Nos. 24-7001, 24-7003, 24-7008, 24-7034

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

LEONARD GLENN FRANCIS,
DEFENDANT-APPELLANT

On Appeal from the United States District Court for the Southern District of California Nos: 13-CR-3781-JLS, 13-CR-3782-JLS, 13-CR-4287-JLS, 24-CR-2313-JLS

ANSWERING BRIEF FOR THE UNITED STATES

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JURISDICTION AND BAIL STATUS

The district court had jurisdiction under 18 U.S.C. § 3231 because Leonard Glenn Francis was charged with an offense against the United States. 2-Excerpts of Record (ER)-131. The court imposed sentence on November 5, 2024, and entered final judgment on November 25, 2024. 1-ER-2-23, 104. Francis timely filed a notice of appeal on November 19, 2024. 3-ER-144; Fed. R. App. P. 4(b)(2). This Court has jurisdiction under 28 U.S.C. § 1291. Francis will be in custody until March 2031.

QUESTIONS PRESENTED

1. Was the court's explanation for Francis' sentence so inadequate as to be plainly erroneous?

2. Was Francis' below-guidelines sentence of 180 months "shockingly high" such that it was substantively unreasonable?

3. Did the district court plainly violate Francis' Fifth Amendment right against compelled self-incrimination when it noted that neither party provided details about how Francis managed to abscond before the original sentencing date?

STATUTORY PROVISIONS

Relevant statutes are included in the addendum.

STATEMENT

A. Background

Leonard Francis was the Chief Executive Officer of Glenn Defense Marine Asia (GDMA), a multinational corporation headquartered in Singapore. Second Amended Presentence Report (PSR)-7. The company's "primary business centered on commercial and government contract work involving the 'husbanding' of marine vessels." *Id*. Operating at ports in more than 16 countries across the Pacific, GDMA provided a range of services when ships arrived at port, including the provision of tugboats, security, fresh water, fuel, and the removal of trash and liquid waste. PSR-7-8, 2-ER-115. GDMA provided these husbanding services to private shipping companies and the U.S. Navy—primarily the Seventh Fleet, the "largest numbered fleet within the Navy, with 60 to 70 ships, 200

to 300 aircraft, and approximately 40,000 Sailors and Marines." PSR-7-8. Over the years, the Navy awarded GDMA multiple contracts, worth hundreds of millions of dollars, and by 2011, GDMA had husbanding contracts covering three out of the four regions in the Pacific—Southeast Asia, Australia and Pacific Isles, and East Asia. PSR-8.

Although GDMA provided legitimate husbanding services to the Navy for years, the company began fraudulently overcharging for its services. 1-ER-64, PSR-9. GDMA accomplished this using a variety of means, including submitting fraudulent quotes for subcontractors; making false representations about the availability of fuel and the price of tariffs; presenting invoices from sham companies; and giving kickbacks to subcontractors for inflated costs. PSR-17-18. In just four years of the charged conspiracy, GDMA caused losses of more than $20 million to the Navy. PSR-17-18, 23.

These tactics worked better at some ports than others. PSR-8. When a ship stopped in Singapore, for instance, the "Navy could easily challenge fraudulent costs." PSR-8. At other ports, "such as Port Klang, Malyasia or Laem Chabang, Thailand," the "Navy had much less visibility, and the port visits were much more susceptible to overbilling and fraud. PSR-8; 3-ER-311. Therefore, Francis set

about trying to influence Navy officials to steer ships—including aircraft carriers—to his favored "pearl ports" or "fat revenue GDMA ports." PSR-8; 2-ER-115. To do so, GDMA and Francis engaged in a yearslong conspiracy to bribe Navy officials with "expensive dinners, liquor, hotel rooms, luxury goods, cash, and prostitutes." 2-ER-115. In return, Navy officials steered vessels to GDMA-favored ports, encouraged new contracts, and advocated for the company's interests within the Navy. *Id*.

GDMA's fraudulent billing practices did not go unnoticed, and the Navy opened several financial investigations. PSR-10. But Francis also bribed a special agent with the Naval Criminal Investigative Service, who—in return for cash, travel, and prostitutes—provided him with sensitive information about the investigations as well as advice on how to "thwart those investigations." PSR-10. The corrupt agent conducted multiple searches of internal records and "transmitted hundreds of pages of those law enforcement sensitive reports to Francis," including identifying information about cooperating witnesses. PSR-15.

B. Arrest and Guilty Plea

In 2013, agents lured Francis to travel to San Diego with the prospect of signing a new, multimillion dollar Navy contract. 2-ER-115. When he arrived in the United States, he was arrested and

arraigned on various bribery and conspiracy charges. *Id*. He quickly signed a plea agreement admitting to "presiding over a massive criminal scheme involving 'scores' of U.S. Navy officials and more than $20 million in fraudulent loss." 2-ER-116. As he explained in the factual basis of his plea, his company provided "millions of dollars" in bribes, including:

> over $500,000 in cash; hundreds of thousands of dollars in the services of prostitutes and associated expenses; hundreds of thousands of dollars in travel expenses, including airfare, often first or business class, luxurious hotel stays, incidentals, and spa treatments; hundreds of thousands of dollars in lavish meals, top-shelf alcohol and wine, and entertainment; and hundreds of thousands of dollars in luxury gifts . . .

2-ER-116. In return, Navy officials provided Francis and GDMA with (1) "classified information about the U.S. Navy's scheduling of ship and submarine port visits," (2) other internal Navy information about competitors' pricing and bids for Navy contracts, and (3) favorable evaluations and recommendations. *Id*. High-level Navy officers also used their influence to move ships to "various ports favored by GDMA" and advocate for awarding contracts to the company. *Id*.

C. Cooperation

Within weeks of Francis' arrest in the United States, he began cooperating with investigators, sitting for lengthy debriefs to provide details about his criminal scheme. 2-ER-118. Over the next

five years, he met with agents and prosecutors more than 50 times and provided "detailed information on hundreds of individuals from petty officers to admirals." 2-ER-117. Francis and his attorneys also "provided documentation and physical evidence on hundreds of occasions, and compiled chronologies with supporting documentation of the corruption he oversaw." 2-ER-119. Ultimately, with the aid of Francis' cooperation, the United States charged 34 defendants with federal criminal offenses, and the Navy referred over 600 individuals for findings of misconduct, resulting in courts marshal, non-judicial punishment, and letters of censure. PSR-9.[1] After almost nine years, when the last of the criminal defendants charged in relation to Francis' scheme had pled guilty or gone to trial, the court set a date for him to be sentenced. 2-ER-180.

D. Flight to Avoid Sentencing

A few weeks before his scheduled sentencing date, Francis—who was by then out of custody on a medical furlough—cut off his

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[1] The case also generated substantial publicity. See, e.g., Craig Whitlock and Kevin Uhrmacher, Prostitutes, vacations and cash: The Navy officials 'Fat Leonard' took down, *The Washington Post*, September 20, 2018; Greg Moran, 'Bad stuff written all over him': Inside the swaggering, scheming world of 'Fat Leonard', *The San Diego Union-Tribune*, July 22, 2023; Nicholas Niarchos, Bribing the Navy is Easier (and More Entertaining) Than You Might Think, *The New York Times*, May 13, 2024.

GPS ankle monitor and fled across the border into Mexico. PSR-20, 23. From there, he flew to Cuba and eventually Venezuela. 2-ER-117; PSR-18. He was arrested and remained imprisoned in Venezuela for over a year until he was returned to the United States. 2-ER-117; PSR-18.

The next year, Francis agreed to plead guilty to one count of failing to appear for sentencing, in violation of 18 U.S.C. § 3146, as part of a "package" disposition with the plea agreement he previously signed. 2-ER-93. In the new agreement, Francis admitted to removing his ankle bracelet and fleeing to Venezuela to avoid sentencing. 2-ER-95. In return, the United States agreed to recommend a "total sentence" of no greater than 140 months "to cover the three underlying cases and the charge for failing to appear as ordered." 2-ER-107. Francis agreed to request a sentence no lower than 105 months, and he agreed to waive appeal of any sentence up to 156 months. *Id.*

E. Sentencing Filings

Prior to sentencing, the probation department prepared an updated PSR, which summarized Francis' account of why he fled before his sentencing hearing. PSR-25. The PSR also included guideline calculations that would have resulted in a range of 324 to 405 months' custody, but were capped at the statutory maximum of

300 months. PSR-49. After applying a downward adjustment for acceptance of responsibility and an additional four-level downward departure for "physical condition," probation calculated the applicable guideline range as 210 to 262 months and recommend a low-end sentence of 210 months. PSR-44.

The United States filed a sentencing memorandum briefly summarizing the nature of Francis' criminal scheme, but noting the district court was already "intimately familiar with the details of the bribery and corruption overseen by Francis," since the court had recently presided over a "months-long trial with weeks of testimony from coconspirators" and already sentenced dozens of co-defendants. 2-ER-116-17. The United States then briefly recounted Francis' flight to avoid sentencing, noting that he removed his GPS tracker, "crossed the border into Mexico, and ultimately made his way to Venezuela." 2-ER-117. Next, the United States outlined Francis' "unparalleled campaign to cooperate with authorities," describing in detail his cooperation and the resulting charges and convictions. 2-ER-117-120. Based on this cooperation, the United States recommended a sentence of 140 months. 2-ER-121, 124.

Francis filed a 50-page sentencing memorandum, with over 80 pages of exhibits that included letters and medical documents. Supplemental Excerpts of Record (SER)-3-147. In the

memorandum, he started by noting that he had already been in pretrial custody for longer "than all but one of the dozens of defendants his cooperation helped bring to justice." SER-9. He explained that he provided "hundreds of hours of unprecedented and extraordinary cooperation," paid five million dollars "in restitution to the United States" and "promptly and fully accepted responsibility for his criminal activity." SER-9-10. He also outlined his health problems and noted that his doctors gave him little chance of surviving for the next five years. SER-10.

Next, Francis discussed his difficult childhood in Malaysia, outlined the impact his incarceration has had on his young children, and noted that both of his parents "passed away while he was detained in the United States." SER-10-17. Francis also provided his work history with GDMA, explaining that he provided ship husbanding services for the U.S. Navy for decades, receiving "widespread praise and commendation from many Naval officers and diplomats." SER-17-18. He then provided pages of additional details about his "wide ranging and unprecedented cooperation" with the government. SER-23-36. Francis also provided the court with the reasons why he "panicked" and tried to flee before being sentenced and argued that this decision should not "erase his extraordinary cooperation." SER-36-40.

As to the applicable guideline range, Francis agreed that it would start at 210 to 262 months, but he argued the court "must not presume that the Guidelines range is reasonable" and "must make an individualized assessment based on the facts presented." SER-41. Turning to the §3553(a) factors, he argued first that his "personal history and characteristics" supported a lenient sentence, including his difficult upbringing, "strong family ties," and history of charitable work. SER-42-43. He then outlined the difficult conditions of confinement he suffered in Venezuela and provided pages of details and exhibits outlining his "myriad of complicated health conditions." SER-36. Francis also argued that a lengthy custodial sentence was not needed to provide specific deterrence, since he already destroyed his professional relationships and his "lengthy incarceration, extensive cooperation, and desire to live out his remaining time with his family all but assure he will not reoffend." SER-51. He also noted he posed "virtually no risk of recidivism," citing a report showing that "older offenders" are "at a lower risk of reoffending." SER-52-53.

Finally, Francis argued that a sentence of more than 105 months would "create unwarranted sentencing disparities." SER-52. He explained that none of the 30 other defendants had "provided anywhere near the exceptional level of cooperation" that he did, yet

all "have faced sentences far less severe than the advisory Sentencing Guidelines or the sentence of imprisonment the government intends to seek." SER-53. He then provided bullet points and descriptions of "just a few of the individuals who were sentenced to less time than the 11 years [he] has already spent facing the consequences of his actions." SER-54. He argued that *accepting* bribes was "in many ways worse than offering or providing them," yet the Naval officers who did so still received sentences lower than 105 months, with some having their cases reduced to a misdemeanor or dismissed. SER-54-56. For all these reasons, he asked the court to balance the role he played in the offense, "against his unprecedented cooperation" and the "heightened culpability" of the Navy defendants, and impose a sentence of 105 months, to "avoid unwarranted sentencing disparities." SER-56.

F. Sentencing Hearing

On November 5, 2024, Francis appeared before the district court for sentencing. At the outset, the court accepted Francis' guilty plea to new charge of failure to appear for sentencing, in violation of 18 U.S.C. § 3146. 1-ER-31-40. Then, turning to sentencing, the court stated that it had "read and considered many, many documents in preparation for today's sentencing," including

"the sentencing memorandums from the defendant and the government," the original and amended presentence reports, "all the exhibits attached by both sides," and "information about the related cases in this matter." 1-ER-41. The court also confirmed that it was prepared to go along with the guidelines as calculated by "both the defense and the government." 1-ER-43. The court then asked for argument from the defense. 1-ER-43.

Defense counsel began by outlining the multiple health issues Francis suffered since his arrest in 2013. 1-ER-43. He also noted the impact that incarceration had on Francis' children, who were "4, 5, and 6 years old" when he was first arrested. 1-ER-44. Then, counsel noted that Francis' cooperation with the government was "unprecedented in degree and significance," in a way "that cannot be overstated." *Id*. That cooperation led to the indictment of 34 other defendants, all but one of whom were convicted." *Id*. It also resulted in numerous disciplinary hearings in the Navy, none of which would have been possible without Francis' cooperation. 1-ER-46. Counsel noted that Francis had over 60 proffer sessions, which often involved "days and days of preparation," and he provided "a tremendous amount of complete and authentic documentary support to the government in hundreds of document productions." 1-ER-46-47.

Next, defense counsel said it would be "illustrative" to look at some of the cooperation departures other defendants in the case received. 1-ER-47. One cooperator, who testified at trial, received a nine-level downward departure, another received a six-level departure, and another had his charges dismissed altogether. 1-ER-46-47. Counsel argued that the cooperation of these defendants "pales in comparison to Mr. Francis." 1-ER-48. After highlighting the sentences that some of these other cooperators received, he argued that a 105-month sentence would "avoid unwarranted sentencing disparities with those other individuals given how this case has shaken out over the years." 1-ER-50.

Counsel then mentioned "a couple of other factors just to touch upon." 1-ER-48. He noted that the risk of recidivism for Francis was "extraordinarily low," given his age, health problems, and notoriety along with the general statistics about recidivism for "those in Criminal History Category I at over 50 years old." 1-ER-48. He explained that Francis had already spent 77 months in custody, with another 57 months on medical furlough, for which he would not receive custody credit. 1-ER-49. He recounted that Francis' time in a Venezuelan prison was "particularly harsh." 1-ER-50. And he noted that, as a deportable alien, Francis would not be eligible for early release to a residential reentry center. *Id.*

Finally, counsel explained that with all of Francis' health problems, the 140-month sentence requested by the government, would be "essentially a death sentence for Mr. Francis here in the United States." 1-ER-52. Defense counsel concluded by asking the court show Francis "mercy and leniency" and allow him to go home to his children "before he dies." 1-ER-52-53.

Francis then addressed the court directly and apologized for "committing the fraud and bribery at the center of this case," his "misconduct that led to this day," and for "leaving the United States in 2022" prior to sentencing. 1-ER-53. He thanked the court for allowing him to stay out of custody on medical furlough with "saved [his] life." 1-ER-54. He told the court he regretted the impact his actions had on his family, and asked the court for "mercy in sentencing" so he could "spend [his] limited time left being a father to [his] children." 1-ER-54.

Next, the prosecutor noted that the court was already intimately familiar with the facts of the case and the "scope of the criminal conduct." 1-ER-55. Francis paid bribes to the "upper echelons of the United States Navy," to "have those individuals sell out their duty, their responsibility, their oath, for wine or cigars or cash or prostitutes or dinners or hotel rooms." 1-ER-56. Francis "led

it all," the prosecutor argued, "and he did it in order to bilk the taxpayers." *Id*.

Nevertheless, the prosecutor noted, in his 25 years on the job, he had never seen "anyone who has provided more insight into the criminal activity of more individuals than this defendant." 1-ER-56. "His cooperation was extensive" and "staggering." 1-ER-57-58. The prosecutor explained how Francis provided "information that had not been known to investigators," and he "corroborated the years and years and years that they put into this investigation." 1-ER-58. Balancing that extensive cooperation against the severity of the criminal conduct, the United States concluded that a sentence of 140 months was "fair in every regard for him to answer for the criminal conduct, for him to answer for the failure to report and fleeing the country, and to take into account the person which includes what he did in cooperation." 1-ER-58.

After hearing from the parties, the court calculated the guidelines range to be 210 to 262 months. 1-ER-62. The court noted that in determining whether to vary downward from that range, it had to consider the §3553(a) factors, which it then recited in detail. 1-ER-62. "With these factors in mind," the court explained that over the past decade, she had "sentenced over 30 defendants and presided over a four-month jury trial" related to Francis' bribery

scheme. 1-ER-62. While the defendants in those cases "had varying roles," what was clear to the court is that Francis was the "leader, the "organizer," the "mastermind," and the "orchestrator of what was an insidious conspiracy to commit bribery and fraud." 1-ER-63. Francis' "criminal activity was long term and it was expansive," and it resulted in ruined lives and shattered careers. *Id*. The court noted that Francis was "methodical and calculating" in his "criminal efforts," and he was "very talented in finding vulnerable people, people capable of being influenced, and exploiting them." 1-ER-63. This allowed him to ultimately defraud the United States out of "tens of millions of dollars." *Id*.

Against this aggravated criminal conduct, however, the court noted that Francis had some equities, including that "the younger members of [his] family have suffered greatly from [his] absence." 1-ER-63. The court noted that it "read and considered" the reports and evaluations he submitted, and the court was sorry that Francis lost both his mother and father while he was incarcerated. 1-ER-63-64. The court also explained it was "well apprised" of Francis' health concerns, after presiding over this earlier medical furlough, and said it would recommend his designation at a facility with the highest-level care for medical services. 1-ER-64. The court also noted that GDMA provided "legitimate and exemplary security

services to the Navy throughout the Pacific over many years," before it grew into a business "that relied on fraud and bribery." 1-ER-64. Finally, the court noted Francis' "extraordinary and unprecedented" cooperation, as outlined in the government's sentencing papers, showing "the government would not have been able to prosecute successfully many of the defendants in this Navy bribery group of cases," without his help. 1-ER-64. The court explained that the "government has advocated for consideration of your cooperation in their sentencing memorandum and here today in court," and the court must "give that some degree of deference." 1-ER-64.

"Unfortunately," the court noted, the §3553(a) factors "do not end here." 1-ER-64-65. The court also had to consider Francis' flight prior to his first sentencing. This represented "a significant breach of the court's trust" and "[t]here must be consequences for this action." 1-ER-65. The court noted that "[n]either you nor the government have explained how this escape occurred," and "[w]hile this sentencing may be the last of many in this group of cases, numerous questions remain unanswered." 1-ER-65. The court concluded that after "[w]eighing all of these factors and considering the need to promote respect for the law and consider general deterrence," it would impose a sentence of 180 months in custody.

1-ER-65. The court explained that sentence was "sufficient but not greater than necessary given the totality of the circumstances in this case." *Id.*

Francis did not object or ask for any further explanation. This appeal followed.

SUMMARY OF ARGUMENT

This Court should affirm Francis' sentence.

First, the court did not plainly err in explaining its sentence. A sentencing court must set forth enough to show it has considered the parties' arguments and has a reasoned basis for exercising its decision-making authority. But the law is clear that a court need not mechanically address every argument a defendant makes at sentencing so long as the court reviews the sentencing materials and explains its reasons for imposing the sentence it does. Here, the district court read and reviewed the sentencing papers; heard extensive argument from both parties; explicitly applied each of the §3553(a) factors; and provided the reasons for its below-guideline sentence over the course of several transcript pages. This explanation sufficed. In fact, this Court routinely affirms sparser explanations. At the very least, Francis has not shown that any error was "plain" or that the outcome of sentencing would have been any different had the court said more when imposing sentence.

Francis' sentence of 180 months was also substantively reasonable. This Court has stressed the significant deference that must be afforded to the district court, such that a sentence will be deemed substantively unreasonable only if it was "shockingly high" or otherwise unsupportable as a matter of law. Francis' sentence—30 months below the applicable guideline range—was neither of those things. Francis argues that his sentence was unreasonable because the court failed to properly weigh his health concerns and the risk of unwarranted sentencing disparities and failed to give proper deference to the government's cooperation recommendation. The law is clear, however, that post-*Booker* a district court's sentence is subject to a unitary review for substantive reasonableness. The question is not whether this Court would have weighed any individual factor differently. It is whether the overall sentence was reasonable. Nevertheless, even if this Court were to review each §3553(a) factor on its own, Francis has not shown that it was illogical or implausible for the court to balance them as it did.

Finally, it was not a plain violation of Francis' Fifth Amendment rights for the court to note that neither party had provided details about how he managed to abscond prior to sentencing. In *Mitchell v. United States*, 526 U.S. 314 (1999), the Supreme Court held that sentencing courts cannot draw an adverse

inference from a defendant's silence "in determining the facts of the offense." *Id.* at 330. In that case, the sentencing court imposed a higher sentence after telling the defendant explicitly "I held it against you that you didn't come forward today…" *Id.* Courts have since construed the holding of *Mitchell* narrowly, however, and have still allowed sentencing courts to consider the absence of evidence from the defendant in determining the guidelines in other contexts. Here, the court was not using Francis' "silence" to determine "the facts of the offense." Francis had already admitted to the facts of his flight prior to sentencing, and it is not even clear which party the court was faulting for the paucity of information. At the very least, Francis has not shown a "plain" Fifth Amendment violation, given the ambiguity of the court's statement and the lack of analogous caselaw. Nor has he shown a reasonable likelihood he would have received a lower sentence—absent the court's off-hand comment—or that any error seriously affected the fairness, integrity or public reputation of judicial proceedings. His sentence should be affirmed.

ARGUMENT

A. The district court did not plainly err in explaining Francis' sentence, and he cannot show prejudice from any error

1. *Standard of Review*. Francis did not object to the district court's explanation of his sentence. This Court thus reviews only for plain error. *United States v. Avendano-Soto*, 116 F.4th 1063, 1068 (9th Cir. 2024) ("Because Avendano did not object below to the adequacy of the district court's explanation of its sentence, we review for plain error"); *United States v. Miqbel*, 444 F.3d 1173, 1176 (9th Cir. 2006) (same). To establish plain error, Francis must demonstrate that there was "'error' that is 'plain' and that 'affects substantial rights.'" *United States v. Olano*, 507 U.S. 725, 732 (1993). If these three factors are met, "the court of appeals has the discretion to remedy the error if it 'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Puckett v. United States*, 556 U.S. 129, 135 (2009). "Meeting all four prongs is difficult, as it should be." *Id.*

2. *Argument*. A sentencing court must "set forth enough to satisfy the appellate court that [it] has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority." *Rita v. United States*, 551 U.S. 338, 356 (2007). "What constitutes a sufficient explanation will necessarily

vary depending upon the complexity of the particular case, whether the sentence chosen is inside or outside the Guidelines, and the strength and seriousness of the proffered reasons for imposing a sentence that differs from the Guidelines range." *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc). "No lengthy explanation is necessary if 'the record makes clear that the sentencing judge considered the evidence and arguments.'" *United States v. Daniels*, 541 F.3d 915, 922 (9th Cir. 2008) (quoting Rita, 551 U.S. at 359).

This Court has held that when a party makes a "specific, nonfrivolous argument tethered to a relevant § 3553(a) factor in support of a requested sentence, then the judge should normally explain why he accepts or rejects the party's position." *Carty*, 520 F.3d at 992-93. There is no requirement, however, that courts mechanically address every argument a defendant makes. *United States v. Flores*, 725 F.3d 1028, 1041-42 (9th Cir. 2013). Where, as here, "the court reviewed all the relevant submitted materials ... and thoroughly explained its reasons for imposing the sentence of imprisonment it did, the district court d[oes] not commit procedural error by not offering a more in-depth explanation of why it rejected" each of the defendant's arguments. *Id.*; *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1053-54 (9th Cir. 2009) (no procedural

error when the "record as a whole" demonstrated that "the court 'listened to [the defendant]'s arguments' and 'then simply found these circumstances insufficient to warrant'" the mitigated sentence the defendant had requested) (citations omitted).

Here, the "record as a whole" shows that the court properly considered Francis' sentencing arguments. Prior to sentencing, he submitted a 50-page memorandum, which outlined and applied the various §3553(a) factors. SER-41-55. He gave details about his health conditions, his difficult background, his employment history, the impact of sentencing on his family, and his extensive cooperation. SER-9-36. He also argued that he presented "virtually no risk of recidivism," and cited general statistics about the lower recidivism rates for "older offenders." SER-52. In addition, he provided a detailed account of his cooperation, compared that against his codefendants and argued that a sentence above 105 months would create an unwarranted sentencing disparity. SER-53-54. At the hearing, the court made clear it had "read and considered" the lengthy defense sentencing memorandum—which had been filed three weeks before sentencing—as well as all of the exhibits to the memorandum, the presentence reports, and information about related cases. 1-ER-41. Defense counsel then repeated many of the same arguments, focusing on Francis' health

issues and cooperation. 1-ER-43-47, 52-53. Counsel also noted that Francis presented an "extraordinarily low" risk of recidivism and expressly compared his sentence against other defendants who provided less cooperation arguing the need to avoid an "unwarranted sentencing disparity" with those individuals. 1-ER-46-50.

After hearing argument from both sides, the court outlined the 18 U.S.C. § 3553(a) factors, starting with the severity of criminal conduct and Francis' role as "leader" and "mastermind" of a scheme to exploit vulnerable individuals and defraud the Navy out of "tens of millions of dollars." 1-ER-63. The court weighed those aggravating factors against Francis' equities, including the impact on his family, his health concerns, his work history, and his "extraordinary and unprecedented" cooperation. 1-ER-64. The court also considered his decision to flee the country before his original sentencing as a "significant breach of the Court's trust." 1-ER-65. Weighing all these factors, the court "departed downward from the guideline range" and imposed a sentence of 180 months as "sufficient but not greater than necessary." 1-ER-65.

This explanation more than sufficed. In fact, this Court routinely affirms sparser explanations. *See, e.g.*, *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1054 (9th Cir. 2009) (court

discussed § 3553(a) factors but "did not mention several of [the defendant]'s mitigating arguments," some of which "were undoubtedly weighty"); *United States v. Carter*, 560 F.3d 1107, 1118-19 (9th Cir. 2009) (court discussed § 3553(a) factors and found that "the Guidelines have adequately taken into consideration defendant's actions and criminal history;" it "had no obligation to address and resolve each of [the defendant]'s arguments"); *United States v. Mejia*, No. 24-664, 2024 WL 4532908, at *1 (9th Cir. Oct. 21, 2024) (district court's "brief" explanation for sentence was sufficient, when the court "reviewed the presentence report and sentencing memoranda from the parties, listened to argument, and directly rejected at least one of Mejia's arguments."). This Court should reach the same conclusion here.

Francis argues that the district court "failed to adequately address" his argument that a sentence above 105 months would create an unwarranted sentencing disparity with other codefendants in the case. Appellant's Opening Brief (AOB)-28. But this Court has made clear that a district court need not address *all* mitigation arguments expressly when the record makes clear that the court considered the evidence and arguments and then rendered a reasoned decision. *See United States v. Rangel*, 697 F.3d 795, 806 (9th Cir. 2012) ("it is often unnecessary" to "directly

address each and every one of the defendant's arguments") (collecting cases); *see, e.g.*, *Amezcua-Vasquez*, 567 F.3d at 1054 (court "did not mention several" "undoubtedly weighty" "mitigating arguments"); *United States v. Perez-Perez*, 512 F.3d 514, 516-17 (9th Cir. 2008) (court "apparently consider[ed]—without explicit reference—[the defendant]'s mitigation arguments").

Francis included an unwarranted sentencing disparity argument in his sentencing memorandum, SER-52-56, submitted a chart outlining the sentences received by other defendants, SER-145-47, and argued against creating a disparity at the hearing. 1-ER-47-50. The court explained that it had read all the sentencing papers, and it noted its familiarity with those other cases—having "sentenced over 30 defendants" and presided over a four-month trial. 1-ER-63. The court also noted that Francis' role was aggravated, since he was the "leader" and "mastermind" of the "insidious conspiracy to commit bribery and fraud." 1-ER-63. Although the court did not explicitly reject Francis' "unwarranted disparities" argument when applying the §3553(a) factors, the record makes clear the court "reviewed all the relevant submitted materials ... and thoroughly explained its reasons for imposing the sentence of imprisonment it did." *Flores*, 725 F.3d 1028, 1041-42. No more explanation was required. *See United States v. Campos*,

No. 22-50258, 2024 WL 2130602, at *1 (9th Cir. May 13, 2024) (court did not procedurally err by failing to address "the need to avoid unwarranted sentence disparities among the co-defendants in this case," when the court said it had "read and considered defendant's sentencing papers, which contained defendant's sentencing disparities argument," listened to the argument at sentencing, and considered the §3553(a) factors at sentencing.).

Francis also argues that the district court failed to address the fact that he posed a "low risk of recidivism." AOB-30. But again, Francis included this argument in his sentencing papers, SER-51-53, which the court stated it read. 1-ER-41. Francis mentioned the issue again—albeit in passing—as part of his sentencing argument to the court. 1-ER-48 ("briefly a couple of other factors just to touch upon…"). The court made clear it had heard and considered these arguments. It was not required to specifically address them when evaluating the §3553(a) factors. See *Carty*, 520 F.3d at 992 ("The district court need not tick off each of the § 3553(a) factors to show that it has considered them."); *United States v. Dougal*, 490 F. App'x 63, 64 (9th Cir. 2012) (rejecting argument that district court failed to "respond to evidence that Dougal represented a low recidivism risk," when the court "listened to [the] mitigation evidence" and "sufficiently explained the reasons for imposing the sentence.").

But even if the court's explanation for its sentence was somehow lacking, Francis has not shown that it was so deficient as to be "plain" error, absent objection. Francis points to no cases where a district court's similar explanation was deemed insufficient; any error was thus not "clear or obvious under current law" and, by definition, not plain. *United States v. Gonzalez Becerra*, 784 F.3d 514, 518 (9th Cir. 2015) ("An error cannot be plain where there is no controlling authority on point and where the most closely analogous precedent leads to conflicting results."). In fact, as noted above, this Court routinely affirms sentences imposed with significantly less explanation. See, e.g., *Amezcua-Vasquez*, 567 F.3d at 1054; *Carter*, 560 F.3d at 1116-19; *Perez-Perez*, 512 F.3d at 514-17. This case falls well within that precedent.

Francis relies on this Court's decision in *United States v. Trujillo*, 713 F.3d 1003 (9th Cir. 2013). But that case does not support a finding of plain error. In *Trujillo*, a defendant with no criminal history was sentenced to 30 years based on the amount of cocaine involved in the offense. *Id.* at 1009. He moved for a reduction of his sentence, "arguing in part that favorable treatment was justified by various factors under 18 U.S.C. § 3553(a)." *Id.* at 1005. Because the district court denied relief in an order that "did not address any of [Trujillo's arguments], even to dismiss them in

shorthand," this Court held that the court did not provide a sufficient explanation. *Id.* That "total omission" was procedural error warranting a remand for resentencing. *Id.* this is not a "total omission" case. The court read and reviewed the presentence reports and the parties' submissions, heard extensive argument, and imposed a below-guidelines sentence after considering the numerous mitigating factors cited by Francis. In short, unlike the court in *Trujillo*, the court here "set forth enough to satisfy the appellate court that [it] ha[d] considered the parties' arguments and ha[d] a reasoned basis for exercising [its] own legal decision making authority." *Id.* at 1010 (quoting *Rita*, 551 U.S. at 356). Any error in failing to address every single one of Francis' §3553(a) arguments when imposing sentence was not "plain" error.

Finally, Francis cannot show that any error in the sufficiency of the court's explanation would have prejudiced him or undermined the fairness or integrity of the judicial proceedings. There is no "reasonable probability that the [alleged error] affected the outcome of the sentencing." *United States v. Whitney*, 673 F.3d 965, 972 (9th Cir. 2012). The court, which was already very familiar with Francis' case, heard extensive argument from the parties, explicitly highlighted the most relevant §3553(a) factors, and gave a lengthy explanation for its below-guidelines sentence over the

course of several transcript pages. There is no reason to believe—and Francis posits none—that the district court's sentence would have been even *further* below the guidelines if the court were told to explain its decision in greater detail. For similar reasons, he has not shown any deficiencies in the district court's explanation seriously affected the "fairness, integrity or public reputation of judicial proceedings," such that this Court should exercise its discretion under the fourth prong of plain error. *Puckett*, 556 U.S. at 135.

B. Francis' below-guideline sentence was substantively reasonable.

1. *Standard of Review*. This Court reviews the substantive reasonableness of a sentence for abuse of discretion. See *United States v. Carty*, 520 F.3d 984, 997 (9th Cir. 2008) (en banc). A court abuses its discretion if it identifies the incorrect legal rule or if its application of the correct rule is illogical, implausible, or without support in inferences that may be drawn from the record. See *United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).

2. *Argument*. Sentences are reasonable when they are based on "rational and meaningful consideration of the factors enumerated in 18 U.S.C. § 3553(a)." *United States v. Ressam*, 679 F.3d 1069, 1089 (9th Cir. 2012) (en banc) (citation omitted).

Unreasonable sentences are "rare" and "few," especially given the "significant deference" owed to the district court's sentencing decision. *Id.* at 1086-88. As this Court has explained, "[e]ven if we are certain that we would have imposed a different sentence had we worn the district judge's robe, we can't reverse on that basis." *United States v. Whitehead*, 532 F.3d 991, 993 (9th Cir. 2008). Instead, a sentence may be reversed only when it is "shockingly high…or otherwise unsupportable as a matter of law," and thus would "damage the administration of justice." *Ressam*, 679 F.3d at 1088 (citation omitted).

Here, the district court correctly calculated the guidelines, expressly applied the §3553(a) factors, discussed both the aggravating and mitigating aspects of the case, and decided that a below-guidelines sentence of 180 months was "sufficient but not greater than necessary." 1-ER-65. This was not a "shockingly high" sentence. *Ressam*, 679 F.3d at 1088. As the court found, Francis was the "mastermind" of a long-term and expansive criminal conspiracy. 1-ER-63. He was "methodical and calculating," took advantage of vulnerable people, and ultimately caused "tens of millions" of dollars in losses, along with shattered careers and "ruined lives." 1-ER-63. Given the aggravated nature of the offense, the court's decision to impose a sentence that was still below the

applicable guidelines was not "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Hinkson*, 585 F.3d at 1261-62; see *United States v. Bendtzen*, 542 F.3d 722, 729 (9th Cir. 2008) ("Because a Guidelines sentence will usually be reasonable, Bendtzen's below-Guidelines sentence, supported by the district court's specific reasoning, is reasonable" (internal quotation marks and citation omitted)).

Francis argues that his sentence was substantively unreasonable, because the court failed to "meaningfully weigh" several of the §3553(a) factors and failed to "give substantial weight" to the government's evaluation of his cooperation. But this Court only reviews a sentencing court's decision to vary from the guidelines, under §3553(a), as part of its broader substantive reasonableness analysis. See *United States v. Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006) ("[A]ny post-*Booker* decision to sentence outside of the applicable guidelines range is subject to a unitary review for reasonableness, no matter how the district court styles its sentencing decision"); see also *United States v. Vasquez-Cruz*, 692 F.3d 1001, 1008 (9th Cir. 2012) (refusing to review "whether the district court procedurally erred by failing to grant ... a departure," and instead "review[ing] [that] exercise of discretion only for substantive reasonableness"). Here, the district court

considered numerous §3553(a) arguments raised by Francis. The question for this Court is not whether any one factor should have been weighed or considered differently; the question is whether the overall below-guidelines sentence was substantively reasonable. Here, it was, for the reasons outlined above.

But even if this Court were to consider each of Francis' §3553(a) arguments separately, none would support a sentence even further below the applicable guideline range. As to his claim of unwarranted sentencing disparities, this Court has made clear that "Congress's primary goal in enacting §3553(a)(6) was to promote *national* uniformity in sentencing rather than uniformity among co-defendants in the same case." *United States v. Jones*, No. 22-10050, 2023 WL 4288349, at *3 (9th Cir. June 30, 2023) (emphasis added) (citing *United States v. Saeteurn*, 504 F.3d 1175, 1181 (9th Cir. 2007)). Moreover, a district court does not create "unwarranted" disparities if, as here, co-defendants are convicted of different crimes. *United States v. Monroe*, 943 F.2d 1007, 1017 (9th Cir. 1991) (unwarranted sentencing disparity consider in 3553(a)(6) does not apply when the defendants "were not found guilty of the same offenses"); see also *United States v. Carter*, 560 F.3d 1107, 1121 (9th Cir. 2009) (difference in sentence caused by cooperation does not result in unwarranted disparity).

Here, the other defendants sentenced as a result of the GDMA investigation were charged and convicted of a range offenses, as Francis outlined in his sentencing papers. SER-145-47. None of them admitted, as Francis did, to "presiding over a massive criminal scheme" involving the bribery of "scores" of Navy officials *and* defrauding the government out of "more than $20 million." 1-ER-116 (emphasis added). Nor did any of those defendants lead federal agents on an international manhunt. And unlike those other defendants, Francis committed another federal crime after pleading guilty—a fact that by itself could have justified withholding of acceptance of responsibility under USSG § 3E1.1(b) and under the terms of his various plea agreements.

The court made clear it was very familiar with these other cases from its own experience with them, and it understood that Francis was the "mastermind" of the entire scheme of bribery and fraud. Indeed, the only reason Francis was *able* to provide such "unprecedented" and valuable cooperation, was because he was the leader of the entire criminal enterprise and had a full understanding of its scope and participants. The various Navy defendants cited by Francis, in contrast, played discrete roles in the overall conspiracy. AOB-36.

The various defendants also presented different types of cooperation, with some testifying extensively at trial. 1-ER-116-17, 119.[2] In short, the role, charges, and type of cooperation varied significantly among the dozens of defendants the court had already sentenced. It was not illogical or implausible for the court to decline to conduct a more explicit, comparative analysis, but to instead focus on the §3553(a) factors as they applied to Francis. Moreover, as outlined above, "even if the disparity in this case were assumed to be unwarranted, that factor alone would not render [Francis'] sentence unreasonable; the need to avoid unwarranted sentencing disparities is only one factor a district court is to consider in imposing a sentence." *United States v. Ghanem*, No. 22-50266, --- F.4th ---, 2025 WL 1970681, at *11 (9th Cir. July 17, 2025).

Likewise, while Francis argues the court failed to adequately consider his need for medical care under 18 U.S.C. §3553(a)(2)(D), the court reviewed his extensive briefing on the topic and said on the record that it was "well apprised" of his health concerns after years of supervising his medical furlough. 1-ER-63. Francis also

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[2] Francis was not called to testify at trial, at least in part, because—as the prosecutor explained to the court at sentencing—he taped an unauthorized podcast that made it "difficult to use him as a witness." 1-ER-57; PSR-24 (Francis apologizing for his "role in the 'Fat Leonard Podcast,'" claiming he was "coached to play a larger-than-life character to help popularize the story.").

outlined his concerns during the sentencing hearing, arguing it would be a "death sentence" if the court imposed even the 140-month sentence recommended by the government. 1-ER-52. The court heard these concerns and designated Francis to serve his custodial term at "the highest medical facility" in the Bureau of Prisons, based on his "very significant health-related issues." 1-ER-75. The court thus considered Francis' arguments about his health, but weighed his need for medical attention against the other §3553(a) factors. As with the need to avoid unwarranted sentencing disparities, Francis' need for medical care was "only one factor" to balance against all the other factors in aggravation. *Ghanem*, 2025 WL 1970681, at *11.

Finally, Francis argues the court erred in its analysis under §3553(a)(5), because it failed to apply a "pertinent policy statement" from the Sentencing Guidelines, by failing to give "substantial weight" to the government's evaluation of the defendant's assistance. AOB-43. The Guidelines give sentencing judges "wide latitude" to evaluate the "significance and usefulness of the defendant's assistance." *United States v. Awad*, 371 F.3d 583, 586 (9th Cir. 2004). Here, the court read and considered both parties' filings on cooperation, heard extensive argument, and found—after giving "some degree of deference" to the government's

recommendation—that Francis' cooperation was "extraordinary and unprecedented." ER-64. The court explained that the cooperation "lasted several years" involved "hundreds of hours" of meetings, and without it, the government "would not have been able to prosecute successfully many of the defendants." 1-ER-64. As the court made clear, however, it still had to balance the value of Francis' cooperation against the other aggravating factors—including Francis' decision to abscond before sentencing. This did not result in an overall substantively unreasonable sentence. See *United States v. Brown*, 771 F.3d 1149, 1155 (9th Cir. 2014) (court properly found that "any benefit to which Brown was entitled under §5K1.1 was offset by the aggravating nature of the §3553(a) factors.").

In the end, Francis' substantive reasonableness arguments boil down to a disagreement with how the court *weighed* each of the §3553(a) factors. The law is clear, however, that "[t]he weight to be given the various § 3553(a) factors in a particular case is for the discretion of the district court." *United States v. Gutierrez-Sanchez*, 587 F.3d 904, 908 (9th Cir. 2009). Here, the district court considered all of Francis' §3553(a) arguments, properly weighed the aggravating factors against the mitigating ones, and ultimately arrived at a sentence of 180 months that was still below the

applicable guideline range. This was not a substantively unreasonable sentence.

C. The court did not plainly err by commenting on the lack of details about Francis' escape, and he has not shown prejudice from any error

1. *Standard of Review*. Francis did not object when the court noted that neither he "nor the government have explained how [his] escape occurred." 1-ER-65. This Court should review his Fifth Amendment claim, raised for the first time on appeal, only for plain error. See *United States v. Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005) (en banc) (explaining that an unpreserved constitutional argument is generally reviewed for plain error); *United States v. Shaw*, No. 18-50384, 2022 WL 636639, at *1 (9th Cir. Mar. 4, 2022) (Fifth Amendment sentencing claim raised for the first time on appeal reviewed only for plain error) (citing *United States v. Perez*, 962 F.3d 420, 435 (9th Cir. 2020).

2. *Argument*. In *Mitchell v. United States*, 526 U.S. 314 (1999), the Supreme Court held that a sentencing court may not, consistent with the Fifth Amendment privilege against compelled self-incrimination, draw an adverse inference from a defendant's silence "in determining the facts of the offense." *Id.* at 330. There, in determining the drug amount for purposes of calculating the mandatory guidelines, the sentencing court explicitly told the

defendant, "I held it against you that you didn't come forward today and tell me that you really only did this a couple of times." *Id.* at 319. Although the Court held this violated the Fifth Amendment, it affirmatively declined to consider whether a defendant's silence could be used in other sentencing contexts. *Id.* at 330. The Supreme Court later explained that it framed its holding in *Mitchell* "narrowly" by "implying that it was limited to inferences pertaining to the facts of the crime." *White v. Woodall*, 572 U.S. 415, at 423 (2014); see also *Mitchell*, 526 U.S. at 340 (Scalia, J. dissenting) (explaining the majority "swept under the rug" the question of how silence could be used in other sentencing contexts that comprised "the *bulk* of what most sentencing is all about."). This Court has likewise distinguished between drawing "an adverse inference from a refusal to testify at sentencing (unconstitutional as per *Mitchell*)," and considering the defendant's failure to put forth information that would challenge the evidence introduced by the government. *United States v. Romero-Rendon*, 220 F.3d 1159, 1163 & n.4 (9th Cir. 2000).

This Court has also acknowledged that *Mitchell* "reserved the question of whether silence may be used to assess remorse or acceptance of responsibility." *Moore v. Helling*, 763 F.3d 1011, 1016 (9th Cir. 2014) (citing *White*, 572 U.S. at 421). And other Circuits

have held that a defendant's silence can still be considered for other purposes at sentencing. See, e.g., *United States v. Keskes*, 703 F.3d 1078, 1090 (7th Cir. 2013) (defendant's silence can be used to find lack of remorse); *United States v. Ronquillo*, 508 F.3d 744, 749 (5th Cir. 2007 ("*Mitchell* is inapplicable to the sentencing decision in this case because 'the facts of the offense'" were not based on "any adverse inference drawn by the District Court."); *United States v. Kennedy*, 499 F.3d 547 (6th Cir. 2007) (defendant's refusal to participate in sex offender evaluation can be used for evaluating his danger to the public under §3553(a)(2)(C)). Indeed, even in a criminal trial, the prosecutor may comment on a defendant's failure to present witnesses without calling attention to the defendant's own failure to testify. *United States v. Garcia-Guizar*, 160 F.3d 511, 522 (9th Cir. 1998).

In this case, the record does not support a conclusion that the district court was using Francis' "silence" against him at sentencing. As an initial matter, the court placed blame on *both* Francis and the government for the lack of information, pointing out—in just one sentence—that neither party had "explained how this escape occurred." 1-ER-65. It is not obvious that the court was making an adverse inference solely against Francis, or as he argues, holding the government's "supposed silence" against him.

AOB-48. But even if the court was holding the lack of details about the escape solely against Francis, it was not doing so "in determining the facts of the offense"—which is all *Mitchell* has been read to prohibit. *White*, 572 U.S. at 423. Here, by the time the court made the comment, Francis had already admitted all the relevant facts. He pled guilty to the new offense, submitted a sentencing memorandum explaining why he fled the country, and personally apologized to the court for "leaving the United States in 2022." 1-ER-37, 53; SER-36-40. When, as here, the defendant has already "admitted all the predicate facts of his offenses" there is no adverse inference to draw from the silence. *Ronquillo*, 508 F.3d at 749.

At the very least, it was not a "plain" violation of his Fifth Amendment rights under *Mitchell* for the court to make the comment it did. First, any "error that hinges on a factual dispute is not 'obvious' as required by the 'plain error' standard." *United States v. Yijun Zhou*, 838 F.3d 1007, 1011 (9th Cir. 2016). As outlined above, it is not clear what the court meant by its comment or that it had any significance in the court's sentence. Even if it was weighing the lack of information in determining the sentence, it was not clear whether it was doing so against Francis, the government, or both. This Court should not, on plain error review, interpret the court's ambiguous comments in the most damaging

light possible. See *Carty*, 520 F.3d at 992 ("Trial judges are presumed to know the law and to apply it in making their decisions"); cf. *United States v. Alcantara-Castillo*, 788 F.3d 1186, 1195 (9th Cir. 2015) (no misconduct when prosecutor's comments could be "reasonably understood" in both permissible and impermissible ways).

But even if this Court interpreted the district court's statement as a comment solely on Francis' failure to provide details of the escape, he still has not provided any controlling authority where a Court has found a Fifth Amendment violation on this or similar facts. See *United States v. Gonzalez-Becerra*, 784 F.3d 514, 518 (9th Cir. 2015) ("An error cannot be plain where there is no controlling authority on point and where the most closely analogous precedent leads to conflicting results."). As outlined above, *Mitchell* only held that it was improper to consider a defendant's silence "in determining the facts of the offense." *Id.* at 330. And the Supreme Court later recognized there are "diverging approaches" among the Circuits illustrating the "possibility of fairminded disagreement" as to the scope of the decision. *Id.* at n. 3.

None of the cases cited by Francis would support a finding of a Fifth Amendment violation on these facts. The first, *United States v. Kurns*, 129 F.4th 589 (9th Cir. 2025), found there was *no*

violation, when the court suggested that the defendant could "add to [his] evidence" by testifying under oath and denying that he touched certain weapons that were the subject of an enhancement. *Id.* at 599. There was also no violation of the Fifth Amendment when the court noted "we don't have statements from any witnesses who did not testify." *Id.* This Court held that these statements do "not show that the court drew a negative inference from silence." *Id.* Although the court warned, at the end of the opinion that "there is good reason to be cautious about judicial comments on a refusal to testify," there was "no evidence that the district court weighed Kurns' silence in determining his sentence." *Id.* The same is true here. And, of course, the district court never made any "judicial comments on a refusal to testify," it merely noted that neither side explained how the escape occurred. *Id.*

Francis also cites this Court's decision in *United States v. Mezas de Jesus*, 217 F.3d 638 (9th Cir. 2000). But that case is also readily distinguishable and provides no basis for finding "plain" error. In *Mezas de Jesus*, the primary issue was whether the district court should have applied a "clear and convincing standard" when evaluating whether the government proved an uncharged crime that increased the guidelines by nine levels. *Id.* at 642-43. While discussing that question, the court also considered an issue that the

defendant "did not separately raise," and noted that "it appears that the district court implicitly drew an adverse inference from [the defendant's] silence at sentencing" because the court questioned whether the defendant was entitled to an evidentiary hearing since the defendant did not provide a "statement under oath." *Id*. "By focusing on the defendant's silence at sentencing and quantitatively weighing it against the government's 'untested' evidence,'" this Court held, "the district court effectively shifted the burden of proof at sentencing to the defendant." *Id*. Nothing of the sort occurred here. The court never shifted the burden of proof to Francis and never made any comment about his failure to testify or provide a statement. *Mezas de Jesus* does not support a finding of plain error. See *Kurns*, 129 F.4th 589, 597–98 (expressly distinguished *Mezas de Jesus* since in that case the district court "never implied that [the defendant's] testimony was necessary to rebut arguments advanced by the government.").

Francis also has the burden on plain error review to show that the court's comments affected his substantial rights, such that there is a "reasonable probability" he would have received a lower sentence absent the court's comments. *United States v. Tapia*, 665 F.3d 1059, 1061 (9th Cir. 2011). He has not met that burden. First, as outlined above, the court's comment was ambiguous and could

have been interpreted as faulting the government as well as Francis, if it even factored into the court's sentencing calculation at all. Second, whatever details the court thought were missing, both Francis and the United States provided the key facts about Francis' flight. They explained how he removed his GPS bracelet, traveled across the border, flew between Mexico, Cuba, and Venezuela, and was eventually arrested and forced to spend a year in the "harsh conditions" of a Venezuelan jail. 1-ER-50. Francis also outlined for the court his reasons for fleeing before sentencing. SER-36-40. It is not clear how any additional facts about his flight would have resulted in a lower sentence. Furthermore, as outlined above, the court already went through the various §3553(a) factors in detail before imposing a below-guideline sentence. Francis has not shown that the court would have imposed an even *lower* sentence, absent the disputed comment. See *United States v. Johnston*, 789 F.3d 934, 943 (9th Cir. 2015) ("Although the district court commented on Johnston's reticence at the sentencing hearing," the "district court's careful review of the record and extensive explanation of the sentence imposed," showed that the "sentence was not affected by an adverse inference drawn from his silence. He is not entitled to resentencing on this ground.").

Finally, any error on the part of the district court did not rise to a "miscarriage of justice" warranting the "'extravagant protection'" of discretionary correction on plain error review. *United States v. Young*, 470 U.S. 1, 12-13, 15 (1985) (plain error meant only for "particularly egregious errors" and "is to be 'used sparingly'"). The court's statements were ambiguous, and if Francis had concerns that the court was implicitly holding his "silence" against him, he could have objected or asked the court for clarification. This is precisely the reason this Court imposes plain-error review. See, e.g., *In re Perez*, 30 F.3d 1209, 1213 (9th Cir. 1994) ("The principal reason we require parties to raise an issue in the trial court is to give that court an opportunity to resolve the matter and, hopefully, avoid error. Also, when matters are first raised in the trial court, it's possible to develop the record as needed to present the issue properly on appeal."). Here, the court considered the parties' extensive arguments, carefully weighed the §3553(a) factors, and imposed a substantively reasonable sentence. Absent objection, the court's seemingly off-hand comment about both parties' failure to provide additional explanation for the escape did not seriously affect "the fairness, integrity or public reputation of judicial proceedings." *Puckett*, 556 U.S. at 135.

CONCLUSION

This Court should affirm Francis' sentence.

Respectfully submitted,

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JULY 25, 2025.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

18 U.S.C. § 3553

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

. . . .