No. [redacted]

In the United States Court of Appeals
For the 5th Circuit

John Enrique Doe
Defendant - Appellant

v

United States Of America,
Plaintiff - Appellee

Appeal from the United States District Court
For the Southern District of Texas
Houston Division, Case No. [redacted]

BRIEF OF DEFENDANT-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

United States of America,
Plaintiff-Appellee

vs. Appeal No. [redacted]

John Enrique Doe,
Defendant-Appellant

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

A. *Parties*:

Plaintiff-Appellee:	United States of America
Defendant-Appellant:	John Enrique Doe

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REQUEST FOR ORAL ARGUMENT

The defendant-appellant, John Enrique Doe, respectfully requests oral argument be permitted because this appeal asks the Court to determine important substantive and procedural issues concerning the United States Sentencing Guidelines. Oral discussion of the facts and the applicable precedent would benefit the Court. Fed. R. App. P. 34(a).

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STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1291, as an appeal from a final judgment of conviction and sentence in the United States District Court for the Southern District of Texas, Houston Division, Case No. 4:11-CR-0099-001 and under 18 U.S.C. § 3742, as an appeal of a sentence imposed under the Sentencing Reform Act of 1984. Notice of Appeal was timely filed in accordance with Fed R. App. P. 4(b).

STATEMENT OF THE ISSUES

Issue Number 1: Did the district court adequately explain John Doe's sentence, sufficiently address non-frivolous arguments and explain reasons for rejecting those arguments?

Issue Number 2: Though the court has authority to impose either a consecutive or concurrent sentence, did it fail to recognize its discretionary power and to decide John Doe's sentence using 18 U.S.C § 3553(a) sentencing factors?

Issue Number 3: Are John Doe's consecutive sentences of 360 months for production and 240 months for distribution totaling 600 months imprisonment longer than necessary to satisfy the goals of 18 U.S.C. § 3553(a)?

STATEMENT OF THE CASE

1. Proceedings Below

On February 15, 2011, a Houston Division grand jury for the Southern District of Texas returned a three count indictment of child pornography against John Enrique Doe ("John"). (1R. 31)[1]. The first count was for production of child pornography occurring on or about September 2009 to November 2010 in violation of 18 U.S.C. §§ 2251(a) & (e). (1R. 32, 33). The second count was for distribution of child pornography occurring on or about November 12, 2010 in violation of 18 U.S.C. §§ 2252A(a)(2)(B) and 2252A(b)(1). (1R. 33). The third count was for possession of child pornography occurring on or about January 12, 2011 in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2). (1R. 33, 34).

On May 26, 2011, John appeared before United States District Judge Sim Lake and entered a plea of guilty to Count 1 and Count 2, under a written plea agreement with the United States Attorney's Office. (1R. 150)(PSR ¶2)[2]. In addition to dismissing Count 3, the Government agreed not to oppose the 2 level downward departure, under 3E1.1(a); or an additional one level departure under U.S.S.G. 3E1.1(b), if the requirements under 3E1.1(a) were not met. (1R. 51) (PSR ¶2). On October 20, 2011, the Court found John guilty as to

[1] Record on Appeal
[2] Presentence Investigation Report

Counts 1 and 2 and granted the Government's Motion to Dismiss Count 3. (1R. 113). At sentencing, John received a 30 year term of imprisonment for Count 1 and a 20 year sentence for Count 2 to be served consecutively, lifetime supervised release, $ 100.00 special assessment, and a $10,000.00 fine. Candelario Elizondo withdrew as John's attorney on October 24, 2011. Judgment was entered on October 25, 2011. (1R. 75). Notice of appeal was filed on October 24, 2011. (1R. 73).

2. Statement of Facts

John Enrique Doe is an only-child, born and raised in Mexico by a single mother. His father left the family when John was only 5 years old and he has had only limited contact with him. (PSI 44). During elementary school, John was the victim of bullying and suffered from various behavioral and mental problems including depression which required psychological counseling. (Sentencing Memo, p. 37).[3] From the ages of 8 to 11, John was molested by a classmate after which he was never the same. (Sentencing Memo, p. 38). John moved with his mother to the United States when he was 13 years old, living for a year in Freeport Texas before relocating to Houston. (PSI 47).

[3] Memorandum in Support of Sentencing (Sealed)

As the new kid in school who didn't speak any English, John spent most of his time on the internet in Spanish chat rooms. It was in one of those chat rooms that a sexual predator named, "Lobo Ferez" took advantage of John and his need for a father figure. "Lobo Ferez" convinced John that deviant sexual conduct involving children was normal and even talked Arturo into exposing himself to this man on his web cam. (Sentencing Memo p. 38).

Despite his personal difficulties, John eventually learned English and graduated from high school in 2008. He continued on to take classes at Houston Community College with a 3.4 GPA and planned on attending Texas A & M University in the fall of 2011. (Sentencing Memo p. 40) (PSI 52). To pay for college and support his mother and grandmother, John held two jobs, one at an interior design firm and the other as a waiter /bartender for a catering company. (PSI 53). This was nothing new to John who held jobs all throughout high school. The jobs included work as a truck driver, construction worker, salesman, furniture factory worker, and valet. At the time of the arrest, John was living with this mother. (Sentencing Memo p. 41).

On November 12, 2010 an undercover agent with the FBI logged onto a peer-to-peer (P2P) file-sharing program under the username "not2innocent." The agent caught the user "Palotinto" sharing several files containing hundreds of images of child

pornography. (PSI ¶5)(1R. 5). The IP address used by "Palotinto" belonged to John Doe. On January 12, 2010 as a result of a search warrant executed at John's apartment, the FBI seized numerous hard drives, DVD's and a CD-R containing thousands of images and videos of child pornography.(1R. 6,7) (PSI ¶8).

The FBI interviewed John while conducting the search. John admitted he possessed about 80 gigabytes of child pornography and traded it over the internet. He also admitted that there might be images or videos of him engaging in sex acts with children . (PSI ¶9). The forensic review of the storage devices found 306,000 images and 6000 videos. The FBI says another 200 videos were produced by John with 5 or 6 victims. (PSI ¶12). The total number of images counted under the guidelines is 465,000 [(306,000 + 6,200 videos (75 images per video)].[4]

Both counts are grouped since they overlap each other. (1R. 20). *See*, U.S.S.G. § 3D1.2(c). The offense level for both counts of conviction is the combined count resulting in the highest offense level

[4] John claims the number of videos and images counted by the government is highly exaggerated because the government counted backup copies of the same videos and images as separate ones. (Sentencing Memo p. 41). The number of images counted is higher than anything reported in this or any other jurisdiction. It seems almost certain that the government miscalculated the actual number of images by counting backup copies on the different storage devices as separate images. A forensic computer consultant may have been helpful to challenge the government's image total. Although a lower number of images would not have made much of a difference in John's point total under the Guidelines, it probably does not reflect well at sentencing.

that being Count 1. (PSI ¶20). For Count 1, production of child pornography, the base offense level is 32 (PSI ¶2). Four points are added for an offense involving a minor under the age of 7 years (PSI ¶23); add 2 points for sexual contact (PSI ¶24); add 2 points for distribution (PSI ¶25); add 4 points for depictions of bondage (PSI ¶26); add 2 points because John's mother was the caretaker of the victims (PSI ¶27); 0 points for victim related adjustments and the total offense level is 46. (PSI ¶30). Then add 5 points for chapter four enhancements for an adjusted offense level of 51 (PSI ¶31); less 3 points for acceptance of responsibility for a total offense level of 48. (PSI ¶33). However, the highest offense level under the guidelines is 43 so that is the total offense level. (PSI ¶34). The criminal history point total is 0 as John has no prior arrests or convictions for anything. (PSI 37).

Based on a total offense level of 43 and a criminal history category I, the guideline range for imprisonment is life, found in Zone D of the Sentencing Table, USSG Chapter 5, Part A. Under U.S.S.G § 5G1.1(a), the guidelines sentence becomes the statutory maximum of 360 months under Count 1 and 240 months for Count 2, to run consecutively for a grand total of 600 months imprisonment. (PSI ¶57). The guideline imprisonment range would have been the same even if John had been convicted on all three counts of the indictment. (PSI 59).

SUMMARY OF THE ARGUMENT

A district court is required to explain its' reasons for imposing a particular sentence to a defendant. To satisfy this requirement the court must provide sufficient detail of its rationale, address any non-frivolous defense or prosecution arguments and state why it is rejecting them. The level of detail required is determined on a case-by-case basis. The District Court's explanation for imposing a sentence of 50 years imprisonment was too sparse considering how long the sentence is. The Court also failed to adequately address John's non-frivolous arguments or adequately explain why it was rejecting them since it simply stated that it was rejecting them and gave no reasons for doing so.

If read alone, U.S.S.G. § 5G1.2(d) seems to require a district court to impose a consecutive rather than concurrent sentence. But according to 18 U.S.C. § 3584(a), multiple terms of imprisonment must run concurrently unless the court orders them to run consecutively. Furthermore, 18 U.S.C. §3584(b) requires a court to consider § 3553(a) sentencing factors when deciding whether to impose consecutive or concurrent sentences. Here, the District Court mistakenly assumes that its discretion is severely limited by § 5G2.1(d) and imposes consecutive sentences on John Doe. Moreover, it failed to recognize that multiple terms of imprisonment should run

concurrently and that when ordering consecutive sentences, it is still necessary to balance § 3553(a) factors.

Ordering a consecutive rather than concurrent sentence requires an analysis for reasonableness under § 3553(a). Thus, it must be "sufficient , but not greater than necessary" to satisfy the requirements of §3553(a)(2). John Doe's consecutive sentences for a total of 600 months imprisonment is "greater that necessary" to promote the sentencing goals of §3553(a), and therefore, unreasonable because John has no prior criminal history, he was only 22 at the time of the offenses, and he had a troubled childhood, among other things relevant to this sentence.

STANDARD OF REVIEW

In *United States v. Booker*, 543 U.S. 220, 260-62 (2005), the Supreme Court declared the Guidelines to be advisory and directed appellate courts to review for "reasonableness" in light of the factors set forth in 18 U.S.C. § 3553(a). All sentences are reviewed under an abuse of discretion standard. *Gall v. United States*, 128 S.Ct. 586, 594 (2007). In performing this review, we "first ensure that the district court committed no significant procedural error" and "then consider the substantive reasonableness of the sentence imposed. . . ." *Id.* The district court's interpretation and application of the Sentencing Guidelines is reviewed de novo. *Unites States v. Ramirez*, 267 F.3d 274 276-77(5th Cir. 2004). The Court's review is for plain error where, as here, there is no objection. To show plain error, John must show clear or obvious error affecting his substantial rights that seriously affects the fairness, integrity or public reputation of the legal system. *Puckett v. United States*, 129 S.Ct 1423, 1428 (2009).

ARGUMENT

Issue Number 1 Restated: Did the district court adequately explain John Doe's sentence, sufficiently address non-frivolous arguments or explain its' reasons for rejecting those arguments?

John's within guideline's sentence should be reversed for procedural error because the district court failed to provide an adequate explanation for it, address John's non-frivolous arguments or explain its' reasons for rejecting those arguments. Under 18 U.S.C. § 3553(c) the sentencing court "shall state in open court the reasons for its imposition of a particular sentence." In *Rita v. United States*, the Supreme Court noted the importance of § 3553(c)'s requirement and observed that "[t]he sentencing judge should set forth enough to satisfy the appellate court that it has considered the parties' arguments and has a reasoned basis for exercising his own legal decision making authority." *United States v. Sanchez*, 667 F.3d 555, 567 (5th Cir. 2012) quoting *Rita v. United States*, 551 U.S. 338, 356 (2001). Whether a lengthy explanation of the sentence is necessary should be determined on a case-by-case basis. The Court stated:

> "Where a defendant or prosecutor presents non-frivolous reasons as for imposing a different sentence, however, the judge will normally go further and explain why he has rejected those arguments. Sometimes the circumstances will call for a brief explanation; sometimes they will call for a lengthier explanation. Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so."

Id., *Sanchez*, 663 F.3d at 567, quoting *Rita* at 551 U.S. at 356 - 357.

Even though a sentence is within the Guidelines, a district court commits procedural error under *Rita* when it fails to adequately explain its sentencing decision as required by § 3553(c). *Id*., *Sanchez* citing *United States v. Mondragon-Santiago,* 564 F.3d 357 (5th Cir. 2009) and *United States v. Tisdale,* 264 Fed. Appx. 403 (5th Cir. 2008)*(unpublished)*. "While sentences within the Guidelines require little explanation, more is required if the parties present legitimate reasons to depart from the Guidelines." *Id*. , *Sanchez* quoting *Mondragon-Santiago,* 564 F.3d at 362. The 5th Circuit held that the Court's meager explanation of the sentence required a reversal because:

> '"The total explanation of the court was as follows: This is an Offense Level 21, Criminal History Category Level 21, Criminal History Category 3 Case with guideline provisions of. . . 46 to 57 months. The defendant is committed to the Bureau of Prisons for a term of 50 months. He will be on supervised release for a term of three years . . . "'

Id. quoting *Mondragon-Santiago*, 564 F.3d at 364. 'The district court's explanation in *Tisdale* was similarly sparse in that it, "gave no indication it had considered [the parties] § 3553(a) arguments or any of the § 3553(a) factors. Instead it merely restated the guidelines range and imposed a within-guidelines sentence for both defendants. "'. *Id, Sanchez* quoting *Tisdale,* 264 Fed.Appx. at 412.

Like *Mondragon-Santiago* and *Tisdale*, the district court in John Doe's case inadequately explained its sentencing decision. Here, the district court states that he adopted the PSI report and addendum and a criminal history category of 1. (1R. 153). John' counsel presented several non-frivolous arguments and objections to his sentence. They include the following: that paragraph 10, alleging that John's mother was the victim's sitter is pure speculation; that John did not produce 200 videos as alleged in paragraph 12; none of the videos John produced depicted sadistic or masochistic conduct or violence as alleged in paragraph 13; that the 2 levels added in paragraph 24 for sexual contact are already counted in the base offense level of 32; that the 2 level adjustment in paragraph 25 does not apply since there is no evidence the produced videos were distributed and the base offense level already accounts for distribution under U.S.S.G. § 2G2.1; John was not the caretaker of the children as stated in paragraph 27; the produced videos did not portray sadistic or masochistic conduct or depictions of violence alleged in paragraph 26. (*See*, Objections to the Presentence Report) (Sealed). Furthermore, John, through his attorney, filed a sentence memorandum where he argues for a downward departure or variance under § 3553(a) and argues the child pornography guidelines are not based on empirical data, and are therefore, unreasonable. (*See,* Memorandum in Support of Sentencing)(Sealed).

The explanation given by the district court is that , "Your attorney has filed objections to a number of paragraphs to the report. The objections to Paragraph 10, 12, 13 24, 27 and 26 are denied. The objection to Paragraph 77 is really not an objection, but a request for a variance." (1R. 152). The reason the district court gives for rejecting any variance under U.S.C. § 3553(a) is, "because of the aggravated nature of this case." (1R. 172). However, the district court completely fails to directly address any of the arguments or objections asserted by John in the above mentioned "Objections to Sentence Report" and "Memorandum in Support of Sentencing."

The Court goes on to perform an analysis of its authority to impose John's sentences either consecutively or concurrently. The Court explains that:

> "U.S.S.G. § 5G1.2(d) states that if the sentence imposed on the count carrying the highest statutory maximum is less that the total punishment then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law."(1R. 172).

The court concludes this to mean that since the highest statutory maximum is 360 months and is less than the life sentence under the Guidelines, the sentences must run concurrently under U.S.S.G. § 5G2.1(d). Then the court cites two cases to find, "that Section §

5G1.2(d) required that the sentences be run consecutively, not concurrently, and that to run them concurrently would require a departure" and that a "departure is not warranted under the facts of this case." (1R. 173).

That is the full extent of the explanation the Court gives for sentencing John to a total of 600 months in prison. The Court's explanation provides it's rationale for imposing consecutive rather than concurrent sentence. Yet it does not go into the level of detail required by § 3553(c)(1) which states, "The Court . . . shall state . . . its' reasons for its imposition of the particular sentence" and if within the Guidelines, the reason for that particular point in the Guidelines. 18 U.S.C. § 3553(c)(1). Does the court adequately explain its' analysis of the § 3553(a) factors that it used to determine John's sentence? *See*, 18 U.S.C. § 3553(a). Like *Mondragon-Santiago* and *Tisdale* cited above, the district court failed to adequately explain why it chose to impose consecutive sentences or why it chose to impose the particular sentence for each count.

Compare the Court's explanation in John's case with the explanation given in a case where the District Court imposed a sentence of 220 months of imprisonment for one count of transportation of child pornography. *Cf., United States v. Miller*, 665 F.3d 114 *(5th Cir. 2011)* In *Miller*, the district court provides a comprehensive explanation for the sentence it imposed. There were

numerous factors, other than the Guidelines, that went into his evaluation. First he relates how he has, "no real concern about the guidelines in this case." *Id*. Miller, 665 F.3d at 126, n. 37. He states that a factor lost in the scholarly discussions about the Guidelines is that in a case like this, with numerous images, you have not one, but numerous victims. *Id*. He explains his concern about the victims and the cycle of child pornography which continues for a couple of paragraphs. *Id*. The court reviews of the background and history of the defendant and the facts surrounding the offense. *Id*. After several more paragraphs the court concludes that his, "prior history of approaching and engaging young females, as well as an obsession for making phone sex calls and viewing pornography, including child pornography, to the point that it's interfered with his employment." *Id.*

The Court is also concerned that Mr. Miller (the defendant) demonstrates a history of assaultive and threatening behavior citing specific events and how Miller, "indicated that if not stopped he would become a sexual predator or a child rapist." *Id*. After this exhaustive account, the court states, "That is what I consider when I look at the full range of statutory punishment. And although I am going to render a sentence that is within the guideline range, it is within the guidelines range solely by happenstance." *Id*. And finally that, "Whether it is a guideline sentence or whether it is an equitable

sentence . . . it is what I believe to be a sentence sufficient but not greater than necessary to impose in this case." *Id*. Unlike the lengthy and comprehensive explanation the court provides in *Miller*, the only justification the Court gives to John Doe when imposing a 50 year sentence is that he doesn't, "think a variance is warranted under 3553 because of the aggravated nature of the facts in this case. (1R. 172).

The sentencing error is clear or obvious error. It affects John Doe's substantial rights and seriously affects the fairness, integrity and public reputation of the legal system. See, *Puckett v. United States*, 129 S. Ct 1423, 1428 (2009).Therefore, John Doe requests that this court vacate his sentence and remand it back to the district court for re-sentencing.

Issue Number 2 Restated: Though the court had authority to impose either a consecutive or concurrent sentence, did it fail to recognize its discretionary power and to decide John Doe's sentence using 18 U.S.C. § 3553(a) factors?

A district court has discretionary authority to impose either a consecutive or concurrent sentence and requires analysis under 18U.S.C. § 3553(a) factors. The district court's failure to consider those factors when deciding whether John received consecutive or concurrent sentences is procedural error.[5] Although U.S.S.G. § 5G1.2(d) gives a district court authority to impose consecutive sentences, it is not the only statute governing this authority. Under 18 U.S.C. § 3584(b) the District Court is required to consider all of the § 3553(a) factors when imposing concurrent or consecutive sentences**.** It states specifically

> "The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553 (a)."

In other words, a sentencing analysis under § 3553(a) is still required even though a consecutive sentence seems mandatory under § 5G1.2(d). The court failed to adequately consider the § 3553(a) factors since it did not refer to them specifically when discussing

[5] It is difficult to determine whether the district court considered any of the factors under section 3553(a) due to the sparseness of the court's explanation as stated previously.

John's sentence. The only basis the court does refer to is the Guidelines. The 5th Circuit upheld the sentence in *Miller*, in part, because the district court "meticulously considered the 3553(a) factors." *See Miller*, 665 F.3d at 126 quoting *United States v. Rowan*, 530 F.3d 379, 381 (5th Cir. 2008).

Multiple terms of imprisonment imposed at the same time must run concurrently unless the court orders them to run consecutively. 18 U.S. C. § 3584(a). Furthermore, courts are required to use the § 3553(a) sentencing factors to decide if the sentences will run consecutively or concurrently as well as separately for each offense. 18 U.S.C. § 3584(b). Here, the court states, "in this case Guidelines require that the 30 years on one count run consecutively with the 20 year sentence on the other count." (1R. 172). The court then simply quotes § 5G1.2(d) which misleadingly implies that consecutive sentences are mandatory for defendant's in John's situation. (1R.172). The brief discussion about U.S.S.G § 5G1.2(d) indicates that the court either did not know it has the authority to choose whether to impose a concurrent or consecutive sentence or that it was required to exercise its discretion when doing so.

The court relies on two cases which held that in this type of case, "where counts of conviction were grouped, section 5G1.2(d) required that the sentences be run consecutively, not concurrently, and that to run them concurrently would require a departure." The

Court's reliance on *US v. Garcia* is misplaced because that case was decided in 2003, before the Supreme Court held that the Guidelines are no longer mandatory. See, *United States v. Garcia*, 322 F.3d 842 (5th Cir.2003. Moreover, the other case the court relies on, *United States v. Mudekunye*, does not say one way or another whether § 5G1.2(d) restricts a district court's authority to impose a concurrent or consecutive sentence. *United States v. Mudekunye*, 646 F.3d 281, 288 (5th Cir. 2011). The 5th Circuit acknowledges that there is a conflict between the seemingly mandatory language of 5G1.2(d) and the discretion permitted by 18 U.S.C .§ 3584. *Garcia*, 322 F.3d at 846. Although the district court briefly mentions § 3553(a) and § 5G1.2 after the parties finished their arguments, it did not mention § 3584 at all. The district court provided no additional reasons why it executed a consecutive rather than concurrent sentence. This suggests the court either failed to realize it had authority to decide whether John received a consecutive or concurrent sentence or failed to exercise its' authority to do so.

The sentencing error is clear or obvious error. It affects John Doe's substantial rights and seriously affects the fairness, integrity and public reputation of the legal system. See, *Puckett v. United States*, 129 S. Ct 1423, 1428 (2009).Therefore, John Doe requests that this court vacate his sentence and remand this case back to district court for re-sentencing.

Issue Number 3 Restated: Are John Doe's consecutive sentences of 360 months for production and 240 months for distribution totaling 600 months imprisonment longer than necessary to satisfy the sentencing goals of 18 U.S.C. § 3553(a)?

Under *Booker,* the consecutive nature of a sentence is ultimately reviewed for reasonableness. *United States v. Candia,* 454 F.3d 468, 472-73 (5th Cir.2006). Whether the district court's imposition of a consecutive sentence is reasonable is reviewed for abuse of discretion. *United States v. Setser*, 607 F.3d 128, 132 (5th Cir. 2010) Argument.

A district 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)(2). The sentence should consider the following factors: the facts of the offense, the defendant's background, seriousness of the offense, promote respect for the law, provide just punishment, deter crime, protect the public, rehabilitation, types of sentences, sentencing guidelines, policy statements, unwarranted sentence disparities, and restitution. *See* U.S.S.G. § 3553(a)(2).

Many experts, courts, and commentators have concluded that the Sentencing Guidelines applicable to child pornography offenses are not based on empirical evidence, are seriously flawed and lead to unreasonable and disproportionate prison sentences.(citations omitted). But this court recently held that the child porn Guidelines

provisions will not be rejected even though they are based on unempirical evidence and lead to sentencing disparities. Even so, the fact that a particular Guidelines provision does result from unempirical evidence remains a relevant factor when determining if the sentence is reasonable. And in John's case, where the Guidelines take precedence over all the other factors listed in 3553(a), it is especially relevant.

Doe asserts that the consecutive sentences are substantively unreasonable since the district court over-emphasized the Guidelines and did not adequately consider all of the other factors required under 3553(a). Several factors the Court could have considered in imposing a concurrent rather than consecutive sentence is that this is John's first criminal offense; he helped care for his mother, he graduated from high school and was enrolled in college courses, his letters of recommendation, his youth at the time of the offense, his past history of abuse and his difficult background. Not one of these factors seemed to receive any consideration from the court. (*See*, Memo in Support of Sentencing)(Sealed).

A sentence within the Guidelines carries a rebuttable presumption of reasonableness even if the applicable Guideline is not empirically based. However, the 5th circuit has emphasized that it does not blindly approve a within-Guidelines sentence. *Miller*, 663 F.3d at 122. A sentence within the applicable Guidelines range is

reviewed for reasonableness based on the statutory factors applied in a particular case. *Id*.

Since the court weighed the § 3553(a) factors incorrectly, the presumption of reasonableness has been overcome. Imposing consecutive sentences for a total of 50 years imprisonment against John Doe is greater than necessary to promote the purposes of the Guidelines. The sentencing error is clear or obvious error. It affects John Doe's substantial rights and seriously affects the fairness, integrity and public reputation of the legal system. See, *Puckett v. United States*, 129 S. Ct 1423, 1428 (2009).Therefore, John Doe requests that this court vacate his sentence and remand his case back to district court for re-sentencing.

CONCLUSION

For the foregoing reasons, the defendant-appellant, John Enrique Doe respectfully requests this Court vacate his sentence and remand it back to the district court for re-sentencing.

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CERTIFICATE OF SERVICE

I, Alan Winograd, certify that on March 12, 2012, an electronic copy of the brief for appellant, a copy of the record excerpts, as required by Fed. R. App. P. 31 and 5th Cir. R. 31.1 were served to appellee/plaintiff's counsel of record as follows:

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by notice of electronic filing with the 5th Circuit CM/ECF System. Upon notification that the electronically filed brief and records excerpts have been accepted as sufficient and upon the Clerk's request, 7 paper copies of this brief and 4 copies of the record excerpts will be placed in the United States mail to the Clerk's office.

Respectfully Submitted,

Winograd Law

/s/ Alan Winograd
Alan Winograd

Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), undersigned counsel certifies that this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. Exclusive of the portions exempted by 5th Cir. R. 32.2.7(b)(3), this brief contains 5791 words printed in proportionally spaced typeface.
2. This brief is printed in a proportionally spaced, serif typeface using Book Antiqua 14 point font in text and 12 point font in footnotes produced by Microsoft Word 10 software.
3. Undersigned counsel will provide an electronic version of this brief and/or copy of the word printout to the Court.
4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 32.2.7, may result in the Court striking this brief and imposing sanctions against the person who signed it.

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