No. 12-15349-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

PAULO MORALES,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

THOMAS E. PEREZ
Assistant Attorney General

JESSICA DUNSAY SILVER
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-4757
teresa.kwong@usdoj.gov

United States v. *Morales*, No. 12-15349-EE

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for the United States as Appellee hereby certifies that the following persons and parties may have an interest in the outcome of this case:

Altonaga, Cecilia M., United States District Court Judge, Southern District of Florida

Caruso, Michael, Counsel for Morales, Appellant

Faccidomo, Jude, Counsel for Morales, Appellant

Ferrer, Wilfredo, Counsel for the United States, Appellee

Goodman, Jonathan, United States Magistrate Judge, Southern District of Florida

A.A.H., victim

R.K., victim

Kwong, Teresa, Counsel for the United States, Appellee

Leventis, Henry, Counsel for the United States, Appellee

Morales, Paulo, Appellant

R.S.O., victim

Perez, Thomas E., Counsel for the United States, Appellee

United States v. *Morales*, No. 12-15349-EE

Rosenbaum, Robin S., United States District Court Judge, Southern District of Florida

Salyer, Kathleen, Counsel for the United States, Appellee

Simonton, Andrea M., United States Magistrate Judge, Southern District of Florida

Silver, Jessica Dunsay, Counsel for the United States, Appellee

Snow, Lurana S., United States Magistrate Judge, Southern District of Florida

Stage, Gail, Counsel for Morales, Appellant

Torres, Edwin G., United States Magistrate Judge, Southern District of Florida

United States of America, Appellee

Weiner, Jeffrey, Counsel for Morales, Appellant

White, William, Counsel for the United States, Appellee

Dated: February 11, 2013

s/ Teresa Kwong
TERESA KWONG
Attorney

STATEMENT REGARDING ORAL ARGUMENT

The government believes the briefs adequately address the facts and legal issues on appeal and that oral argument is not necessary. Should the Court schedule oral argument, the government requests the opportunity to participate in oral argument.

TABLE OF CONTENTS

PAGE

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

TABLE OF CITATIONS

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

GUIDELINES:

GUIDELINES (continued): **PAGE**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-15349-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

PAULO MORALES,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

This is an appeal from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant on October 4, 2012 (Doc. 42),[1] and an amended judgment on October 12, 2012 (Doc. 47). Defendant filed a timely notice of

[1] "Doc. __" refers to the docket entry number of documents filed in district court. "Br. __" refers to pages in Morales's opening brief.

appeal on October 15, 2012 (Doc. 48). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether Paulo Morales's sentence was procedurally or substantively unreasonable.

STATEMENT OF THE CASE

Defendant Paulo Morales appeals his sentence in connection with his guilty plea to three counts of depriving his victims' civil rights through unwanted sexual contact while acting under color of law. On June 14, 2012, a federal grand jury returned a superseding indictment against Morales. Doc. 10. The six-count superseding indictment charged that Morales engaged in unwanted sexual contact with A.A.H., R.S.O., and R.K., by intentionally touching their breasts without permission, while Morales was working as an employee of the Department of Homeland Security's Customs and Border Protection at the Miami International Airport. The indictment charged that Morales violated 18 U.S.C. 2244(b) by knowingly engaging in unwanted sexual contact with A.A.H. (Count 1), R.S.O. (Count 3), and R.K. (Count 5), and that Morales did so while acting under color of law, in violation of 18 U.S.C. 242 (Counts 2, 4, and 6). Doc. 10 at 2-5.

On July 12, 2012, Morales pled guilty to Counts 2, 4, and 6 in the superseding indictment, which charged him with misdemeanor deprivation of

rights under color of law in violation of 18 U.S.C. 242. Doc. 26 at 1 (Plea Agreement). Morales also agreed to waive his right to appeal his sentence. Paragraph 10 of the plea agreement states:

> [D]efendant hereby waives all rights conferred by Section 3742 to appeal any sentence imposed, including any order of restitution, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure from the advisory guideline range that the Court establishes at sentencing. * * * However, if the United States appeals the defendant's sentence * * *, the defendant shall be released from the above waiver of appellate rights.

Doc. 26 at 4. At the change of plea hearing, the district court specifically questioned Morales about his sentence appeal waiver and explained that Morales could appeal if the government appeals. Doc. 69 at 9-10 (Plea Hearing Tr.). After conclusion of the Rule 11 hearing, the court determined that Morales fully understood the consequences of his plea and accepted Morales's plea. See Doc. 69 at 8-21; see also Doc. 26 (Plea Agreement).

On October 4, 2012, the district court conducted Morales's sentencing hearing. Morales raised several objections to the sentence range of 33 to 36 months recommended in the Presentence Investigation Report (PSR), including arguing that the PSR's application of a two-level enhancement because the victims were in Morales's custody, care, or supervisory control, and a six-level enhancement because he acted under color of law amounted to impermissible double counting. See, *e.g.*, Doc. 71 at 13-47 (Sentencing Hearing Tr.); see also

Doc. 34 at 2-4 (Morales's Objections To PSR). Morales also argued that the court should consider a sentence without imprisonment because he does not have a criminal history, he is the sole income earner for his family, and that he pled guilty to misdemeanor, not felony, charges. Doc. 71 at 54-57, 61-62, 65.

After considering the parties' arguments as to Morales's legal objections and Morales's arguments with respect to the 18 U.S.C. 3553(a) factors, the district court overruled Morales's objections to the calculation of the applicable sentencing range and sentenced Morales at the low end of the advisory guidelines range: 12 months' imprisonment on each of Counts 2 and 4, and 9 months' imprisonment on Count 6, to be served consecutively. Doc. 71 at 36, 47-48, 66-68. In addition, the court sentenced Morales to one year of supervised release, and ordered him to pay a $75 special assessment. Doc. 71 at 69. The court then granted the government's motion to dismiss remaining Counts 1, 3, and 5 for abusive sexual contact in violation of 18 U.S.C. 2244(b). Doc. 71 at 72.

STATEMENT OF THE FACTS

In January 2011, defendant Paulo Morales worked at the Miami International Airport as an employee of the Department of Homeland Security's Customs and Border Protection (CBP). Doc. 69 at 18. On different dates in January 2011, the three female victims in this case – A.A.H., R.S.O., and R.K. – arrived at the airport from their respective countries. Doc. 69 at 18-19. While at

the airport, each victim entered the customs line and was subsequently directed to leave the primary customs line and go to a detention area that CPB refers to as "hard secondary." PSR 4. While in hard secondary, each of the victims was questioned and waited for a determination regarding whether they could legally enter the United States. PSR 4.

Morales, while working as a CBP officer, approached each victim while she was in hard secondary and guided her to an unoccupied space within hard secondary. PSR 4. While alone with the victims, he proceeded to place his hands on the victims' breasts and massaged them, without the victims' consent. Doc. 69 at 18-19; see also PSR 5. With respect to A.A.H. and R.S.O., Morales placed his hands underneath their clothing, and made skin-to-skin contact with their breasts. Doc. 69 at 18; see also PSR 5. With respect to R.K., Morales placed his hands on her breast on top of her clothing. Doc. 69 at 19.

SUMMARY OF THE ARGUMENT

This Court should dismiss Paulo Morales's appeal. Morales signed a plea agreement voluntarily waiving his right to appeal his sentence unless certain conditions, not present here, were met. The district court engaged in a colloquy with Morales at sentencing and ensured that he entered into the plea agreement – including its waiver provision – knowingly and voluntarily.

If this Court nonetheless considers Morales's appeal, this Court should affirm Morales's sentence. The district court properly calculated the applicable Sentencing Guidelines range for his sentence and then properly considered the factors in 18 U.S.C. 3553(a) in imposing Morales's sentence of 33 months of imprisonment, at the bottom of the advisory guidelines range.

Morales's challenges to his sentence are meritless. The sentence is not procedurally unreasonable. The district court's application of Sentencing Guidelines § 2A3.4(b)(3) because the victim was in Morales's custody, care, or supervisory control, and Sentencing Guidelines § 2H1.1(b)(1) for action under color of law does not constitute impermissible double counting. These provisions address different harms and, therefore, the application of both provisions to Morales's sentence does not amount to impermissible double counting. Nor does double counting result because "color of law" is an element of the offense that Morales is convicted of committing. This Court has previously rejected that exact argument.

Morales's claim that his sentence is substantively unreasonable is also without merit. He contends that the district court should have sentenced him without incarceration or below the guidelines range. Morales, however, does not identify any Section 3553(a) factor that the district court should have, but failed to, consider. On the contrary, the record shows that the district court gave careful

consideration to the Section 3553(a) factors and Morales's arguments for a more lenient sentence, and based Morales's sentence on the totality of the circumstances. Because Morales has not carried his burden of establishing that the sentence is unreasonable in light of both the record and the factors in Section 3553(a), this Court should affirm Morales's sentence.

ARGUMENT

I

THIS COURT SHOULD DISMISS THE APPEAL BECAUSE MORALES WAIVED THE RIGHT TO APPEAL HIS SENTENCE

A. Standard Of Review

Whether a defendant validly waives his right to appeal his sentence in a plea agreement is reviewed de novo. See *United States* v. *Johnson*, 541 F.3d 1064, 1066 (11th Cir. 2008), cert. denied, 129 S. Ct. 2792 (2009).

B. The Plea Agreement Contains A Valid Waiver Of Morales's Appellate Rights

Morales's plea agreement, which the district court accepted at the conclusion of the Rule 11 hearing, makes clear that Morales waived his right to appeal "any sentence imposed, including any order of restitution, or to appeal the manner in which the sentence was imposed." Doc. 26 at 4. This waiver remains in effect except in three circumstances: (1) "the sentence exceeds the maximum permitted by statute"; (2) the sentence "is the result of an upward departure from the advisory

guideline range that the Court establishes at sentencing"; or (3) the government appeals Morales's sentence. Doc. 26 at 4. None of these circumstances applies here. The district court sentenced Morales to the maximum sentence permitted (12 months' imprisonment) as to each of Counts 2 and 4, and under the maximum (9 months' imprisonment) as to Count 6, resulting in a sentence at the bottom of the advisory guidelines range. See Doc. 71 at 68.

C. Morales's Waiver Of His Appellate Rights Was Knowing And Voluntary

This Court enforces a sentence appeal waiver if it was made knowingly and voluntarily. See *United States* v. *Bushert*, 997 F.2d 1343, 1351 (11th Cir. 1993), cert. denied, 513 U.S. 1051, 115 S. Ct. 652 (1994). To establish that the waiver was made knowingly and voluntarily, the government must show either that: (1) "the district court specifically questioned the defendant" about the "waiver during the [plea] colloquy," or (2) the record makes clear "that the defendant otherwise understood the full significance of the waiver." *Ibid*.

The record here clearly indicates that Morales knowingly and voluntarily waived his right to appeal his sentence because the district court specifically questioned Morales about the waiver during the Rule 11 colloquy. At Morales's change of plea hearing, the district court specifically questioned Morales about his sentence appeal waiver in paragraph ten of the Plea Agreement, and confirmed that Morales understood and agreed to waive the right to appeal his sentence:

> Court: Paragraph 10, you agree to waive your right to appeal any sentence imposed, including any order of restitution[,] and [to] appeal the manner in which [the] sentence was imposed unless it exceeds [the] law, and upward departure from the advisory Guideline range that I establish at the time of sentencing. Do you understand that?
>
> Morales: Yes.
>
> Court: You will be allowed to appeal if the Government appeals.
>
> Morales: Yes.
>
> Court: Do you have any question[s] about your waiver of your right to appeal the sentence?
>
> Morales: No, Your Honor.
>
> Court: Did anybody force you to waive your right to appeal the sentence?
>
> Morales: No.
>
> Court: Are you doing it voluntarily?
>
> Morales: Yes.

Doc. 69 at 9-10. Based on the foregoing, Morales's sentence appeal waiver was made knowingly and voluntarily. See *Bushert*, 997 F.2d at 1351. Indeed, Morales not does argue otherwise. Morales, therefore, may not appeal his sentence. This Court should dismiss Morales's appeal of his sentence.

II

IF THE COURT FINDS THAT MORALES DID NOT WAIVE HIS APPELLATE RIGHTS, THE COURT SHOULD AFFIRM MORALES'S SENTENCE AS REASONABLE

A. Standard Of Review

The Court reviews a defendant's sentence for reasonableness under an abuse of discretion standard. See *United States* v. *Booker*, 543 U.S. 220, 261-262, 125 S. Ct. 738, 765-766 (2005); *United States* v. *Irey*, 612 F.3d 1160, 1189-1190 (11th Cir. 2010) (en banc), cert. denied, 131 S. Ct. 1813 (2011). Reasonableness review consists of two components, procedural and substantive. *Gall* v. *United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 597 (2007). First, this Court must ensure that the district court did not commit any significant procedural errors, such as improperly calculating the sentencing range under the Sentencing Guidelines. See *United States* v. *McGarity*, 669 F.3d 1218, 1263 (11th Cir.), cert. denied, 133 S. Ct. 378 (2012). The Court reviews factual findings for clear error, and the interpretation and application of the Sentencing Guidelines de novo. See *United States* v. *Johnson*, 694 F.3d 1192, 1195 (11th Cir. 2012); see also *United States* v. *Dudley*, 463 F.3d 1221, 1226 (11th Cir. 2006) (claim of double counting under the guidelines is reviewed de novo).

If the Court concludes that the district court did not procedurally err, the Court must also "consider the substantive reasonableness of the sentence imposed"

based on the "totality of the circumstances." *Gall*, 352 U.S. at 51, 128 S. Ct. at 597. The Court's substantive reasonableness review is guided by the factors in 18 U.S.C. 3553(a), which requires the district court to impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" listed in Section 3553(a). *United States* v. *White*, 663 F.3d 1207, 1217 (11th Cir. 2011), cert. denied, 133 S. Ct. 646 (2012). This review is "deferential," *United States* v. *Talley*, 431 F.3d 784, 788 (11th Cir. 2005), and the Court "will not second guess the weight (or lack thereof) that the [district court] accorded to a given factor * * * as long as the sentence ultimately imposed is reasonable in light of *all* the circumstances presented." *United States* v. *Snipes*, 611 F.3d 855, 872 (11th Cir. 2010) (citation omitted), cert. denied, 131 S. Ct. 2962 (2011).

This Court will vacate a sentence for substantive unreasonableness "if, but only if, [the Court is] left with the definite and firm conviction that the district court committed a clear error of judgment weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *Irey*, 612 F.3d at 1190 (citation and internal quotation marks omitted). The burden of establishing that a sentence is substantively unreasonable lies with the party challenging it. See *White*, 663 F.3d at 1215.

B. Morales's Sentence Is Procedurally Reasonable

1. Under Section 2H1.1(a) of the Sentencing Guidelines, the base offense level for a defendant convicted of violating 18 U.S.C. 242 is the greatest offense level from the offense guideline applicable to any underlying offense. U.S.S.G. § 2H1.1(a) (Base Offense Level for Offenses Involving Individual Rights). As the district court determined, the base offense level of 12 for unwanted sexual contact under Section 2A3.4(a)(3) applies. Doc. 71 at 20; see also U.S.S.G. § 2A3.4(a)(3) (Base Offense Level for Abusive Sexual Contact). Pursuant to Section 2A3.4(b)(3), the district court increased the base offense level by two levels because the victim was in Morales's custody, care, or supervisory control, resulting in an offense level of 14. Doc. 71 at 20, 48; see also U.S.S.G. § 2A3.4(b)(3) (Specific Offense Characteristics).

The district court further increased the 14-point offense level derived from Section 2A3.4 by six levels, as provided by Section 2H1.1(b)(1), because Morales acted under color of law. Doc. 71 at 48; see also U.S.S.G. § 2H1.1(b)(1) (Specific Offense Characteristics for Offenses Involving Individual Rights). After adding a multiple count adjustment of three levels and subtracting three levels for acceptance of responsibility, the district court calculated a total offense level of 20. Doc. 71 at 48. Based on a category I criminal history and total offense level of 20, the district court calculated the advisory guidelines range to be 33 to 41 months,

but reduced it to 33 to 36 months because the counts Morales pled guilty to carry a maximum of 12 months per count. Doc. 71 at 51.

2. Morales contends (Br. 10) that the district court's application of both Sections 2A3.4(b)(3) (in-custody adjustment) and 2H1.1(b)(1) (color or law adjustment) amounts to impermissible double counting.[2]

This Court has held that "[i]mpermissible double counting occurs only when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines." *White*, 663 F.3d at 1217 (quoting *Dudley*, 463 F.3d at 1226-1227). Double counting a factor in sentencing "is permitted if the Sentencing Commission intended the result, and if the result is permissible because each section concerns conceptually separate notions related to sentencing." *United States* v. *Naves*, 252 F.3d 1166, 1168 (11th Cir. 2001) (citation and internal quotation marks omitted). "'Absent a specific direction to the contrary, [this Court] presume[s] that the Sentencing Commission intended to apply separate sections cumulatively,' and as a result a defendant asserting a double counting

[2] Morales conceded at sentencing that the district court's application of a base offense level of 12 for abusive sexual contact and two-level enhancement because the victim was in Morales's care, custody, or supervisory control were appropriate. See Br. 10; see also Doc. 71 at 29-31.

claim has a tough task." *United States* v. *Lebovitz*, 401 F.3d 1263, 1270 (11th Cir. 2005) (citation omitted).

Contrary to Morales's argument, the application of Sections 2A3.4(b)(3) and 2H1.1(b)(1) does not constitute impermissible double counting because each provision addresses a different kind of harm. The harm to be punished, and deterred, by the "under color of law" offense characteristic is the misuse of power by a person with government authority, while the custody, care, or supervisory control offense characteristic concerns itself with punishing an abuse of power over an individual in the officer's physical and legal control. An offense committed under color of law does not necessarily include a victim in the defendant's custody, care, or supervisory control. For example, had Morales committed his offenses while the victims were in line at customs, instead of while they were in hard secondary, the in-custody adjustment would not apply.

Indeed, the in-custody offense characteristic could apply in many circumstances that do not include a defendant acting under color of law. The Sentencing Guidelines' Application Note for Subsection (b)(3) provide numerous examples of potential non-law-enforcement defendants, including "teachers, day care providers, baby-sitters, or other temporary caretakers." U.S.S.G. § 2A3.4 comment. (n.4(A)). Likewise, the "color of law" offense characteristic can apply in a number of circumstances that do not include victims who are under a

defendant's custody, care, or supervisory control. One example would be when a law enforcement officer uses excessive force on a person prior to or in lieu of taking the person into custody.

The Second Circuit has addressed whether the application of Section 2A3.1(b)(3)(A) – which provides a similar two-level adjustment for when the victim is in the defendant's custody, care, or supervisory control as Section 2A3.4(b)(3) – and Section 2H1.1(b)(1) results in impermissible double counting and held that it does not. See *United States* v. *Volpe*, 224 F.3d 72, 76 (2d Cir. 2000). In *Volpe*, 224 F.3d at 75-76, which involved a police officer who sexually assaulted a person in his custody, the Second Circuit concluded that application of Sections 2A3.1(b)(3)(A) and 2H1.1(b)(1) to the defendant's sentence did not constitute impermissible double counting because the "color of law" adjustment punishes an abuse of authority, whereas the in-custody adjustment punishes an abuse of power over an officer's physical and legal control.

Morales argues (Br. 12) that the Second Circuit erred because "power" and "authority" have the same meaning and therefore address the same harm. In support, Morales cites *United States* v. *Morrill*, 984 F.2d 1136, 1138 (11th Cir. 1993), for the proposition that an enhancement is "improperly duplicative" where "the * * * offense level already accounts fully for the level of culpability which the Sentencing Commission ascribed to that crime." Br. 12-13. At issue in *Morrill*,

however, was an enhancement under Section 3A1.1. 984 F.2d at 1138. Unlike the provisions at issue in this case, the Application Note for Section 3A1.1 expressly states: "Do not apply this adjustment if the offense guideline specifically incorporates this factor." *Ibid*. Absent such specific direction, this Court must presume that Sections 2A3.4(b)(3) and 2H1.1(b)(1) are meant to be applied "cumulatively." See *Lebovitz*, 401 F.3d at 1270. Moreover, contrary to Morales's argument, Sections 2A3.4(b)(3) and 2H1.1(b)(1) do not address the same harm. As stated above, the two provisions do not always apply in tandem. The additional punishment for an offense committed when the victim is in custody recognizes the "particular harm inflicted when an individual [is] entrusted to the care and supervision of an officer" and "abuse under these circumstances is more likely to be coercive because of the victim's legal inability to leave." *Volpe*, 224 F.3d at 76.

Morales further argues (Br. 11) that the fact that the victims were in Morales's custody or control "could not exist" in this case without the fact that Morales acted under state law; therefore, the enhancement for care, custody, or supervisory control and the enhancement for color of law are directed at the same harm. Morales's emphasis (Br. 11) on the fact that the victims here were in hard secondary when Morales committed his offenses is misplaced. Whether double counting is impermissible turns on whether the two adjustments are directed at the same harm, not whether the adjustments involve the same conduct. See *White*, 663

F.3d at 1217 (stating that impermissible double counting occurs only when both guideline provisions address the same "harm"); *United States* v. *Bracciale*, 374 F.3d 998, 1009 (11th Cir. 2004) (same). As stated in *Volpe*, 224 F.3d at 76, "multiple adjustments may properly be imposed when they [are directed] at different harms emanating from the same conduct."

Similarly unavailing is Morales's argument (Br. 13) that the six-level enhancement is impermissible double counting because "under color of law" is an element of 18 U.S.C. 242, the offense to which Morales pled guilty, and therefore his "culpability is already taken into account." This Court has rejected this argument numerous times, stating that the Sentencing Commission may increase a defendant's offense level based on a specific offense characteristic that is an element of the offense the defendant was convicted of committing. For example, in *Naves*, 252 F.3d at 1169, the Court affirmed the application of a two-level increase to the offense level based on the offense involving a carjacking to a defendant who was convicted of carjacking. See also *Bracciale*, 374 F.3d at 1009-1010 (applying an abuse-of-trust enhancement to a sentence for wire fraud was not impermissible double counting); *United States* v. *Phillips*, 363 F.3d 1167, 1168 (11th Cir. 2004) (affirming sentence for failing to pay court-ordered child support, which included a two-level enhancement because his offense involved a violation

of a prior judicial order "not addressed elsewhere in the guidelines") (citation omitted).

Furthermore, as this Court stated in *Bracciale*, 374 F.3d at 1010 (citation omitted), "[t]he Sentencing Commission is authorized to provide enhancements as long as there is a rational relationship between the enhancement and a legitimate governmental objective." Morales bears the burden of demonstrating that the guideline provision is irrational, see *Naves*, 252 F.3d at 1169, and has not done so. He has not shown that it was irrational for the Sentencing Commission to establish a base offense for a variety of offenses under Section 2H1.1(a) and allow a "color of law" adjustment to apply in cases like this one. Doc. 71at 21-25 (discussing scope of Section 2H1.1). The fact that the Sentencing Commission did not establish a separate guideline for Morales's specific offense does not render application of Section 2H1.1(b)(1) irrational nor result in impermissible double counting. See *Bracciale*, 374 F.3d at 1010.

Accordingly, the district court properly applied both Sections 2A3.4(a)(3) and 2H1.1(b)(1), and did not procedurally err.

C. Morales's Sentence Is Substantively Reasonable

Morales has not carried his burden of demonstrating that his 33-month sentence, which is at the bottom of the advisory guidelines range, is substantively unreasonable. See *United States* v. *Tome*, 611 F.3d 1371, 1378 (11th Cir.) (stating

that party challenging the sentence bears the burden to show it is unreasonable in light of the record and the Section 3553(a) factors), cert. denied, 131 S. Ct. 674 (2010); see also *White*, 663 F.3d at 1217 ("We ordinarily 'expect a sentence within the Guidelines range to be reasonable.'") (quoting *Talley*, 431 F.3d at 788). The record shows that the district court gave ample consideration to the 18 U.S.C. 3553(a) factors and Morales's arguments for a sentence below the guidelines range and for a sentence without incarceration. See Br. 14-15.

At sentencing, the district court explicitly considered the Section 3553(a) factors, such as the history and characteristics of the defendant, and the need to reflect the seriousness of the offense, promote respect for the law, and provide just punishment of the offense. Doc. 71 at 49-68. In particular, the district court referred to the "large number of letters" from Morales's family and community in support of Morales. Doc. 71 at 49. The court also stated that it did not believe that Morales would engage in this specific crime again in light of his resignation from his job and agreement not to seek federal employment in the future. Doc. 71 at 51.

But the district court emphasized, on more than one occasion, that the offenses that Morales was convicted of committing are serious ones. For instance, the court stated:

> The nature and circumstances of the offense * * * are somewhat troubling not only because they involve unwanted touching but because they involve unwanted touching in the context of pat-downs at the airport where we really do require the cooperation of those who

> go through the security procedures and through – and pass through our borders in order to be able to – for security reasons, obviously, for the public as a whole, but also for the security of the officers themselves, and it undermines confidence in our system when passengers or travelers have to be concerned that the security pat-downs that they are going through are excuses for someone to engage in sexual assault. It is the kind of offense that has far-reaching consequences well beyond the individuals who are personally affected by it. And so I think that also has to be taken into account.

Doc. 71 at 49-50; see also Doc. 71 at 50 (stating "there is something particularly troubling about someone who uses a position of authority in order to commit a criminal act, especially a criminal act of such a personal nature * * * [and] [i]t occurred again and again"); Doc. 71 at 67 (stating "one of the things that is particularly disturbing about this is the context in which it occurred; that is, under color of law; that is, the use of a position that must engage in searches as part of getting the job done appropriately and must subject people to searches").

In addition, the district court stated that a sentence below the guidelines range based on aberrant behavior was inappropriate because Morales committed three separate offenses. Doc. 71 at 66. Nor did the district court believe that Morales's role as the sole financial provider for his family is a "unique or extraordinary" circumstance. Doc. 71 at 67. For these reasons and based on the seriousness of Morales's convicted offenses, the district court rejected Morales's requests for a below-guidelines sentence or a sentence without incarceration. Doc.

71 at 66-68. In light of Morales's personal history and characteristics, and low risk of repeating this particular offense, though, the court sentenced Morales at the very bottom of the advisory guidelines range. Doc. 71 at 68.

Thus, the district court did what is required under Section 3553(a). It weighed the various Section 3553(a) factors and set forth a reasoned basis for its sentencing decision. See *Rita* v. *United States*, 551 U.S. 338, 356, 127 S. Ct. 2456, 2468 (2007) ("The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority."); see also *McGarity*, 669 F.3d at 1263 ("The district court's acknowledgement that it considered the defendants' arguments at sentencing and that it considered the factors set forth in § 3553(a) alone is sufficient explanation for a particular sentence."); *Talley*, 431 F.3d at 786 ("[A]n acknowledgement by the district court that it has considered the defendant's arguments and the factors in section 3553(a) is sufficient under *Booker*."). "The weight to be accorded any given § 3553(a) factor is a matter committed to the sound discretion of the district court, and [this Court] will not substitute our judgment in weighing the relevant factors." *United States* v. *Amedeo*, 487 F.3d 823, 832 (11th Cir.) (alterations omitted), cert. denied, 552 U.S. 1049, 128 S. Ct. 671 (2007); see also *Gall*, 522 U.S. at 57, 128 S. Ct. at 600 (stating that courts are permitted to accord "great weight" to one factor over others).

Morales argues (Br. 15) that his sentence is substantively unreasonable because the applicable guidelines range would have been lower (15 to 21 months) had he pled guilty to the felony, instead of the misdemeanor, counts in the superseding indictment. This comparison does not support finding that Morales's sentence is unreasonable. Morales chose to plead guilty to the misdemeanor counts rather than the felony counts in the superseding indictment, and he has and will continue to benefit from not having a felony conviction. Indeed, prior to the district court's acceptance of Morales's guilty plea, Morales confirmed that he understood that the court "could impose a sentence up to three years imprisonment." Doc. 69 at 12. He does not argue on appeal that his plea was not knowing and voluntary. Moreover, as the government argued, and the district court agreed, at the sentencing hearing, had Morales pled guilty to the felony counts, the government could have moved for an enhancement for acting under color of law. Doc. 71 at 63-64, 67-68.

To the extent that Morales contends that his sentence is greater than necessary to achieve the various goals of sentencing because the district court ordered the sentence for each count to run consecutively, that argument is without merit. Taking into account the Section 3553(a) factors and the discretion the district court is afforded in weighing those factors, the district court did not abuse its discretion by treating Morales's offenses as three separate events and sentencing

Morales to 12 months each for Counts 2 and 4, and 9 months for Count 6, to run consecutively. Doc. 71 at 66, 68.

As this Court stated in *United States* v. *Covington*, 565 F.3d 1336, 1346-1347 (11th Cir.), cert. denied, 130 S. Ct. 564 (2009), a district court may impose a concurrent or consecutive sentence provided that the court had considered the Section 3553(a) factors. See also 18 U.S.C. 3584(b) (authorizing courts to impose consecutive sentences). "Once those factors are considered, the *only limitation* on running sentences consecutively is that the resulting total sentence must be reasonable, and ordinarily a sentence within the advisory guidelines range is reasonable." *Covington*, 565 F.3d at 1347 (emphasis added). Morales does not contend that the district court failed to consider the Section 3553(a) factors in sentencing him. At most, Morales simply disagrees (Br. 15-16) with how the district court balanced the Section 3553(a) factors. This Court, however, "will not second guess the weight (or lack thereof) that the judge accorded to a given factor * * * [under § 3553(a)], as long as the sentence ultimately imposed is reasonable in light of *all* of the circumstances presented." *Snipes*, 611 F.3d at 872 (citation omitted and alteration in original).

In short, Morales's within-in guideline sentence is supported by the Section 3553(a) factors, and Morales has not met his burden to show that the court abused its discretion in sentencing him at the bottom of the advisory guidelines range.

CONCLUSION

For the reasons stated, this Court should dismiss defendant's appeal of his sentence or, in the alternative, affirm defendant's sentence.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/ Teresa Kwong
JESSICA DUNSAY SILVER
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-4757
teresa.kwong@usdoj.gov

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS APPELLEE does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Office Word 2007 and contains 5,156 words of proportionally spaced text. The typeface is 14-point Times New Roman font.

s/ Teresa Kwong
TERESA KWONG
Attorney

Dated: February 11, 2013

CERTIFICATE OF SERVICE

I certify that on February 11, 2013, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system and that seven paper copies of the electronically-filed brief were sent to the Clerk of the Court by First Class mail. I further certify that counsel of record for appellant will be served via the appellate CM/ECF system.

s/ Teresa Kwong
TERESA KWONG
Attorney