No. 10-15888-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

ROLAND PUGH CONSTRUCTION, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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CERTIFICATE OF INTERESTED PERSONS

Appellee, the United States of America, believes that the following persons and entities have an interest in the outcome of this appeal:

1. Alston & Bird LLP
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3. Commission of Jefferson County, Alabama
4. Dillon, William D.
5. Flint, David H.
6. Fonte, John P.
7. Fredricks, James J.
8. Gale, Fournier J., III
9. Hammond, Scott D.
10. Jefferson County (Alabama) Environmental Services Department
11. Lavoie, Andrew J.
12. Limarzi, Kristen C.
13. Maynard, Cooper & Gale, P.C.
14. Powers, John J., III
15. Proctor, Honorable R. David
16. Pugh, Andrew
17. Pugh, Grady Roland, Jr.

18. Pugh, Grady Roland, Sr.
19. Roland Pugh Construction, Inc.
20. Schreeder, Wheeler & Flint, LLP
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25. Yessick, Joseph E.

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STATEMENT REGARDING ORAL ARGUMENT

Because of the limited issues raised in this appeal from a resentencing after remand by this Court, the United States does not believe that the Court would benefit from oral argument.

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This brief refers to the records by the last three digits of the district court docket number followed by R then the document number and, where applicable, the page number preceded by a colon (e.g., 061R934:1543 refers to page 1543 of the document entered as number 934 on the 05-061 docket).[*] Similarly, government exhibits are referred to by the last three digits of the district court docket number followed by GX then the exhibit number (e.g., 061GX4B refers to government exhibit 4B admitted during the trial of the 05-061 case).

In addition, reference is made to Appellants Expanded Record Excerpts (volumes 1-4) and Appellee's Supplemental Expanded Record Excerpts (volumes 5-7).

Dkt No.	Vol. No.	Document	Br. Page
542R127	Vol. 7	Testimony of Eddie Yessick (1/8/2007)	4, 24
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061R982	Vol. 4	Transcript of Sentencing (12/13/2007) (Roland Pugh Construction, Inc.)	5, 6, 10, 17, 23
061R1081	Vol. 3	Transcript of Resentencing (12/6/2010) (Roland Pugh Construction, Inc.)	*passim*

[*] This format was adopted during the initial appeal after consultation with the Clerk's Offices for this Court and the district court because no single comprehensive Certificate of Readiness was prepared for any of these four cases. Letter to Brenda Wiegmann, Deputy Clerk, from John P. Fonte (January 7, 2009).

Dkt No.	Vol. No.	Document	Br. Page
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TABLE OF ABBREVIATIONS

This brief uses the following abbreviations:

Andy Pugh or Andy.	Andy Pugh, co-owner of PUGH
Barber	Clarence R. Barber, Chief Construction Maintenance Supervisor for JCESD (witness)
Chandler	Harry T. Chandler, Assistant Director of JCESD (witness)
JCESD	Jefferson County Environmental Services Department
Grady Pugh or Grady	Grady Roland Pugh, Jr., CEO of PUGH (witness)
McNair	Jewell "Chris" McNair, Jefferson County Commissioner (co-defendant)
PUGH	Roland Pugh Construction, Inc. (defendant-appellant)
RAST	Rast Construction, Inc. (co-defendant)
Roland Pugh or Roland	Grady Roland Pugh, Sr., Chairman of the Board of PUGH (co-defendant)
Swann	Jack W. Swann, JCESD Director (co-defendant)
Wilson	Ronald K. Wilson, Chief Engineer for JCESD (witness)
Yessick	Joseph E. "Eddie" Yessick, President of PUGH (co-defendant, witness)

STATEMENT OF JURISDICTION

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

ISSUE PRESENTED

Whether it was reasonable for the district court to sentence Roland Pugh Construction, Inc. to a $19.4 million criminal fine for its participation in a bribery scheme that yielded the company a $43 million pecuniary gain.

COURSE OF PROCEEDINGS

On August 26, 2005, a federal grand jury sitting in Birmingham, Alabama, returned a 127-count Second Superseding Indictment (Indictment) charging Roland Pugh Construction, Inc. (PUGH) and others in a vast scheme to corrupt Jefferson County officials and employees in connection with the County's $3 billion sewer rehabilitation project. The sewer rehabilitation project was required by a consent decree settling a Clean Water Act lawsuit with the United States Environmental Protection Agency. *United States v. McNair*, 605 F.3d 1152, 1165 n.1 (11th Cir. 2010).

Specifically, the Indictment charged PUGH and two of its principals, Grady Roland Pugh Sr. (Roland Pugh or Roland) and Joseph "Eddie" Yessick (Yessick), with conspiring with public officials and other contractors to commit bribery (18 U.S.C. § 371), with bribing public officials (18 U.S.C. § 666(a)(2)), and with mail fraud (18 U.S.C. § 1341). The Indictment was severed into five separate cases for trial. *Id.* at 1167. PUGH was charged in four of those five cases, which are referred to in this appeal by the name of the principal public official in the case: *McNair* (05-061), *Swann* (05-544), *Barber* (05-542), and *Wilson* (05-545).[1]

[1] PUGH CEO Grady Roland Pugh Jr. (Grady Pugh or Grady), Roland Pugh's son, pleaded guilty and testified against PUGH. *McNair*, 605 F.3d at 1166. After his convictions in the *McNair* and *Swann* trials, Yessick

1. The Trials

The *McNair* trial involved bribes paid to Jefferson County Commissioner Jewell "Chris" McNair, who supervised the Jefferson County Environmental Services Department (JCESD) during the sewer rehabilitation project, and Harry Chandler, who was JCESD's Assistant Director. Trial began on April 6, 2006, and on April 21, the jury convicted PUGH of conspiring to give and accept bribes (Count 1) and bribing McNair with the installation of hand railings worth $17,200 at McNair's photography studio (Count 15). PUGH was also convicted of bribing Chandler by providing him with a Pelican Beach condo rental, worth $610 (Count 71). 061R631 (Vol. 2).

The *Swann* trial concerned the bribery of JCESD Director Jack Swann, who reported directly to McNair. The trial began on September 19, 2006, and the jury returned a verdict on October 2, 2006. PUGH was convicted of conspiring to give and accept bribes (Count 51) and bribing Swann by providing him with $140,680 worth of landscaping services from Guthrie Landscaping (Count 61); a $7,422 waterfall and pond installation by Aquatic Gardens (Count 62); and $1,000 worth of Alabama Booksmith gift certificates (Count 63). PUGH was also convicted of eleven counts of

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pleaded guilty to a conspiracy count, and testified against PUGH, in connection with the *Barber* trial. 542R127:707-08 (Vol. 7).

honest services mail fraud in connection with the landscaping by Guthrie Landscaping (Counts 90-100). 544R128 (Vol. 2).

The *Barber* trial involved bribes paid by PUGH to JCESD's Chief Construction Maintenance Supervisor, Clarence Barber. On January 27, 2007, PUGH was convicted of conspiring to commit bribery (Count 78), and bribing Barber with a parcel of land worth about $48,000 (Count 83) and with approximately $1,200 worth of lodging at three different resorts during Barber's October 2001 vacation (Counts 84-86). 542R109 (Vol. 3).

Finally, the *Wilson* trial involved bribes paid by PUGH to JCESD's Chief Engineer, Ronald Wilson. On June 13, 2006, PUGH was convicted with conspiring to commit bribery of Wilson (Count 75) with a bribe in the form of a "scholarship" for his son to attend the University of Alabama at Birmingham. 545R89 (Vol. 2).

2. PUGH's Initial Sentencing

On November 13, 2007, Judge Proctor, who presided over the *Barber* trial, sentenced PUGH on all twenty-four counts of conviction. Judge Proctor found that the company's pecuniary gain from the offense was $43,985,869 – PUGH's profits on JCESD contracts during the bribery scheme. 061R982:14 (Vol. 4). After determining PUGH's culpability score, Judge Proctor determined that PUGH's guidelines range was

$61,580,216 to $87,971,738. *Id*. at 41. To ensure the ongoing viability of the company, Judge Proctor reduced PUGH's fine to $21 million. He then offset PUGH's fine by an additional $1.6 million to reflect criminal fines paid by three owners of the company. *Id.* at 62-63. In addition to the $19.4 million fine, PUGH was also sentenced to 60 months probation, $239,652 in restitution, and a special assessment of $400 per conviction, or $9,600. 061R996 (Vol. 3).

3. The First Appeal

PUGH, along with eight co-defendants, filed timely notices of appeal. On May 12, 2010, this Court affirmed all of the appellants' convictions except PUGH's conviction in the Wilson trial (Count 75). *McNair*, 605 F.3d at 1238. While this Court found the evidence sufficient to support that count, *id.* at 1198-99, it nonetheless reversed the conviction on statute of limitations grounds, *id.* at 1214.

As to PUGH's sentence, this Court "(1) affirm[ed] the district court's findings of fact as supported by the record; and (2) conclude[d] there was no error in the district court's calculations under the sentencing guidelines." *Id*. at 1238. This Court further noted that "the reversal on Count 75 does not appear to impact [PUGH's] overall sentence." *Id.* at 1238 n.143. However, "in an abundance of caution," it vacated PUGH's sentence and remanded for

resentencing without Count 75, noting that Count 75 had to be removed from the judgment. *Id.*

4. Sentencing on Remand

On December 6, 2010, PUGH was resentenced by Judge Proctor on the remaining twenty-three counts of conviction. Without objection from PUGH, the court re-adopted its own prior findings of fact of "other than those that are affected by Count 75." 061R1081:4 (Vol. 3). Based on its prior finding that PUGH's pecuniary gain was $43,985,869, the court again found that PUGH's guidelines range was $61,580,216.99 to $87,971.738.56. *Id.* After considering PUGH's financial circumstances, the court again reduced the company's fine to $19.4 million, payable immediately. *Id.* at 36-38. The court also sentenced PUGH to 60 months probation, and $239,652 in restitution. 061R1075 (Vol. 3). The court amended its judgment to remove Count 75, and lowered the special assessment by $400 (to $9,200) to reflect this change. 061R1081:39 (Vol. 3).

PUGH filed a timely notice of appeal on December 21, 2010. 061R1076 (Vol. 3). On February 14, 2011, PUGH filed a motion in the district court seeking to stay payment of the fine pending this appeal, 061R1085 (Vol. 5), which the United States opposed, 061R1086 (Vol. 5). As of the date of this filing, that motion was still pending.

STATEMENT OF FACTS

A. Background

This Court detailed the facts underlying PUGH's bribery scheme in its opinion affirming twenty-three of PUGH's convictions. *McNair*, 605 F.3d at 1165-84. In brief, between August 1999 and January 2002, PUGH was paid over $178 million on construction contracts in connection with Jefferson County's $3 billion sewer rehabilitation project.[2] *Id.* at 1166. During this time, PUGH gave hundreds of thousands of dollars in goods, labor, and cash to public officials responsible for the sewer project, including County Commissioner Chris McNair, JCESD Director Jack Swann, Assistant Director Harry Chandler, Chief Engineer Ronald Wilson, and Chief Construction Maintenance Supervisor Clarence Barber.

Among the bribes paid to the public officials were: materials, labor, and cash for the major renovation and expansion of McNair's photography studio,[3] *id.* at 1170-74; over a hundred thousand dollars in landscaping

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[2] The sewer rehabilitation project was required under the terms of a consent decree between Jefferson County and the Environmental Protection Agency, which settled claims brought in 1994 by the U.S. Department of Justice against Jefferson County for violations of the Clean Water Act. *McNair*, 605 F.3d at 1165 n.1.

[3] PUGH went so far as to bill Jefferson County for certain of the items it gave to McNair, including $3,773 worth of steel for a second-story deck, and $5,200 handrails; the invoice for the handrails even included a

services for Swann's new home, *id*. at 1178-79; a $46,877 check for Barber's purchase of land for a retirement house, *id*. at 1183-84; and condo rentals for Chandler's vacation, *id.* at 1174.

PUGH CEO Grady Pugh explained that giving things of value to County employees provided PUGH with the "general benefit" of "hav[ing] preferential treatment and, you know, if we had problems it would help resolve the problems. Numerous ways that things could be made easier." *Id*. at 1182. Grady similarly explained the "benefit" of bribing McNair:

> Jefferson County treated us real well. We had an opportunity to do a tremendous amount of work there. The work that we did there generated huge profits . . . [I]t took our company [PUGH] from a normal struggling contracting company in [the] mid to late '90s, to a thriving, wealthy, strong construction company.

Id. at 1170.

Indeed, in 1996 and 1997, at the sewer project's outset, PUGH made gross profits of 10%. *Id.* "[A]s the project continued and payments were made to JCESD officials, the company's sewer rehabilitation profits increased to 50% in 1999, 40% in 2000, and 45% in 2001, making PUGH tens of millions of dollars each of these years." *Id.* at 1170. In total, PUGH's gain from the Jefferson County bribery schemes was over $43 million. *Id.* at 1237-38.

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markup and bogus charges for labor and equipment. *McNair*, 605 F.3d at 1170-72.

B. PUGH's Post-Conviction Financial Circumstances

Following its convictions in the *McNair*, *Swann*, and *Wilson* cases, PUGH filed for Chapter 11 bankruptcy in the Northern District of Alabama. By November 2007, when PUGH initially was sentenced, it was liquidating its assets. At that time, it held approximately $22 million in cash that was earning interest at a rate of approximately $77,000 per month. *McNair*, 605 F.3d at 1236 n.140. At that time, claims by creditors in the bankruptcy proceeding totaled less than $200,000. *Id.* The district court sentenced PUGH to a $19.4 million fine, leaving PUGH close to $3 million with which to continue operations. The district court also ordered the fine payable without interest and stayed payment pending appeal, allowing PUGH to keep any interest earned to fund its operations. 061R982:59-60 (Vol. 4).

After PUGH's sentencing, the bankruptcy court established an escrow account with a principal of $19.4 million, thereby ensuring PUGH maintained sufficient funds to pay its criminal fine. As the fine was payable without interest, PUGH was entitled to any interest earned on this account. 061R1081:5-7 (Vol. 3).

By the time of its resentencing in December 2010, PUGH's only remaining asset was the escrow account. At the resentencing hearing, PUGH presented testimony regarding the company's financial circumstances

from Andy Pugh, one of the company's owners. Andy testified that PUGH had been shut down, had auctioned off its property, had no equipment, and had no employees. *Id.* at 18-19, 23-25. When asked why the company was shut down, Andy testified that the company's debarment from federal contracting in 2006 was the "main factor that we could not continue." *Id.* at 30. The district court asked Andy "[w]hat happened to the $3 million spread over the last couple years?" He simply responded that "[i]t took a lot of money to close the Company down. There were jobs that had to be finished up." *Id.* at 29.

Andy further testified that he was now a co-owner of a new construction company called Onyx Construction, Inc. *Id.* at 16-17. If PUGH were to be given additional resources by a reduction in its criminal fine, he would consider "liquidat[ing]" Onyx, and opening PUGH "back up," so as to take advantage of the PUGH "reputation" and to continue his "father's company that he founded and he created." *Id.* at 25.

Finally, Andy testified that he and his co-owners, Roland, Grady and Yessick, were currently owed $310,000 in "bonuses" by PUGH. *Id.* at 23, 26-27. When asked about those bonuses, Andy testified as follows:

Q. If the Company were funded with money today, you would want to see these bonuses funded for the officers and directors, wouldn't you?
A. Well, we would make a choice. If we want to be leaving the Company at half operation, that would be, you know, something – we would have to make that choice.
Q. And, of course, if you wanted to just take the money out of the Company because it can't do business, that would be another choice, wouldn't it?
A. That would be a choice.

Id. at 28.

C. PUGH's Sentence on Remand

PUGH was resentenced by Judge Proctor on December 6, 2010. Without objection from PUGH, Judge Proctor re-adopted his prior findings of fact "other than those that are affected by Count 75." 061R1081:4 (Vol. 3). Based on his prior finding that PUGH's pecuniary gain was $43,985,869, Judge Proctor once again determined that PUGH's guidelines range was $61.6 million to $88 million. *Id.* After hearing arguments from PUGH, and testimony regarding PUGH's financial circumstances, Judge Proctor concluded for a second time that PUGH's fine should be reduced to $19.4 million, but no further. *Id.* at 34-39.

First, Judge Proctor considered PUGH's argument that its fine should be further reduced because of the smaller fines received by certain of PUGH's co-defendants. Judge Proctor found that the disparity in fines resulted from a negotiated disposition in one case and from a different

sentencing judge making different factual findings and using different guidelines calculations in another. *Id.* at 34-35. Given this Court's prior affirmance of the factual findings and guidelines calculation underlying PUGH's original sentence, Judge Proctor found that the asserted disparity was "not a logical basis for the Court to change Course." *Id.* at 35.

Judge Proctor also considered PUGH's argument that the fine should be reduced by a further $5 million to allow the company to remain in business. Judge Proctor determined, however, that the original $19.4 million fine had left "sufficient assets" to allow PUGH to do business, but that PUGH had ceased operating for other reasons, including the company's debarment from federal contracting. *Id.* at 36. Judge Proctor also expressed concern whether any additional funds poured into PUGH would "really be used to keep the Corporation viable" or would instead be used to pay bonuses to the culpable officers of the corporation. *Id.* at 37.

Thus, having "fully considered the [section 3553(a)] sentencing factors," and having "exercise[d] sentencing discretion," Judge Proctor resentenced PUGH to a criminal fine of $19.4 million, 60 months probation, $239,652 in restitution, and a $9,200 special assessment. *Id.* at 38-39.

STANDARD OF REVIEW

In reviewing sentences, this Court ensures that the district court committed no significant procedural error, such as improperly calculating the guidelines range, and then reviews the reasonableness of the sentence under a deferential abuse of discretion standard. *United States v. Livesay*, 525 F.3d 1081, 1091 (11th Cir. 2008). The Court evaluates the substantive reasonableness of a sentence under the totality of the circumstances. *United States v. Irey*, 612 F.3d 1160, 1189-90 (11th Cir. 2010) (en banc). A defendant challenging his sentence bears the burden of establishing that it is unreasonable. *United States v. Sanchez*, 586 F.3d 918, 935-36 (11th Cir. 2009).

Where a defendant has failed to object to a sentencing error before the district court, the sentence is reviewed for error that is plain and that affects a defendant's substantial rights. *United States v. Bonilla*, 579 F.3d 1233, 1238 (11th Cir. 2009).

SUMMARY OF ARGUMENT

The district court imposed a substantively reasonable sentence when it resentenced PUGH to a $19.4 million fine. In its May 12, 2010 opinion, this Court affirmed the district court's findings of fact with respect to PUGH's original sentence and determined that there was no error in the district court's calculations under the sentencing guidelines. *McNair*, 605 F.3d at 1238. Noting that the reversal of Count 75 did not appear to impact PUGH's sentence, this Court nonetheless vacated and remanded for sentencing "in an abundance of caution" and for the court to amend the final judgment to reflect the reversal on Count 75. *Id.* at 1238 n.143.

After making the necessary change to the judgment and hearing PUGH's evidence and arguments, Judge Proctor again concluded that PUGH's minimum guidelines fine of $61.6 million should be reduced to $19.4 million, but no further.

PUGH is wrong that its sentence is substantively unreasonable because the fine should have been reduced to avoid unwarranted sentencing disparities with co-defendants. Significantly, PUGH does not dispute that its fine was based upon correct factual findings and a properly calculated guidelines range. PUGH's fine is not unreasonable simply because co-

defendants who are not similarly situated were sentenced to lower fines based upon different guidelines calculations.

PUGH is also wrong that its sentence is substantively unreasonable because it should have been reduced to permit the now-defunct company to continue operating. The district court properly considered PUGH's financial circumstances when it reduced PUGH's fine from the minimum guidelines fine of $61.6 million to $19.4 million. At resentencing, Judge Proctor determined that PUGH had ceased operating for reasons other than the imposition of the criminal fine, specifically, the company's debarment from federal contracting. The court also recognized that any funds obtained through a further reduction in PUGH's fine would likely not be used to run the business, but would instead be used to pay bonuses to the culpable owners of the company. Indeed, the fact that Andy Pugh could not adequately explain the whereabouts of the almost $3 million the court left PUGH in 2007 to continue operating strongly supports the court's determination.

The district court properly considered PUGH's arguments and determined that neither warranted a reduction in PUGH's sentence. The district court's conclusions are fully supported by the record, and appellant's arguments that the sentence is unreasonable are meritless.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONSIDERED THE NEED TO AVOID UNWARRANTED SENTENCING DISPARITIES BETWEEN SIMILARLY SITUATED DEFENDANTS

Under section 3553(a)(6) of Title 18, a sentencing court must consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. 18 U.S.C. § 3553(a)(6); *United States v. Docampo*, 573 F.3d 1091, 1102 (11th Cir. 2009). During its initial sentencing, PUGH argued that the district court should reduce PUGH's fine to avoid unwarranted sentencing disparities between PUGH's co-defendants, including Rast Construction, Inc. (RAST), which was fined $1.7 million when sentenced by Judge Coogler, and Roland Pugh, who was fined $250,000 when sentenced by Judge Propst. 061R982:73-75 (Vol. 4). Although PUGH failed to raise this argument during its first appeal, it renewed the argument before Judge Proctor at resentencing, 061R1081:5-9 (Vol. 3).

Judge Proctor explicitly considered PUGH's argument and found that the disparity in fines resulted from different guidelines calculations by the different sentencing judges. *Id.* at 34-35. PUGH's $19.4 million fine resulted from Judge Proctor's determination that PUGH had gained $43 million from the bribery scheme. This pecuniary gain finding led to a

minimum guidelines fine of $61.6 million, which the court reduced to $21 million to ensure the ongoing viability of the company, and further reduced to $19.4 million to offset criminal fines paid by three owners of the company. In contrast, Roland Pugh was sentenced by a judge who was skeptical that Jefferson County had sustained any loss and did not believe, based on the evidence presented to him, that pecuniary gain had been proven.[4] 061R967:311, 313 (Vol. 5). RAST's fine, meanwhile, resulted from an agreement between RAST and the United States that the guidelines range would be calculated based upon the amount of bribes RAST paid to JCESD officials, not on the profits RAST realized from its illegal conduct. 061R966:26-31, 54-55 (Vol. 5). Noting that this Court had already affirmed the guidelines calculation used to determine PUGH's fine, Judge Proctor found that the asserted sentencing disparities did not warrant a reduction in PUGH's fine. 061R1081:3, 35 (Vol. 3).

PUGH does not argue on appeal that its fine is based upon an incorrect factual finding or incorrect guidelines calculation, nor even that

[4] In sentencing Roland Pugh, Judge Propst found that there was "really no evidence to prove any quote 'loss' as such to the County," nor was there "sufficient evidence before the Court, for the Court to make a determination of benefits, certainly not based on profits." 061R967:311, 313 (Vol. 5). In the absence of sufficient evidence to determine benefits or loss, Judge Propst sentenced Roland to a statutory maximum fine of $250,000. *Id.* at 318, 377.

RAST's and Roland Pugh's fines were based upon correct factual findings and correct guidelines calculations. Indeed, PUGH did not object at resentencing to either the district court's factual findings or its guidelines calculation, *id.* at 3-4, which this Court previously affirmed, *see McNair*, 605 F.3d at 1238. PUGH essentially argues that because Roland Pugh and RAST had lower fines, it should get a lower fine too. This argument is meritless.

"That a district court may have used the wrong version of the guidelines in a co-defendant's separate sentencing (to the benefit of a defendant) does not make another defendant's sentence under the correct version unreasonable in any way." *McNair*, 605 F.3d at 1232. Similarly, the mere fact that other district courts used different guidelines calculations for Roland Pugh and RAST – whether because of different findings of fact, or because of a negotiated disposition, or some other reason – does not mean that PUGH's sentence, which was based upon correct factual findings and correct guidelines calculations, was unreasonable. *See United States v. Regueiro*, 240 F.3d 1321, 1325-26 (11th Cir. 2001) ("Disparity between the sentences imposed on codefendants is generally not an appropriate basis for relief on appeal."); *see also McCleskey v. Kemp*, 753 F.2d 877, 894 (11th Cir. 1985) ("[N]ot only will no two defendants be seen identical by the

sentencers, but no two sentencers will see a single case precisely the same.").

Furthermore, PUGH has failed to show that it is similarly situated to either RAST or Roland Pugh. *See Docampo*, 573 F.3d at 1101 (finding no error where "the other defendants who received less severe sentences were not similarly situated"). PUGH was convicted of twenty-three counts of conspiracy, bribery, and wire fraud, *McNair,* 605 F.3d at 1238 n.143, in contrast to RAST's twelve counts of conviction, 061R840 (Vol. 5). Jefferson County paid PUGH $178 million between August 1999 and January 2002, while it paid RAST about $100 million during the same period. *McNair*, 605 F.3d at 1166. Finally, PUGH's profit margin was over 40% during this period, while RAST's profit margin was around 18%. *Id.* at 1217 n.96, 1224 n.114 (citing Presentence Investigation Reports of McNair and Swann).

Likewise, there is nothing similar between PUGH and Roland Pugh. Roland was convicted of only one count of conspiracy in connection with bribes to a single JCESD official. 061R897 (Vol. 5). PUGH was convicted on twenty-three counts in connection with bribes to four different officials. *McNair,* 605 F.3d at 1238 n.143. In addition, Roland was sentenced to both

a fine and a 45-month term of imprisonment, 061R897 (Vol. 5); PUGH got probation, 061R996 (Vol. 3).

Finally, PUGH ignores the fact that its $19.4 million fine is drastically lower than the minimum guidelines fine of $61.6 million, and less than half the company's $43 million pecuniary gain from its offenses. *See McNair*, 605 F.3d. at 1232 (defendant, in arguing that there was an unwarranted sentencing disparity, "ignores the fact that the district court granted a downward variance . . . from his advisory guidelines range"). In short, PUGH has not shown that its sentence is unreasonably disproportionate to other defendants in this case.

II. THE DISTRICT COURT PROPERLY CONSIDERED PUGH'S FINANCIAL RESOURCES WHEN IT REDUCED PUGH'S FINE TO $19.4 MILLION FROM THE MINIMUM GUIDELINES FINE OF $61.6 MILLION

A. The District Court Did Not Commit Error, Let Alone Plain Error, In Considering PUGH's Financial Circumstances Under 18 U.S.C. § 3572(a)

In determining whether to impose a fine, and what the amount of the fine should be, a district court must consider the factors set forth in 18 U.S.C. § 3572(a). PUGH argues that the district court erred in its application of section 3572 because it "said nothing at the resentencing hearing to indicate its due consideration of any of the specific factors prescribed by 18 U.S.C. § 3572(a)." Appellant's Br. at 20. PUGH raised no

such objection during its resentencing, and this argument must be reviewed for plain error. *Bonilla*, 579 F.3d at 1238.

First, the district court need not make specific findings of fact with respect to each factor as long as the record reflects the court's consideration of the pertinent factors prior to imposing the fine. *United States v. Gonzalez*, 541 F.3d 1250, 1255-56 (11th Cir. 2008) (when imposing a fine a district court need not specifically address every factor under U.S.S.G. § 5E1.2(a)); *United States v. Talley*, 431 F.3d 784, 786 (11th Cir. 2005) ("[N]othing in *Booker* or elsewhere requires the district court to state on the record that it has explicitly considered each of the section 3553(a) factors or to discuss each of the section 3553(a) factors.") (quoting *United States v. Scott*, 426 F.3d 1324, 1329 (11th Cir. 2005)); *see also United States v. Corace*, 146 F.3d 51, 56 (2d Cir. 1998) (section 3572 "imposes no separate requirement that th[e] consideration [of these factors] be articulated") (quoting *United States v. Marquez*, 941 F.2d 60, 65 (2d Cir. 1991)). Second, as discussed below, the district court properly considered the only relevant factor raised by PUGH either during the resentencing hearing or on appeal – the financial resources of the company and its ability to pay a fine. PUGH did not argue at resentencing that the court had failed to address any other factor, nor does it refer to any other neglected factor on appeal, let alone explain how that

neglect could have affected its "substantial rights." *Bonilla*, 579 F.3d at 1238.

B. The District Court's Decision to Reduce PUGH's Fine From $61.6 Million to $19.4 Million Was Reasonable

The United States Sentencing Guidelines (U.S.S.G.) authorize a district court to reduce an organization's fine if the organization "cannot and is not likely to become able . . . to pay such minimum guideline fine," U.S.S.G. § 8C2.2(b), provided "that the reduction . . . shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization," U.S.S.G. § 8C3.3(b). As previously discussed, during PUGH's initial sentencing, in November 2007, the district court determined that PUGH could not pay the minimum guidelines fine of $61.6 million. Giving PUGH "the benefit of doubt on the 8C3.3 analysis," Judge Proctor determined that PUGH could pay a fine of $21 million, 061R982:76 (Vol. 4), which he further reduced, pursuant to U.S.S.G. § 8C3.4, by an additional $1.6 million to reflect criminal fines paid by PUGH's owners, Roland, Grady, and Yessick, *id.* at 63, thus leaving PUGH a "buffer" of almost $3 million to continue operations, 061R1081:14, 29 (Vol. 3).

After PUGH's sentencing, the bankruptcy court established an escrow account to ensure that sufficient funds would remain for payment of the

$19.4 million criminal fine. Because the fine was stayed pending appeal, and payable without interest, PUGH also had the benefit of interest earned on that escrow account. In November 2007, PUGH's $22 million in cash earned interest at a rate of approximately $77,000 per month. *McNair*, 605 F.3d at 1236 n.140.

At resentencing, presenting testimony regarding the company's financial circumstances from co-owner Andy Pugh, PUGH urged the district court to reduce its fine even further. However, the district court determined that no further reduction in PUGH's sentence was warranted under section 8C3.3. In particular, the court found that the $19.4 million fine had left "sufficient assets . . . to allow the Corporation to do business," but that other factors, including PUGH's debarment from federal contracts and the downturn in the economy, had contributed to PUGH's inability to do business since the original sentence was imposed. 061R1081:36-37 (Vol. 3). In addition, the district court expressed doubt whether any additional reduction in PUGH's fine could be used to run the company, or whether it would more likely be used to pay bonuses owed to the four owners of the company. *Id*. Three of these owners were convicted in connection with the bribery scheme. While Andy was not convicted, and told Judge Proctor that he didn't remember contributing to cash bribes, *id*. at 20-21, he was

implicated in the conspiracy to bribe McNair by both Yessick, 542R127:701-02 (Vol. 7), and Grady, 061R929:311 (Vol. 6) ("In the very beginning, we had a meeting between Andy and myself, and Eddie Yessick, and Roland announced in that meeting that we were going to have kick in our ten percent part, since we were ten percent owners, and help Mr. McNair. We had to gather up some money to give to Mr. McNair."). *Accord* 061R929:316-17 (Vol. 6); 061R930:601-05 (Vol. 7); 061GX4B (Vol. 7).

On appeal, PUGH argues that the district court erred in its application of U.S.S.G. § 8C3.3, claiming that the $19.4 million fine is "sounding [PUGH's] death knell." Appellant's Br. at 21. While a sentencing court must consider the corporation's ability to pay the fine, *see* 18 U.S.C. § 3572(a), it is not obligated to reduce a corporation's fine simply to avoid financial hardship, *see United States v. Four Pillars Enterprise Co., Ltd.*, 253 F.App'x 502, 514-15 (6th Cir. 2007). Indeed, while section 8C3.3 authorizes a district court to reduce a fine in order to preserve the continued viability of an organization, it does not require that the court do so. *See* U.S.S.G. § 8C3.3(b); *United States v. Nathan*, 188 F.3d 190, 213 (3d Cir. 1999) (noting that while "[g]uideline section 5E1.2 requires that a fine be waived when an individual defendant is unable to pay[, b]y contrast, section 8C3.3(b), the corresponding provision in the *corporate* Sentencing

Guidelines, does not require waiver or reduction") (emphasis in original); *United States v. Eureka Laboratories, Inc.*, 103 F.3d 908, 912-13 (9th Cir. 1996). Rather, section 8C3.3 only requires that a corporation's fine be reduced if its ability to pay restitution is impaired, which is not at issue here. *See* U.S.S.G. § 8C3.3(a).

Perhaps more importantly, there is no reason to apply section 8C3.3(b) here because PUGH is not a functioning organization whose "continued viability" can be preserved. U.S.S.G. § 8C3.3(b). According to Andy Pugh, PUGH's "death knell" was sounded in 2006 when it was debarred from federal contracting. Andy explained that "[d]ebarment was the main factor that we could not continue." 061R1081:30 (Vol. 3). PUGH has long since ceased operations and liquidated its assets. It has no customers who are relying on the company to finish construction jobs in progress, and it has no employees whose jobs are in jeopardy. Moreover, its owners are the very actors whose wrongdoing brought about the debarment and the company's demise. *Id.* at 37.

Furthermore, reducing PUGH's fine will reap no economic benefit for the State of Alabama. Even if PUGH does use additional funds to recreate a viable construction company, it will merely replace a currently viable construction company, Onyx Construction, which Andy Pugh would

"liquidate." *Id.* at 25. In fact, the only "benefit" to recreating a viable "Roland Pugh Construction, Inc." would be preserving the name of Roland Pugh and the "reputation" of a company that was convicted on twenty-three counts of bribery and fraud. *Id.*

Finally, PUGH has not even established that it can or will use the funds to recreate a viable construction company. Despite Judge Proctor originally leaving the company close to $3 million to continue operations, PUGH today has no equipment, property, or employees. *Id.* at 19, 25. PUGH does not have the expertise necessary to find private work, *id.* at 29-30, and, as Judge Proctor noted, even if the debarment were not in place, it seems unlikely that any government agency would hire PUGH in the wake of its multiple convictions for conspiring with and bribing public officials, *Id.* at 36.

Given that Andy Pugh had difficulty explaining what happened to the "buffer" of almost $3 million that PUGH was given to continue operations in 2007, Judge Proctor reasonably concluded that PUGH seems more likely to use any additional funds it receives to pay hundreds of thousands of dollars in "bonuses" currently owed to the four co-owners, including the three principals convicted of the bribery scheme. Judge Proctor accurately assessed the situation as follows:

> I've got substantial questions in my mind about, quite frankly, whether if there were additional assets poured into the Corporation at this point, whether they could really be used to keep the Corporation viable or would be used for payment of debts on the books owed to prior officers who were either directly culpable based upon the Corporation's involvement in this crime or even if not directly culpable, were certainly aware; or even if they weren't aware of the circumstances, it happened on their watch.

Id. at 37.

In short, Judge Proctor properly considered PUGH's financial resources, and any changed financial conditions between the 2007 and 2010 sentencing proceedings, and he gave a reasoned basis for reducing PUGH's fine from $61.6 million to $19.4 million. PUGH has failed to show that Judge Proctor acted unreasonably in refusing to reduce the fine even further.

CONCLUSION

For the reasons stated, the judgments of the district court should be affirmed.

Respectfully submitted.

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Certificate of Compliance With Fed. R. App. P. 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,237 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Times New Roman style.

Dated: April 6, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2011, I served a true copy of the foregoing Appellee's Brief on Appellant's counsel, by Federal Express, addressed to:

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