 407, 410. Catchings also was armed. 5.R(05).412.

When Simmons finished raping Robinson, he took her to Catchings and asked him if he wanted "to do it" too. 5.R(05).304-306. Catchings understood

that Simmons was asking him whether he wanted to have sex with Robinson. 5.R(05).308-310, 368. Catchings testified that when Simmons brought Robinson to him, she was sobbing and asking to be taken home. 5.R(05).309-310, 368. Robinson testified that when Simmons offered her to Catchings, she feared that she was about to be raped "all over again." 5.R(05).410.

Catchings declined Simmons' invitation to sexually assault Robinson and instead drove her home. 5.R(05).310, 411-412. On the way there, Catchings warned Robinson not to tell anybody what had occurred or else "something was going to happen." 5.R(05).411. Robinson interpreted Catchings' warning to mean that "they w[ere] going to have [her] killed" if she reported the rape. 5.R(05).411.

2. Simmons' Statements About The Rape

After Robinson reported the rape to authorities, Simmons and Catchings were charged with and tried in state court for sexual battery and conspiracy to commit sexual battery. 2.R.224; *Simmons I*, 470 F.3d at 1119; 5.R(05).424-425. In his state trial testimony, Simmons denied having sex with Robinson. 2.R.224; 470 F.3d at 1119. He and Catchings were acquitted. 2.R.224; 470 F.3d at 1119.

Despite the state court acquittal, the Jackson Police Department fired Simmons because of the incident with Robinson. 2.R(05).11; 6.R(05).603, 607; 7.R(05).727-729, 734-737, 752. Simmons took a job as a police officer in Fort Hood, Texas. 7.R(05).725-726, 741-742.

While at Fort Hood, Simmons told fellow officers about having sex with Robinson. He told one officer that he had had sex with a woman "on the back of his patrol car" while another officer was present, and that he was fired because of the incident. 7.R(05).727-732, 736-737. Simmons referred to the incident as a "[b]ooty call," and appeared to be bragging about it. 7.R(05).730-732. Simmons indicated that he considered the incident "no big deal" and could not understand why he had been fired. 7.R(05).730. While describing the incident to another Fort Hood officer, Simmons called Robinson a "skank" and a "prostitute." 7.R(05).748-754, 757. Simmons later told this officer he might be indicted because of the incident but that "he had a 50/50 chance" of "beating" the charge. 7.R(05).751-752.

3. Federal Trial And Sentencing

Simmons was later indicted on federal charges related to his rape of Robinson. The federal jury found him guilty of violating 18 U.S.C. 242 by committing aggravated sexual assault while acting under color of law. 2.R.114.

After the trial, the probation officer prepared a presentence report for Simmons in which he calculated a total offense level of 43 under the Sentencing

Guidelines.[2] 2.R.246; *Simmons I*, 470 F.3d at 1128. That offense level triggers a Guidelines sentence of life imprisonment. 2.R.246; 470 F.3d at 1128.

At Simmons' sentencing hearing, the government argued that the court should impose the Guidelines sentence of life imprisonment. 10.R(05).18-20. The prosecutor emphasized that Simmons' crime was "unusually heinous," "constituted an outrageous abuse of his power" as a police officer, and thus warranted a life sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, ensure adequate deterrence, and protect the public. 10.R(05).21-22. In response, the court stated that it agreed with the prosecutor about "the egregiousness of the crime." 10.R(05).21.

Also at the hearing, Robinson and her mother made statements to the court indicating that the rape had caused the victim psychological damage. 10.R(05).25-26. Specifically, Robinson's mother told the court Robinson was not able to care for her children as a result of mental problems caused by the rape and that

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[2] The Presentence Report calculated Simmons' Guidelines offense level using the 1998 version of the Guidelines, which was "less punitive than the 2004 version in effect at the time of [the original] sentencing." 2.R.246; *Simmons I*, 470 F.3d at 1128. As the government pointed out to the district court, 2.R.299 & 10.R(05).19, application of the current version of the Guidelines would result in a total offense level of 46 rather than 43. Compare U.S.S.G. § 2A3.1(a) (1998) with U.S.S.G. § 2A3.1(a) (2007). Under either offense level – 43 or 46 – the Guidelines sentence is life imprisonment. See Guidelines Manual Ch. 5, Pt. A.

counseling was "not working." 10.R(05).25. Robinson agreed, and added that she was suffering from "a lot of depression." 10.R(05).26.

During allocution, Simmons did not apologize or express remorse but, instead, suggested that the victim had lied about the rape: "Your Honor, I would like just to say [to Robinson] for her to seek God and maybe one day come to you and tell the truth." 10.R(05).31.

The district court gave Simmons a far more lenient sentence than the Guidelines recommend. The court concluded that the Guidelines offense level should be 41 rather than 43; the court reached that conclusion by sustaining Simmons' objection to the two-level "custody" enhancement under § 2A3.1(b)(3)(A). 10.R(05).33. The court then concluded that the Guidelines sentencing range of 324 to 405 months for offense level 41 was "too harsh" and opted for a sentence of 240 months. 10.R(05).34. When asked to explain the grounds for the sentence, the judge pointed to the defendant's age:

> The court simply feels that a term of imprisonment of 20 years for a man who is 48 years old is a sufficient sentence in this case and serves all of the reasons for incarcerating a person for a long period of time. The court does not feel that a sentence in excess of 20 years would be beneficial either to the victim, to the public or to the defendant himself.
>
> The court believes that a sentence within the guideline range without the departure would, in essence, put this man probably very close if not at the end of his life. And I think that 20 years of imprisonment is enough.

10.R(05).36.

4. First Appeal

Simmons appealed his conviction and the government cross-appealed Simmons' sentence. 2.R.222-223; *Simmons I*, 470 F.3d at 1118. In its cross-appeal, the government argued that the district court erred by refusing to apply the two-level "custody" enhancement under Guidelines § 2A3.1(b)(3)(A). The United States also contended that the sentence of 240 months – 84 months less than the low end of the improperly calculated Guidelines range – was unreasonable under *United States* v. *Booker*, 543 U.S. 220 (2005). 2.R.223; 470 F.3d at 1118. This Court affirmed Simmons' conviction, but vacated his sentence and remanded for resentencing because it concluded that the district court erroneously denied the two-level enhancement under § 2A3.1(b)(3)(A) in calculating the Guidelines range. 2.R.245-254; 470 F.3d at 1127-1131. Because it held that the district court miscalculated the Guidelines range, this Court did not decide whether the 240-month sentence was reasonable. 2.R.251; 470 F.3d at 1130.

Nevertheless, "to assist the district court on remand," this Court explained that a Guidelines policy statement provides that age "*is not ordinarily relevant* in determining whether a sentence should be outside the applicable guideline range [but] may be a reason to [depart downward] when the defendant is *elderly and infirm*." 2.R.251; *Simmons I*, 470 F.3d at 1130 (quoting U.S.S.G. § 5H1.1 (1998)).

This Court found § 5H1.1 "particularly noteworthy" because "it appears the decision to sentence below the Guideline range was based solely on Simmons' age." 2.R.251-252; 470 F.3d at 1130. Although explaining that "consideration of age appears not to be *per se* unreasonable post-*Booker*," this Court cautioned that "a district court's sentencing discretion * * * must be guided by the sentencing considerations stated in 18 U.S.C. 3553(a)." 2.R.253; 470 F.3d at 1131. This Court instructed that "[o]ne such guiding consideration is 'any pertinent policy statement . . . issued by the Sentencing Commission,'" including § 5H1.1. 2.R.253; 470 F.3d at 1131 (citing 18 U.S.C. 3553(a)(5)(A)). The Court then stated that "a district court should acknowledge such a policy statement and explain why the * * * discouraged factor, as it relates to the defendant, is so extraordinary that the policy statement should *not* apply." 2.R.254; 470 F.3d at 1131.

5. Resentencing

Simmons asked the district court to stay resentencing to await the Supreme Court's decision in *Gall* v. *United States*, 128 S. Ct. 586 (2007). 2.R.263-264; Doc. 77. In December 2007, the Supreme Court decided *Gall* and held that appellate courts can no longer require "'extraordinary' circumstances to justify a sentence outside the Guidelines range." *Gall*, 128 S. Ct. at 595. *Gall* also held that "[i]f [a district court] decides that an outside-Guidelines sentence is warranted, [it] must consider the extent of the deviation and ensure that the

justification is sufficiently compelling to support the degree of the variance." *Id.* at 597.

In August 2008, the court held a resentencing hearing. The district court first recalculated the Guidelines offense level as required by this Court's opinion in *Simmons I*. The court increased the offense level from 41 to 43, which calls for life imprisonment under the Guidelines. 2.R.296; Guidelines Manual Ch. 5, Pt. A. The court also noted that this Court's initial opinion "did not rule on" its earlier downward variance, but "certainly addressed it." 2.R.296.

Simmons asked the court to reimpose a 20-year sentence instead of the Guidelines sentence of life imprisonment. 2.R.304. The reduction from life to 20 years is a substantial variance, equivalent to a five- or six-level departure under the Guidelines.

The government argued that the district court should impose the Guidelines sentence of life imprisonment. 2.R.301. It argued that consideration of the Section 3553(a) factors makes "clear that a life sentence in this particular case is appropriate." 2.R.301. Specifically, the prosecutor asserted that a life sentence was appropriate because of "[t]he seriousness of [Simmons'] offense" and because it would "promote respect for the law and provide[] just punishment for the offense," "provide deterrence to other rapists and other law enforcement officials who would abuse their authority in such a manner," and "protect[] the public from

further crimes of this defendant who is a convicted sex offender." 2.R.301. The government reminded the district court that the Guidelines are "not binding." 2.R.299. It also noted that the district court is still required under *Gall* to "consider the extent of the deviation [from the Guidelines range] and ensure that the justification is sufficiently compelling to support the degree of variance." 2.R.299. It noted further that, under *Gall*, "a major departure should be supported by a major justification." 2.R.300. The defendant's age was not, the government argued, a sufficiently compelling justification and so did not support the substantial variance Simmons requested. 2.R.300. Instead, the government contended, the defendant's age is thoroughly unremarkable; "[h]e's a middle-aged man with no history of health problems that are related to age." 2.R.300.

Simmons' attorney responded that, under *Gall* and recent Fifth Circuit case law, the district court need not find that defendant's age is "extraordinary" in order to consider it as a basis for a variance. 2.R.301-303. Counsel went on to claim that the district court no longer needed to "have some good reasons for ignoring [the Guidelines'] policy statement." 2.R.303. The defense then told the district judge that "if you sent the exact same sentencing transcript [to this Court] that you sent the first time, this time it would be affirmed under the new law." 2.R.306. Counsel also urged the court to justify a 20-year sentence by tying "the age factor to the specific factor under 3553 of failure to recidivate." 2.R.307.

In its rebuttal argument, the government acknowledged that, under *Gall*, "the court is no longer required to find extraordinary circumstances for any departure or any variance." 2.R.312. But the prosecutor also pointed out that *Gall* had "not * * * held that the court has free [rein] at this point to ignore the guidelines and to ignore the 3553 factors." 2.R.312.

The court then heard from the victim and the defendant. The victim, Robinson, said that what Simmons did to her will "never leave" her and that she is "going to have to think about [the rape] every day of [her] life." 2.R.313. Simmons then read a lengthy statement that discussed the hardship of prison life, his religious conversion, and his good behavior while in prison. 2.R.315-318. He did not apologize to the victim or express remorse for her suffering. Later, after the court pronounced its sentence, Simmons claimed he was "innocent" and urged someone to talk to Robinson and get her to tell the truth. 2.R.324-325.

The district court decided that Simmons "should be resentenced * * * to a sentence of life imprisonment within the guideline range." 2.R.321. The court explained that in choosing the sentence it had considered the presentence report, the government's recommendation, the statements of the victim and defendant, and the Section 3553(a) factors. 2.R.321. Referring to the first sentencing, the court found "at that time and at this time [it] has no reason to recommend a variance from the Guidelines except based on age." 2.R.321. It stated further that

it "has no reason to grant a variance other than what has already been expressed." 2.R.322. The court inferred from this Court's opinion in *Simmons I* "that age alone is not a sufficient reason to vary." 2.R.322. The court also found that Simmons, who was 53 at the time of resentencing, was neither elderly nor infirm. 2.R.323.

The judge said he "disagree[s] with the Guidelines" and that he "still holds the opinion that a life sentence is a sentence that is unnecessarily harsh." 2.R.321-322. But he also noted several arguments in favor of a life sentence. 2.R.321-322. The court explained that Simmons violated his position of trust as a police officer "in a way that leaves a permanent scar on a young woman that will be there for the rest of her life." 2.R.322. "Obviously," the court emphasized, "there is no excuse for this crime or this type of crime." 2.R.322. Further discussing the impact on the victim, the court said "that Ms. Robinson has suffered with this matter daily since its occurrence in 1999." 2.R.321.

After the district court imposed the sentence, defense counsel made a general objection. She stated that "for purposes of the record, I believe that I'm required now to make an objection as to the reasonableness of the sentence; and I so make that objection." 2.R.322. She provided no further explanation of the basis for her objection.

SUMMARY OF ARGUMENT

This Court should affirm Simmons' life sentence. Because Simmons failed to properly preserve the specific objections he now seeks to raise on appeal, this Court must review his sentence under a plain-error standard. Simmons has not met his heavy burden of proving, under that deferential standard, that the district court committed reversible error in sentencing him.

A. Simmons has not demonstrated any error, much less error that is clear or obvious. The record refutes Simmons' claim that the district court thought it was compelled to sentence him to life imprisonment. The district court never stated that it was compelled to impose a life sentence but, instead, correctly noted that this Court's initial opinion "did not rule on" the variance issue. 2.R.251, 296; *Simmons I*, 470 F.3d at 1130.

Simmons makes three arguments in support of his contention that the court did not properly understand its sentencing discretion. Each of his arguments is meritless.

1. First, Simmons argues that the district court incorrectly believed that it could grant a variance only if it found "extraordinary circumstances," a standard that the Supreme Court rejected in *Gall*. In fact, the court's resentencing decision did not depend in any way on the "extraordinary circumstances" standard. The court waited until *Gall* was decided to hold the resentencing hearing, and both

parties advised it that *Gall* overruled the "extraordinary circumstances" requirement. The court never said or indicated that it was required to find extraordinary circumstances in order to vary from the Guidelines.

2. Second, Simmons criticizes the district court's statement that "age alone is not a sufficient reason to vary." Br. 19; 2.R.322. But that statement is legally correct. Section 3553(a) and cases interpreting it make clear that a characteristic of the defendant like age can only be considered as it relates to a purpose of sentencing defined in Section 3553(a). In a particular case, the defendant's age may profoundly impact the risk of recidivism or directly bear on some other statutory purpose of sentencing in a way that justifies a variance. But "age alone" – that is, age unconnected to a sentencing goal under Section 3553(a) – cannot. *Simmons I* conveyed this rule, and the district court's resentencing was consistent with this Court's instructions. The district court chose not to follow defense counsel's suggestion that it link consideration of age to recidivism. Instead the court said explicitly that it had nothing to add to its earlier – "age alone" – justification for the variance.

3. Third, despite Simmons' contrary contention, a judge's own disagreement with the Guidelines, untethered to the Section 3553(a) factors, is not a proper basis for a variance. Rather, the variance must be driven by the sentencing court's belief that a non-Guidelines sentence better reflects the goals of

Section 3553(a). Additionally, the court's justification for a non-Guidelines sentence must be "sufficiently compelling" to support the degree of the variance. The judge's personal disagreement with the Guidelines is not a "sufficiently compelling justification" for the substantial variance Simmons asked for. The government emphasized the "sufficiently compelling" requirement at the resentencing hearing. The court decided not to offer any additional justification for a variance, but instead stated it had no reason to vary from the Guidelines other than "age alone."

B. Finally, the sentence should be upheld under the plain-error standard even assuming, for the sake of argument, that the district court erred and that such an error was clear or obvious. The district court's decision to impose a Guidelines sentence – a sentence that is presumptively reasonable under this Court's precedent – does not seriously affect the fairness, integrity or public reputation of judicial proceedings.

ARGUMENT

SIMMONS HAS NOT MET HIS HEAVY BURDEN OF PROVING THAT THE DISTRICT COURT COMMITTED REVERSIBLE ERROR UNDER A PLAIN-ERROR STANDARD WHEN IT RESENTENCED HIM TO LIFE IMPRISONMENT

Simmons incorrectly claims (Br. 4, 11-12, 19) that the district court believed it lacked discretion to vary from the Sentencing Guidelines range. Simmons fails to meet his heavy burden of proving that the court committed reversible error

under the plain-error standard of review. Instead, the record shows that the district court correctly understood its discretion.

A. The Standard Of Review Is Plain Error

Where a defendant properly preserves an objection below, this Court reviews the sentencing decision of a district court for "reasonableness." *United States* v. *Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008). In conducting its reasonableness review, this Court:

> must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range.

Gall v. *United States*, 128 S. Ct. 586, 597 (2007). "Provided that the sentence is procedurally sound, the appellate court then considers the 'substantive reasonableness of the sentence imposed.'" *Cisneros-Gutierrez*, 517 F.3d at 764 (quoting *Gall*, 128 S. Ct. at 597). This Court "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of [a] variance." *Gall*, 128 S. Ct. at 597. "A discretionary sentence imposed within a properly calculated guidelines range is presumptively reasonable." *United States* v. *Campos-Maldonado*, 531 F.3d 337, 338 (5th Cir.), cert. denied, 2008 WL

3996218 (Oct. 6, 2008). In general, the "abuse-of-discretion standard of review now applies to appellate review of sentencing decisions." *Gall*, 128 S. Ct. at 594.

But, "[w]here the defendant has failed to object on specific grounds to the reasonableness of his sentence, thereby denying the court the opportunity to identify and correct any errors," this Court reviews for plain error. *United States* v. *Casper*, 536 F.3d 409, 416 (5th Cir. 2008). "This rule 'serves a critical function by encouraging informed decisionmaking and giving the district court an opportunity to correct errors before they are taken up on appeal.'" *United States* v. *Lopez-Velasquez*, 526 F.3d 804, 806 (5th Cir. 2008) (citation omitted).

Simmons "failed to object on *specific grounds* to the reasonableness of his sentence." See *Casper*, 536 F.3d at 416 (emphasis added). Now, on appeal, Simmons argues his sentence is procedurally unreasonable because the district court thought it lacked discretion to impose a below-Guidelines sentence. Br. 4, 11-12, 19. Simmons objected right after the judge made the statements he now advances as the basis for this argument. But his objection failed to give the judge notice of the claimed error. Indeed, defense counsel presented the objection as a mere formality. She stated, "for purposes of the record, I believe that I'm required now to make an objection as to the reasonableness of the sentence; and I so make that objection." 2.R.322. She provided no additional explanation of the basis for her objection. By making this general objection, instead of explaining the claimed

error, Simmons "den[ied] the [district] court the opportunity to identify and correct any error[]." See *Casper*, 536 F.3d at 416.

At no time during the sentencing hearing – either before or after sentence was pronounced – did defense counsel object on the ground that the district court's statements indicated that it misunderstood its sentencing discretion. Consequently, this Court should review the sentence only for plain error. See *United States* v. *Contreras-Hernandez*, No. 08-10141, 2008 WL 3889973 (5th Cir. Aug. 22, 2008) (unpublished) (holding that the defendant's "general objection to the unreasonableness of his sentence" did *not* preserve his argument "that his sentence is unreasonable because the district court [wrongly] considered his arrest record;" upholding the sentence under plain-error review); see also *United States* v. *Alvizo-Trujillo*, 521 F.3d 1015, 1018 (8th Cir. 2008) (concluding that defense counsel's "general statement that the Guidelines range was unreasonably high * * * made before the district court announced the improper presumption [that the Guidelines sentence is reasonable] and the sentence" was insufficient to preserve the issue of procedural unreasonableness on appeal; upholding the sentence under plain-error review); *United States* v. *Romero*, 491 F.3d 1173, 1178 (10th Cir.) ("We therefore conclude that, because Romero did not object on procedural grounds under § 3553(a) or (c) after the district court imposed his sentence, he has

forfeited his right to appeal this issue and our review is only for plain error."), cert. denied, 128 S. Ct. 319 (2007).

When reviewing for plain error, this Court "may correct the sentencing determination only if (1) there is error (and in light of [*United States* v. *Booker*, 543 U.S. 220 (2005)], an 'unreasonable' sentence equates to a finding of error); (2) it is plain; and (3) it affects substantial rights." *Casper*, 536 F.3d at 416 (citations omitted). Simmons "bears the burden of persuasion with respect to this showing." *United States* v. *Molina*, 469 F.3d 408, 411 (5th Cir. 2006). "Additionally, 'the decision to correct the forfeited error [is] within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Casper*, 536 F.3d at 416 (citation omitted).

B. Legal Framework

As a result of the Supreme Court's decision in *Booker*, the Federal Sentencing Guidelines are advisory. Post-*Booker*, "a district court's sentencing discretion * * * must be guided by the sentencing considerations stated in 18 U.S.C. 3553(a)." *Simmons I*, 470 F.3d at 1131. The introductory paragraph of Section 3553(a) provides that a sentencing court "shall impose a sentence sufficient but not greater than necessary, to comply with the purposes" of sentencing defined in the statute. 18 U.S.C. 3553(a); see also *Kimbrough* v.

United States, 128 S. Ct. 558, 570 (2007) (citing 18 U.S.C. 3553(a) and explaining that the "overarching provision" of the statute requires the sentence "to accomplish the goals of sentencing"); *United States* v. *Shortt*, 485 F.3d 243, 248 (4th Cir. 2007) ("A sentence that does not serve the announced purposes of § 3553(a)(2) is unreasonable."). Section 3553(a)(2) defines the "purposes" of sentencing. They are:

> (2) the need for the sentence imposed –
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

18 U.S.C. 3553(a)(2).

"[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range" because "[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall*, 128 S. Ct. at 596. "The fact that § 3553(a) explicitly directs sentencing courts to consider the Guidelines supports the premise that district courts must begin their analysis with the Guidelines and

remain cognizant of them throughout the sentencing process." *Id.* at 597. If the district court "decides that an outside-Guidelines sentence is warranted, [it] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Ibid.* "[A] major departure [from the Guidelines range] should be supported by a more significant justification than a minor one." *Ibid.* "After settling on the appropriate sentence, [the sentencing court] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Ibid.*

C. Simmons Fails To Show That The District Court Erred, Much Less That It Committed Plain Error

In order to prevail on appeal, Simmons must show not only that the district court erred but also that any error was "plain" – that is "'obvious,' 'clear,' or 'so conspicuous that the trial judge and prosecutor were derelict in countenancing [it], even absent the defendant's timely assistance in detecting [it].'" *Casper*, 536 F.3d at 416-417 (citation omitted). He has not met this heavy burden. Indeed, he has not shown that the district court erred at all in resentencing him.

Simmons claims that the district court found "it had no discretion to resentence [him] to a term of anything other than life imprisonment." Br. 4; see also Br. 11-12, 19. He argues that if the court had properly understood its

discretion it would have imposed the same age-based variance it granted at his first sentencing. Br. 19. The claim is not supported by the record.

The district court never stated that it lacked discretion to grant a variance or that it was compelled to sentence Simmons to life imprisonment. Indeed, the court correctly noted that this Court's earlier opinion in *Simmons I* "did not rule on" the variance issue. 2.R.296. Moreover, in imposing the life sentence, the court explained that it had "considered * * * the factors under United States Code Section 3553(a)," 2.R.321, thus suggesting that it exercised its discretion to decide for itself which sentence best satisfied the sentencing goals of Section 3553(a).

In support of its claim that the district court misunderstood its sentencing discretion, Simmons focuses on three points: (1) the Supreme Court's holding that sentencing judges need not find "extraordinary circumstances" in order to impose a non-Guidelines sentence; (2) the district court's statement "that age alone is not a sufficient reason to vary" (2.R.322); and (3) its stated disagreement with the Guidelines and its "opinion that a life sentence * * * is unnecessarily harsh" (2.R.321). None of these factors demonstrates that the district court erred, much less committed plain error, in resentencing Simmons.

*1. The District Court Did **Not** Mistakenly Believe It Was Required To Find "Extraordinary Circumstances" In Order To Vary From The Guidelines*

In *Simmons I*, this Court stated that "a district court should acknowledge [the Guidelines policy statement that age is not ordinarily relevant] and explain why the prohibited or discouraged factor, as it relates to the defendant, is so extraordinary that the policy statement should *not* apply." 2.R.254; 470 F.3d at 1131. After *Simmons I*, the Supreme Court decided *Gall*. It held that courts of appeals may no longer require "'extraordinary' circumstances to justify a sentence outside the Guidelines range." *Gall*, 128 S. Ct. at 595. Simmons argues that the district court improperly relied on the "extraordinary circumstances" standard that *Gall* rejected. Br. 11, 15-20. His argument fails because the district court did not rely on the portion of *Simmons I* that was overruled.

The record lends no support to the claim that the court misunderstood *Gall* and mistakenly believed it was still required to find "extraordinary circumstances" in order to vary from the Guidelines. Instead, the record shows that the court was fully aware of *Gall*'s holding. It delayed resentencing until the Supreme Court decided *Gall*. Docs. 75 & 78; 2.R.259-260, 266. Both parties discussed *Gall* extensively. See Doc. 79 at 4-5; 2.R.270-271, 299-303, 311-312. The government freely acknowledged at the resentencing hearing "that [because of *Gall*] the court is no longer required to find extraordinary circumstances for any

departure or any variance." 2.R.312. Finally, the district court never said or gave any indication that it considered itself bound by the "extraordinary circumstances" requirement.

Simmons' reliance (Br. 18-20) on *United States* v. *Warfield*, 283 Fed. Appx. 234 (5th Cir. 2008) (unpublished), is therefore misplaced. In *Warfield*, the district court sentenced the defendant *before* the Supreme Court decided *Gall*. *Id.* at 235. The court interpreted then-applicable law to prohibit consideration of the defendant's "age, health, family conditions, or role in the offense unless it found those factors 'extraordinary.'" *Ibid.* The district court did not find those factors extraordinary with respect to the defendant and accordingly did not consider them. *Ibid.* But it stated that it would have considered them were it not so constrained. *Ibid.* This Court remanded to allow the district court in *Warfield* to make "an individualized assessment in light of all of the § 3553(a) sentencing factors" without the need "to find that certain factors were extraordinary with respect to the defendant before deviating." *Ibid.*

The relevant difference between *Warfield* and Simmons' case is apparent. The district court in *Warfield* based its decision on the now-overruled "extraordinary circumstances" requirement. The district court in Simmons' case did not.

2. "Age Alone," Without Reference To The Section 3553(a)(2) Purposes Of Sentencing, Cannot Support A Variance

Simmons argues that "the district court erred by finding that it was precluded from considering age as a factor when sentencing Mr. Simmons." Br. 19. In fact, the district court never asserted that it could not *consider* age. To the contrary, the court *did* consider age when it found at the resentencing hearing that Simmons was neither elderly nor infirm. 2.R.323. In making this finding, the district court complied with this Court's instructions to consider a Guidelines policy statement providing that "age * * * is not ordinarily relevant in determining whether a departure is warranted" but may be relevant where a defendant is "elderly and infirm." U.S.S.G. § 5H1.1. See 2.R.251-254; *Simmons I*, 470 F.3d at 1130-1131.

Instead of refusing to consider age, the district court merely said that "age *alone*" does not justify a variance. 2.R.322 (emphasis added). That is a correct statement of law. Although age may permissibly be considered, it can support a variance only if the district court can show how it is relevant under the framework of 18 U.S.C. 3553(a), particularly how it furthers the sentencing goals of Section 3553(a)(2).

In *Simmons I*, this Court confirmed that any consideration of age must be linked to the Section 3553(a) sentencing factors. In remanding for resentencing, this Court stated that "it appears the [district court's] decision to sentence below

the Guideline range was based *solely* on Simmons' age." 2.R.251-252; *Simmons I*, 470 F.3d at 1130 (emphasis added). This Court then looked at post-*Booker* caselaw in other circuits and concluded that "[a]lthough consideration of age appears not to be *per se* unreasonable post-*Booker*, a district court's sentencing discretion, and our reasonableness-inquiry on appeal, *must be guided by the sentencing considerations stated in 18 U.S.C. 3553(a)*." 2.R.253; 470 F.3d at 1131 (emphasis added).

The district court resentenced Simmons in accordance with these instructions. First, it effectively conceded that the initial variance was based on "age alone." 2.R.322. Second, it stated its understanding that "age alone" is insufficient to justify a variance. 2.R.322. Third, it considered the Section 3553(a) factors before deciding that Simmons "should be resentenced * * * to a sentence of life imprisonment." 2.R.321.

The language of Section 3553(a) makes clear that age, like any other personal characteristic of a defendant, must be connected to the statute's sentencing goals in order to justify a variance. The introductory paragraph of the statute states that a sentencing court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)." 18 U.S.C. 3553(a). Section 3553(a)(2) defines the purposes of sentencing. See pp. 22-23, *supra*. The structure of Section 3553(a) thus reveals that "a sentence that

does not serve the announced purposes of § 3553(a)(2) is unreasonable." *Shortt*, 485 F.3d at 249. Accordingly, if a sentencing court wishes to rely on age or another characteristic of the defendant (see 18 U.S.C. 3553(a)(1)) to justify a variance, the court must explain how that characteristic furthers the purposes of sentencing set forth in Section 3553(a)(2).

On this point, the Supreme Court's decision in *Gall* is instructive. The Court reversed the Eighth Circuit's conclusion that consideration of age was improper. *Gall*, 128 S. Ct. at 601. The Court's analysis makes plain, however, that the district court's consideration of the defendant's youth was permissible *because* the sentencing court linked age closely to the issues of culpability, recidivism, and rehabilitation (*ibid.*), which are inherently relevant to the purposes of sentencing under Section 3553(a)(2)(A), (C) & (D). Specifically, the Court concluded that "[g]iven the dramatic contrast between Gall's behavior before he joined the conspiracy and his conduct after withdrawing, it was not unreasonable for the District Judge to view Gall's immaturity at the time of the offense as a mitigating factor, and his later behavior as a sign that he had matured and would not engage in such impetuous and ill-considered conduct in the future." *Ibid.*

In *United States* v. *Carter*, 538 F.3d 784 (7th Cir. 2008), the Seventh Circuit upheld a sentencing court's consideration of age where the court had linked age to the goal of preventing recidivism, a purpose of sentencing under Section

3553(a)(2)(C). The district court in that case determined "that, based on her age and the totality of the circumstances, Ms. Carter [age 61] was unlikely to commit further crimes in the future." *Id.* at 792. The court thus concluded "that this factor counseled in favor of a sentence significantly below an advisory guidelines sentence." *Ibid.*[3] In upholding the variance, the Seventh Circuit held that "a district court may properly consider a defendant's age *as it relates to* the possibility of her committing crimes in the future." *Ibid.* (emphasis added). The court of appeals explained that "[t]he likelihood of recidivism is a proper sentencing consideration" under Section 3553(a)(2). *Ibid.* (citing 18 U.S.C. 3553(a)(2)(C)) ("The court, in determining the particular sentence to be imposed, shall consider . . . the need for the sentence imposed . . . to protect the public from

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[3] The government does not concede that the potential impact of age on recidivism would justify a variance in any particular case, including this one. Indeed, in some circumstances, courts have reasonably concluded that middle-aged violent offenders are more likely to recidivate. See, *e.g.*, *United States* v. *Reed*, 522 F.3d 354, 363-364 (D.C. Cir. 2008) (upholding a district court's sentencing decision that was based in part on the court's concern that because the defendant "committed armed bank robbery when he was almost 40 – an age at which criminal behavior is expected to have waned – recidivism was likely and therefore a significant prison sentence was necessary to protect the public"). In fact, in Simmons' case, the government argued in its sentencing memorandum that the risk of recidivism for sex offenders weighed heavily in favor of a life sentence. See Doc. 79 at 6; 2.R.272 ("It is well documented that sexual offenders have a high recidivism rate.") (citing *Recidivism of Sex Offenders*, United States Department of Justice, Center for Sex Offender Management (2001) (http://www.csom.org/pubs/recidsexof.html)).

further crimes of the defendant."). Thus, while age can be considered "*as it relates to*" the Section 3553(a)(2) purposes of sentencing, (see *ibid.*), age *alone* is not a sufficient reason to impose a variance.

Defense counsel's argument at the resentencing hearing illustrates this distinction. Simmons' attorney asked the court to justify a significant variance by tying "the age factor to the specific factor under 3553 of failure to recidivate." 2.R.307. In effect, defense counsel explained to the district court how it could avoid reliance on "age alone" and, instead, link age to one of the Section 3553(a)(2) purposes of sentencing (see 18 U.S.C. 3553(a)(2)(C)). But the district court did not follow defense counsel's recommendation. Instead, the court said that it had "no reason to grant a variance other than what ha[d] already been expressed" at the first sentencing hearing. 2.R.322. This statement suggests that the court was fully aware of its sentencing discretion. Although the court could not merely rely on its previous reasoning – age alone – to reimpose the variance, it could grant the requested variance if it expanded on that reasoning in a way that shows how age is relevant to the Section 3553(a)(2) purposes of sentencing. Faced with this choice, the court expressly opted *not* to expand on its previous reasoning.

3. Mere Disagreement With The Guidelines Is Not In Itself A Sufficient Reason To Grant A Variance

Simmons contends that a judge's disagreement with the Guidelines is in itself sufficient reason for a variance. Br. 16-17, 19. The argument fails for two reasons. First, it ignores the requirement that variances based on disagreements with the Guidelines must be driven by a sentencing court's independent assessment that a non-Guidelines sentence better reflects the sentencing considerations that Congress set forth in 18 U.S.C. 3553(a). Mere personal disagreement with the Guidelines, untethered to the Section 3553(a) factors, does not suffice. Second, Simmons' argument ignores the requirement under *Gall* that a district court provide a "justification [that] is sufficiently compelling to support the degree of the variance" from the Guidelines range. 128 S. Ct. at 597. The government repeatedly reminded the court of this requirement at the resentencing hearing. See Doc. 79 at 5; 2.R.299-300, 312. Simmons was asking for 20 years where the Guidelines call for life, a substantial variance. The judge's personal disagreement with the Guidelines was not, by itself, a "sufficiently compelling" reason to grant a such a variance.

a. Variances Based On Disagreement With The Guidelines Are Appropriate Only When The Sentencing Court Concludes That The Guidelines Fail Properly To Reflect Section 3553(a) Considerations

Simmons cites the Supreme Court's decision in *Kimbrough*[4] for the proposition that, "as a general matter, 'courts may vary [from the Guidelines range] based solely on policy considerations, *including disagreements with the Guidelines*.'" Br. 16 (citing 128 S. Ct. at 570). The citation is incomplete because it fails to acknowledge the limitation that the Supreme Court and this Court have placed on a district court's discretion to impose a policy-based variance. A district court may not base its variance on just any policy disagreement, but may grant a policy-based variance only upon concluding that "the Guidelines sentence fails properly to reflect § 3553(a) considerations." *Rita* v. *United States*, 127 S. Ct. 2456, 2465 (2007); *Kimbrough*, 128 S. Ct. at 570. Following *Rita* and *Kimbrough*, this Court defined the contours of a district court's discretion to vary from the Guidelines for policy reasons. "[A] sentencing court may vary from the Guidelines based solely on policy considerations, including disagreements with the Guidelines, *if the court feels that the guidelines sentence fails properly to*

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[4] The district court was fully aware of the Supreme Court's opinion in *Kimbrough*. The Supreme Court decided *Kimbrough* on the same day it decided *Gall*, the decision the district court stayed the resentencing hearing to await. Additionally, defense counsel discussed *Kimbrough* at the hearing. 2.R.306-308.

reflect § 3553(a) considerations." *Campos-Maldonado*, 531 F.3d at 339 (citing *Rita* and *Kimbrough*) (emphasis added). Thus, the district judge's statements that he "disagree[s] with the guidelines" and considers the Guidelines sentence "unnecessarily harsh" cannot by themselves justify a variance. 2.R.321-322. Rather, in order to justify a variance for policy reasons the court must conclude that the Guidelines sentence "fails properly to reflect § 3553(a) considerations" and that a variant sentence better reflects those considerations. *Campos-Maldonado*, 531 F.3d at 339.

This requirement is consistent with the mandates of 18 U.S.C. 3553(a), which states that a sentencing "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [18 U.S.C. 3553(a)(2)]," and that "in determining the particular sentence to be imposed, shall consider" the seven categories of factors listed in Section 3553(a)(1)-(7). 18 U.S.C. 3553(a). A sentencing judge fails to satisfy these statutory mandates if he or she imposes a sentence based on a mere policy disagreement with the Guidelines without basing the disagreement on a weighing of the Section 3553(a) factors, particularly the sentencing purposes set forth in Section 3553(a)(2).

Simmons' citation of this Court's decision in *United States* v. *Williams*, 517 F.3d 801 (5th Cir. 2008), does not support his argument. Br. 17. *Williams* presumes that the structure of Section 3553(a) still limits district courts'

sentencing discretion. 517 F.3d at 811. In *Williams*, this Court rejected the defendant's challenge to the district court's above-Guidelines sentence because "[a]ll of the factors about which Williams complains *are permissible factors for consideration under 18 U.S.C. § 3553(a)*." *Ibid.* (emphasis added). Moreover, the Court stated "we cannot say that the district court abused it discretion in concluding that a 172-month sentence was reasonably necessary *to achieve the objectives of 18 U.S.C. § 3553(a)*." *Id.* at 813 (emphasis added). *Williams* is thus fully consistent with *Campos-Maldonado*'s requirement that district courts base variances on their consideration of the Section 3553(a) sentencing factors.

Neither does *United States* v. *Herrera-Garduno*, 519 F.3d 526 (5th Cir. 2008), support Simmons' argument. Br. 17. *Herrera-Garduno*, like *Williams*, is fully consistent with *Campos-Maldonado*. In *Herrera-Garduno*, this Court upheld a non-Guidelines sentence where the district court had justified it by relying on Section 3553(a) factors, including the sentencing goals of Section 3553(a)(2). See 519 F.3d at 530 & n.5. This Court specifically noted that the district court explained the facts that formed the principal basis for its variance "*and their relation to the § 3553(a) factors* in some detail." *Id.* at 531 (emphasis added). This Court's precedent thus presumes that the district court can impose a non-Guidelines sentence only under the framework of Section 3553(a).

The record of Simmons' resentencing hearing does *not* indicate that the district court believed that the Section 3553(a) factors justified a significant variance. The court stated that it had "considered" the Section 3553(a) factors before concluding that Simmons "should be resentenced * * * to a sentence of life imprisonment." 2.R.321. The court then acknowledged that several factors weighed in favor of a Guidelines sentence. It described the seriousness of the offense, stating that Simmons "violated [his position of] trust * * * in a way that leaves a permanent scar on a young woman that will be there for the rest of her life." 2.R.322. The court explained further the terrible effect Simmons' crime had on the victim: "Ms. Robinson has suffered with this matter daily since its occurrence in 1999." 2.R.321. After explaining the extreme seriousness of the offense, the judge said "[a]lthough I disagree with the guidelines, there certainly is an argument as to why they're so harsh." 2.R.322. The court did not say that it believed the Section 3553(a) purposes of sentencing would be better served by a variant sentence. Instead, the district judge merely voiced his own personal disagreement with the Guidelines. That is not enough to justify a variance.

b. The Judge's Mere Disagreement With The Guidelines Was Not A Sufficiently Compelling Reason To Impose The Significant Variance Simmons Requested

If the judge believed the statutory purposes of sentencing were better served by a non-Guidelines sentence, he was required to explain that belief. Likewise, if

he thought that Simmons' age provided a basis for varying because it makes him less likely to recidivate or had some other impact relevant to the sentencing goals of Section 3553(a), he needed to explain that. The Supreme Court requires a district court to provide a "sufficiently compelling" justification for the extent of any variance from the Guidelines. See *Gall*, 128 S. Ct. at 597. Moreover, the district court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Ibid.* The government repeatedly emphasized *Gall*'s "sufficiently compelling" justification requirement. See Doc. 79 at 5; 2.R.299-300, 312. But instead of expanding on its initial reasoning in support of the variant sentence in this case, the district court expressly declined to give any further justification. Indeed, the court specifically stated "that it has no reason to grant a variance other than what has already been expressed." 2.R.322. The district court thus implicitly recognized that, although it disagreed with the Guidelines, it lacked a "sufficiently compelling" justification for granting the substantial variance that Simmons requested.

D. Even Assuming Plain Error, This Court Should Not Vacate Simmons' Within-Guidelines Sentence As It Does Not Seriously Affect The Fairness, Integrity Or Public Reputation Of Judicial Proceedings

Under plain-error review, this Court should not exercise its discretion to correct an error "unless the error seriously affect[s] the fairness, integrity or public

reputation of judicial proceedings." *Casper*, 536 F.3d at 416 (citation omitted). As explained above, Simmons has not shown error, much less plain error. But even assuming that this Court concludes that Simmons has shown that the district court plainly erred in sentencing him to life imprisonment and that such error affected his substantial rights, this Court should not exercise its discretion to correct it. The district court imposed the sentence that the Guidelines recommend. In this Court, a sentence "imposed within a properly calculated guidelines range is presumptively reasonable." *Campos-Maldonado*, 531 F.3d at 338. Especially in light of the depravity of Simmons' offense, the imposition of a presumptively reasonable Guidelines sentence does not "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Casper*, 536 F.3d at 416.

CONCLUSION

The Court should affirm Simmons' sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2008, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE, along with a computer disk containing an electronic version of the brief, were served by Federal Express, overnight delivery, on:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complied with the type-volume limitations of Fed. R. App. P. 32(a)(7)(C). The brief was prepared using WordPerfect 12.0 and contains 8,992 words of proportionally spaced text. The typeface is Times New Roman, 14-point font.

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