No. 11-3636

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT GRIFFITHS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(Honorable Susan D. Wigenton)

SUPPLEMENTAL BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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This brief is filed in response to the Court's request for a supplemental brief addressing "the issue, raised in Appellant's Reply Brief (pages 13-21), of procedural error resulting from the District Court's finding that the greatest downward departure applied in a related case was 8 levels, instead of 10 levels."[1]

The government agrees that the district court was mistaken when it stated that "looking at all the other individuals that have been involved, the greatest departure that I've given has been an 8-level departure. That's been the greatest level." A118-19. In fact, as the government earlier noted, Br. for Appellee 20 n.15, the greatest departure was the 10-level departure given to Zul Tejpar, who pleaded guilty to participating in the same conspiracy as Griffiths. Tr. of Sentencing Hr'g at 22-23, *United States v. Tejpar*, No. 08-912 (D.N.J. Mar. 30, 2011), ECF No. 12. The court also gave an 8-level departure to John Drimak, who pleaded guilty to participating in a different, though related, conspiracy and other offenses. Tr. of Sentencing Hr'g at 20, *United States v. Drimak*, No. 08-522 (D.N.J. Apr. 6, 2011),

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[1] Letter from Marcia M. Waldron, Clerk, to Counsel (Oct. 12, 2012). This supplemental brief does not address Appellant's separate argument that the uncorrected mistake regarding the greatest departure, in addition to constituting procedural error, also implicates *Brady v. Maryland*, 373 U.S. 83 (1963), *see* Reply Br. 16 n.3. The Court only requested a supplemental brief addressing the alleged procedural error. Moreover, the *Brady* issue has been waived and should not be considered because it was only raised in a footnote and in the reply brief. *See McBride v. Superintendent, SCI Houtzdale*, 687 F.3d 92, 95 n.5 (3d Cir. 2012); *In re Surrick*, 338 F.3d 224, 237 (3d Cir. 2003). If the Court decides to reach the merits, it should request a supplemental brief on that issue.

ECF No. 21; *see* Br. for Appellee 3. The five-month lapse of time between these two sentencings and Griffiths' sentencing may explain the court's factual mistake. During sentencing, government counsel also did not recall the 10-level departure.

The government disagrees, however, with Griffiths' claims that 1) he did not waive the procedural error argument raised only in his reply or any waiver is excused by extraordinary circumstances, Reply Br. 14 n.2; and 2) the alleged error is subject to plenary review, *id.* at 16 & n.4.

I. Procedural Error Argument Raised Only in the Reply Brief Is Waived

"It is well settled that an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal." *United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005). In his opening brief, Griffiths did not identify the district court's mistake regarding the greatest departure or argue that the mistake constitutes procedural error, and his references to the 8-level departure do not remotely raise the issue of procedural error based on this mistake. Accordingly, Griffiths waived the argument, and this Court should not consider it.

To be sure, this waiver "rule does yield in 'extraordinary circumstances,'" *United States v. Albertson*, 645 F.3d 191, 195 (3d Cir. 2011) (citation omitted), but Griffiths fails to show them here. Lacking "explicit standards" for extraordinary circumstances, this Court has identified three factors to consider: 1) the existence of some excuse for failing to raise the issue in the opening brief; 2) prejudice to the

opposing party; and 3) whether not considering the argument would lead to a miscarriage of justice or undermine confidence in the judicial system. *Id*.

Griffiths has no sound excuse for failing to raise the issue. While he asserts that "[i]t was unknown to whom the Court was referring when it referenced the greatest departure," Reply Br. 14, Tejpar was plainly among those individuals sentenced in related cases. At sentencing, Griffiths' counsel argued for a large departure by comparing Griffiths' and Tejpar's places in the "pecking order" of the case. A111-12. Similarly, appellate counsel acknowledged that Tejpar was Griffiths' only co-schemer who had been sentenced and that Tejpar's sentence was "a more apt comparison" than the sentences imposed in other related cases. Br. of Appellant 12. The record does not reveal if either counsel reviewed Tejpar's transcript or otherwise inquired about his departure. But they could have reviewed that 27-page transcript for free at the courthouse or purchased it for $32.40. Had defense counsel done so, the error would likely have been corrected at sentencing or, even if not corrected, identified and argued on appeal in the opening brief as required. Thus, the first factor strongly favors waiver.

In *Albertson*, this Court found the second factor—prejudice to the opposing party—weighed against waiver because the government was permitted to file a sur-reply but did not meaningfully pursue a waiver argument in the sur-reply. 645 F.3d at 196. Here, the government presses the waiver argument.

The third factor is "somewhat similar to the 'plain error' rule," which allows correction of an error not raised below if an appellant shows the error was plain, affected his substantial rights, and seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* Griffiths falls short on this factor, as he would on plain error review, *see infra* p. 5. To affect substantial rights, the error must be prejudicial, *i.e.*, outcome affecting. *United States v. Vazquez-Lebron*, 582 F.3d 443, 446 (3d Cir. 2009). Griffiths speculates that, if the district court had known the greatest departure was 10 levels, it would have given him a 10-level departure and a lower sentence. But, while the court thought the greatest departure was right for Griffiths when it believed that departure was 8 levels, what it would have done had it known the greatest departure was actually 10 levels is unclear. It may still have departed 8 levels, believing 10 levels was too many.

Nevertheless, we recognize that this Court "cannot be sure that the district court would have imposed the same sentence if not for the error" and has granted relief under such circumstances. *Id.* at 446-47; *see, e.g., United States v. Andrews*, 681 F.3d 509, 532 (3d Cir. 2012); *United States v. Knight*, 266 F.3d 203, 207-08 (3d Cir. 2001). But remanding here may discourage defense counsel from raising factual objections at sentencing when they are readily resolved or investigating related sentencings before drawing comparisons to them on appeal. Moreover, denying relief in this direct appeal would not prevent Griffiths from seeking

postconviction relief in the district court if he can establish his right to such relief. *See* Br. for Appellee 22-23. Under these specific circumstances, the Court need not grant relief to preserve the fairness, integrity, and public reputation of the judicial proceedings.

II. If Reviewed, the Alleged Procedural Error Is Reviewed for Plain Error

Griffiths incorrectly states that the "standard of review is plenary," Reply Br. 16. If this Court finds no waiver or excuses the waiver, review is only for plain error because the issue was not raised below. *See Vazquez-Lebron*, 582 F.3d at 445. In fact, his counsel stated that he was "not challenging" the 8-level departure. A124. And contrary to Griffiths' suggestion that review is plenary for "constitutional protections," Reply Br. 16 n.4, constitutional violations are also reviewed for plain error when not raised below. *See United States v. Booker*, 543 U.S. 220, 268 (2005); *United States v. Lopez*, 650 F.3d 952, 959 (3d Cir. 2011).

Respectfully submitted.

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October 23, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the clerk's direction by letter dated October 12, 2012 that the supplemental brief should be no more than five pages long because it is five pages long, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point Times New Roman font.

3. This brief complies with Local Appellate Rule 31.1(c) because the text of this electronic brief is identical to the paper copies, and Symantec Endpoint Protection Version 11.0.6300.803 has been run on the file of this electronic brief and no virus was detected.

October 23, 2012 /s/ James J. Fredricks
Attorney

CERTIFICATE OF SERVICE

I, James J. Fredricks, hereby certify that on October 23, 2012, I electronically filed the foregoing supplemental brief for Appellee, the United States of America, with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the CM/ECF System. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

October 23, 2012 /s/ James J. Fredricks
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