

In The
United States Court of Appeals
For The Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

**SAMPSON DELTON COTTEN, also known as
Sampson D. Cotten, also known as Hector Castro,
also known as Sampson Cotten,**

Defendant – Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO**

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The issue before this Honorable Court is whether or not the district court violated Title 18 U.S.C. § 3553(a)(6) when it sentenced Sampson Delton Cotten to 18 months imprisonment when the same district court granted five (5) years probation to another defendant, Eddie Alberto Madrigal (“Madrigal”) in Case No. 5-13-CR-00331-FB, who had a similar record and was charged with the very same crime of aiding and assisting the preparation of false tax returns under Title 26 U.S.C. § 7206(2). [ROA.50820.153-165 and ROA.15-50820.7 (Doc. 73)]. As stated in the appellant’s brief, the sentence of 18 months imprisonment is being appealed because of the disparity among the two similarly situated defendants. This reply brief is being filed in order to address the argument put forth by the government regarding the standard of review. (Appellee’s Brief p. 8). The government incorrectly argues that the standard of review is for plain error when the correct standard of review is substantive reasonableness under an abuse of discretion standard.

ARGUMENT

- I. The proper standard of review of the substantive reasonableness of Mr. Cotten’s sentence is an abuse of discretion standard under the totality of circumstances.**
 - A. Mr. Cotten preserved his challenge to the reasonableness of his sentence by way of his written sentencing memorandum and the arguments made to the district court at his sentencing hearing.**

The record of this proceeding is clear that Mr. Cotten preserved error on his challenges to the reasonableness of his sentence because Mr. Cotten specifically objected to any sentence other than a probated sentence in his written sentencing memorandum to the district court wherein he stated that “to sentence him to prison would result in an unwarranted sentence disparity in violation of § 3553(a)(6).” [ROA.50820.7 (Doc. No. 73 p. 4)]. Additionally, the sentencing memorandum fully articulated the basis for Mr. Cotten’s objection to a sentence of imprisonment and the same basis is reflected in both the transcript of the sentencing hearing and in Mr. Cotten’s appellant brief. [ROA.50820.154-165]. Indeed, it cannot be disputed that virtually the entire sentencing proceeding before the district court focused on the very same arguments contained in Mr. Cotten’s sentencing memorandum wherein he objected to any sentence other than a probated sentence based on the probated sentence the district court granted to Eddie Alberto Madrigal (“Madrigal”) in Case No. 5:13-CR-00331-FB. [ROA.50820.154-165].

At the sentencing hearing, the government acknowledged Mr. Cotten's objection to any sentence other than a probated sentence and it vehemently argued against a probated sentence. [ROA.50820.154-156, and 158]. The transcript of the proceeding clearly reveals that William R. Harris, the Assistant United States Attorney responsible for the prosecution of Mr. Cotten, specifically addressed Mr. Cotten's objection to any sentence other than a probated sentence when he stated to the district court that he had spoken to his "colleague, Jay Hulings," who prosecuted Madrigal and that he had done so in an effort to differentiate the two defendant's and urge the district court to deny Mr. Cotten a probated sentence. [ROA.50820.158].

The Court should review this challenge to the sentence imposed for reasonableness under an abuse of discretion standard because the objection made in the sentencing memorandum and the arguments made at the sentencing proceeding, show that Mr. Cotten made his position regarding a probated sentence abundantly clear to the district court and any further objection to the 18 month sentence imposed by the district court would have been an exercise in futility. See, *United States v. Gerezano-Rosales*, 692 F.3d 393, 399 (5th Cir. 2012) (citing *United States v. Castillo*, 430 F.3d 230, 242 (5th Cir. 2005)). The futility of any further objection by Mr. Cotten is clearly evident given the efforts by Mr. Cotten both before and during the sentencing proceeding to show the disparity that would

occur if the Court were to sentence him to a term of imprisonment. Moreover, given the angry tone of the comment by the district court just before it announced its sentence wherein the court stated that Mr. Cotten was “not somebody who’s—who just came in on the last load of turnips,” any further objection to a probated sentence by Mr. Cotten would not have only been futile but it could have resulted in an even longer sentence of imprisonment.

This Court has held that “under certain circumstances a party can preserve sentencing error without a formal objection if (1) “the essential substance of the objection is obvious and was made known to the district court” and (2) the “context of the [informal] objection and ruling” suggests that “counsel was entitled to believe that further explanation would not be welcomed or entertained by the district court.” *Id.* (citing *United States v. Mendiola*, 42 F.3d 259, 261 n.2 and Fed. R. Crim. P. 51). In *Gerezano-Rosales*, the defendant communicated his objections to the procedural and substantive reasonableness of his sentence only orally at sentencing prior to the announcement of the sentence but the defendant was found to have “clearly communicated” the “essential substance of his challenges” such that his objection was preserved. *Gerezano-Rosales*, 692 F.3d at 399.

The circumstances of this case present a much stronger case for this Court to review this challenge under an abuse of discretion standard than those in *Gerezano-Rosales* because Mr. Cotten made a written objection and virtually the

entire sentencing hearing focused on his objection to a sentence of imprisonment. [ROA.50820.154-165] and [ROA.50820.7 (Doc. No. 73 p. 4)]. Based on the record of the proceeding, the substance of Mr. Cotten's sentence should be reviewed for abuse of discretion under the totality of circumstances.

CONCLUSION

For the foregoing reasons and those set forth in the appellant's brief, SAMPSON DELTON COTTEN respectfully requests that this Court vacate the sentence imposed upon him and remand his case for resentencing wherein all relevant sentencing factors are considered and all irrelevant sentencing factors are ignored, and Mr. Cotten is granted a probated sentence that is consistent with the sentence of the same court granted Eddie Alberto Madrigal in Case No. 5:13-CR-00331-FB.

Dated: February 18, 2016

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 18th day of February, 2016, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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Upon acceptance by the Clerk of the Court of the electronically filed document, the required number of bound copies of the Reply Brief of Appellant will be filed with the Clerk of the Court via UPS Next Day Air.

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Counsel for Appellant

CERTIFICATE OF COMPLIANCE

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Dated: February 18, 2016

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