IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. WILLIE JAMES COWARD, aka "WILLIAM JAMES COWARD", Defendant-Appellant.	)	C.A. NO. 10-10262 D.C. NO. CR. 09-00343-JMS (District of Hawai`i)

APPELLANT'S OPENING BRIEF.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI`I

The Honorable J. Michael Seabright, Judge.

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JURISDICTIONAL STATEMENT

The United States District Court Hawai`i had jurisdiction of this matter pursuant to 18 U.S.C. § 3231. This Court has jurisdiction to review criminal sentences under 28 U.S.C. § 1291.

As to timeliness of the Notice of Appeal, the district court imposed sentence on May 17, 2010, and entered the Judgment in a Criminal Case on May 19, 2010. [ER I 2-7].[1] On May 26, 2010, Mr. Coward filed the Notice of Appeal. [ER I 1]. Since Mr. Coward filed the Notice of Appeal within 14 days of entry of the Judgment, the appeal is timely pursuant to Fed.R.App.P. 4(b).

ISSUE PRESENTED

Whether the district court failed to consider the sentencing options for the Guidelines range that was within Zone B of the Sentencing Table, and failed to consider the totality of the circumstances, resulting in a procedurally defective and unreasonable sentence that must be vacated?

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[1] As used herein: "ER I" and "ER II" refers to the two volumes of the excerpts of record; "CR" refers to the district court clerk's record, attached to the back of ER II; "PSR" refers to the Presentence Investigation Report filed with this Court under seal pursuant to Circuit Rule 30-1.10.

STATEMENT OF THE CASE

On August 27, 2009, the Grand Jury returned a single-count indictment against Mr. Coward, charging him with Making a False Statement in an Application for United States Passport, in violation of 18 U.S.C. §1542 [2] [ER II 79-80]. On September 4, 2009, Mr. Coward appeared in district court and entered a plea of not-guilty. [CR 4]. On the same date, the court permitted Mr. Coward to remain at liberty on an Appearance Bond, and pursuant to an Order Setting Conditions of Release. [ER II 72; ER II 75-77]. On December 16, 2009, Mr.

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[2] "Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws; or

Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement—

Shall be fined under this title, imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929 (a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both."

18 U.S.C. § 1542.

Coward changed his not-guilty plea to guilty. [CR 12; ER II 70].

On May 17, 2010, the district court imposed sentence, which included a period of imprisonment of eight months, followed by three years supervised release. [ER I 3, 30]. The court entered judgment on May 19, 2010. [ER I 2]. On May 26, 2010, Mr. Coward filed the Notice of Appeal. [ER I 1]. Pursuant to the scheduling order in this matter, this opening brief is due on or before August 25, 2010.

BAIL STATUS

On July 21, 2010, the district court granted Mr. Coward's Motion to Stay Sentence Pending Appeal, permitting him to remain on the previously ordered conditions of bail pending this appeal. [ER II 37.1].

STATEMENT OF RELEVANT FACTS

For most of his adult life Mr. Coward used the birth date of a relative from Louisiana (referred to in the record as his "uncle" or "Billy") and, in the process, came to believe that attributes of his uncle were actually his. This is a psychological state known as *idee fixe*. [ER II 41; *see* report by J. Gregory Turnbull, Psy.D., J.D., dated May 4, 2010, attached to PSR ("Turnbull

Attachment")]. That facade came crashing down in September 2008 when he sought to renew his passport to go on vacation to Mexico, using the incorrect birth date actually belonging to his uncle. The incorrect birth date belonging to his uncle is in 1934; Mr. Coward's correct birth date is in 1947.[3] [PSR ¶ 14].

A. Background.

According to a birth certificate, Mr. Coward was born in 1947 in Louisiana to Lony Coward and Olena Jonwell. [PSR 2, ¶¶ 14, 38]. Mr. Coward was actually sired by his paternal grandfather William Coward. [PSR ¶ 38]. Mr. Coward did not learn that his 'grandfather' was his biological father until he was a teenager, which knowledge precipitated a long bout of depression. [PSR ¶ 51].

Mr. Coward's grandparents raised him in Louisiana, where he had 12 siblings, six of whom have since died. [PSR ¶ ¶ 38, 39]. He remains close to a sister Matilda Thomas, with whom the U.S. Department of Probation had contact. Mrs. Thomas reported that:

> "[T]he defendant is a very nice, hard-working, individual who always helped her and the rest of their family when they were in financial need. She advised that her daughter died last year and the defendant paid for the

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[3] In accordance with Fed. R. App. P. 25(a)(5), Fed. R. Civ. P. 5.2, Fed. R. Crim. P. 49.1, Mr. Coward has omitted references to the specific birth date in the opening brief. The parties sought no redactions of the lower court record in this matter. Restricted access to transcripts of district court proceedings in this matter will be lifted August 30, 2010, as per CR 36.

> funeral. She stated that the defendant has never hurt anyone and requests leniency for him at sentencing."

[PSR ¶ 42]. Mr. Coward never married and sired no children. [PSR ¶ 40].

In 1965 Mr. Coward graduated from the Charles Drew High School in Louisiana, and commenced attending colleges and universities in Louisiana until approximately 1969. [PSR ¶ ¶ 55-57]. School records from McNeese State College and Louisiana State University reflect a birth date in 1946. [PSR ¶ ¶ 56-57]. Mr. Coward did not graduate, but received a certificate for teaching with an emphasis in sociology from Louisiana State University. [PSR ¶ 57].

In 1970 Mr. Coward moved from Louisiana to San Francisco, California where he lived until 1975. [PSR ¶ 42]. In 1975 he moved to Honolulu, Hawai`i, where he has lived ever since. [PSR ¶ 41].

Mr. Coward explained during his interview with Probation that he began using the 1934 birth date of his uncle with a similar name ("William James Coward") in the 1970s to be eligible for an inheritance from his biological father, who was considered his paternal grandfather. [PSR ¶ 18]. Thereafter he kept using his uncle's birth date, including on his original application for a U.S. passport in 1977, and 31 years later in 2008 later when he sought to renew his passport. [PSR ¶ ¶ 2, 18].

B. The Underlying Passport Incident.

On July 26, 1977, the United States Passport Agency issued Mr. Coward U.S. passport #H 211 0752, in the name of "William James Coward", date of birth in the year 1934, at the New Orleans passport agency. [PSR ¶ 7]. Thirty-one years later, Mr. Coward sought to renew his passport because he wanted to go on vacation to Mexico. [PSR ¶ 18; ER II 40].

On September 16, 2008, he submitted Form DS-11, U.S. Passport Application #121-456-930, at the Honolulu Post Office. [PSR ¶ 7]. On the application, Mr. Coward identified himself as "William James Coward"; his place of birth in Louisiana; his date of birth in the year 1934; his parents as Willie Coward and Bertha Fontenot. [PSR ¶ 7]. As evidence of his citizenship, he submitted an authenticated copy of the 1977 U.S. passport application containing the same personal identifiers, and a Hawai`i state identification card. [PSR ¶ 7].

The Agency's fraud prevention manager found that Mr. Coward appeared young for his stated age of 74 years. [PSR ¶ 8]. And the official noted that Mr. Coward's 1977 passport application showed that in lieu of a certified Louisiana birth certificate he had submitted a "Letter of No Record" and a baptismal certificate. [PSR ¶ 8]. Consequently, the official referred the matter to the Diplomatic Security Service (DSS) in Honolulu. [PSR ¶ 8].

On October 9, 2008, DSS investigators conducted a voluntary interview with Mr. Coward at the Honolulu Passport Agency. [PSR ¶ 9]. Mr. Coward confirmed that he completed and executed the DS-11 passport application #121-456-930. [PSR ¶ 9]. He identified himself as "William James Coward"; year of birth 1934; place of birth, Louisiana; parents, Willie and Bertha Coward. [PSR ¶ 9]. He reported that he had no birth certificate because he was born with the assistance of a midwife; that he was previously employed in Hawai`i as a teacher at Hawai`i Pacific University and St. Joseph High School; that he held a Ph.D. in education; that he worked in the field of psychology as a counselor. [PSR ¶ 9]. Mr. Coward agreed to be fingerprinted to confirm his identity. [PSR ¶ 9].

DSS agents interviewed a Louisiana school official where Mr. Coward was baptized. [PSR ¶ 11]. The representative stated that the true "William Coward" was an African-American man who married Marjorie Semien in 1960. [PSR ¶ 11]. However, on both of Mr. Coward's passport applications he claimed to have never been married. [PSR ¶ 11].

DSS agents contacted Marjorie (Semien) Coward who reported that the true William Coward was her husband who had passed away. [PSR ¶ 12]. Agents also met with Annette Torres, the daughter of Marjorie (Semien) Coward, who informed them that the individual depicted in the U.S. passport application was

not her father. [PSR ¶ 13]. Annette Torres advised that her father died in San Antonio, Texas, in 2007 and was buried at the Fort Sam Houston National Cemetery. [PSR ¶ 13].

Agents subsequently obtained Mr. Coward's "Certificate of Live Birth" from the state of Louisiana Department of Health. It identified his birth date in the year 1947, in Louisiana, to Lony Coward and Olena Jonwell, and provided the name: "Willie James Coward". [PSR ¶ 14].

C. The Change of Plea Hearing.

On December 16, 2009, Mr. Coward appeared before Judge J. Michael Seabright to withdraw his plea of not guilty and to plead anew. [ER II 47-74]. There was no written plea agreement in this matter. Represented by Matthew Winter of the Federal Public Defender's Office, Mr. Coward agreed to the following facts represented by the Government's attorney:

> "... Willie James Coward, is a Hawaii resident who was actually born on [ ] 1947 in Louisiana. His true mother's name was Elena Jonewell (verbatim). In 1977 he applied for and obtained a U.S. passport using identity information pertaining to his uncle William James Coward including the name and date of birth and mother's name of his uncle William James Coward.
>
> * * *
>
> [T]hey [Mr. Coward and his uncle] actually have the same father, but they have different mothers. So the defendant's mother was Elena Jonewell, but

the name of the mother he put on the passport was Bertha Fontaneau (verbatim) who is the mother of his uncle. The uncle was actually born on [ ] 1934, whereas the defendant was born on [ ] 1947. * * * So he used a false birth date, false name of his mother, and false name.

* * *

[I]nstead of a birth certificate, when he applied for that 1977 passport, he submitted a letter of no record of birth and a baptismal certificate in support of his application. In fact, he does have a birth certificate – or there is one in existence for the defendant's birth.

On September 16, 2008, the defendant signed and submitted a new application for a U.S. passport at the Honolulu post office, again claiming his date of birth as [ ] 1934, which was his uncle's birthday, and listing his mother as Bertha Fontaneau which was his uncle's mother.

In support of the 2008 application and as evidence of his U.S. citizenship, he provided a copy of the 1977 passport with a letter from the Department of State certifying that it matched the original in their records. The Honolulu passport agency's fraud prevention manager noticed that the man depicted in the 1977 passport looked too young to have been born in 1934 and referred the matter to the diplomatic security service in Honolulu for investigation.

On October 9, 2008, two DSS agents interviewed the defendant under the ruse that they were passport specialists at the passport agency in Honolulu. And the defendant confirmed that he had completed the application. And in that interview he falsely stated that he was born on [ ] 1934 to a mother named . . . Bertha Fontaneau, and he falsely stated that he does not have a birth certificate because he was born with the assistance of the midwife, when in fact the Louisiana birth certificate does exist. He stated that he had used the 1977 passports to travel to England and to Germany.

And when the agents asked why he looked so young in the 1977 photos, he said there were certain methods one could use to make oneself look younger.

> On November 25, 2008, the diplomatic security service received a letter from the defendant attempting to withdraw his passport application. The true William Coward, who is the defendant's uncle, passed away on July 8, 2007. His daughter Annette Torres, the daughter of the uncle, had identified the photograph that the defendant submitted with the 2008 passport application. She stated that that was her cousin, defendant Coward, and not her father."

[ER II 61-63]. Mr. Coward agreed to these facts. [ER II 64].

The court summarized that Mr. Coward applied for the passport using his uncle's identifying information because he had previously done this, and was "sort of stuck with that at this point in time". [ER II 70]. Mr. Coward pleaded guilty to the one-count indictment. [ER II 70].

The court found that Mr. Coward was competent to understand the proceedings and enter a knowing, informed and voluntary plea, and that he understood the charge to which he was pleading guilty. [ER II 70]. The court found that the plea of guilty was supported by an independent basis in fact, containing each of the essential elements of the offense. [ER II 71]. As well, the court found that Mr. Coward understood the rights associated with a trial, the Sentencing Guidelines and other sentencing factors, along with the maximum possible punishment. [ER II 71]. The court accepted the guilty plea and adjudged Mr. Coward guilty of the offense in the indictment. [ER II 71].

With respect to the upcoming sentencing proceedings, the court made the

following relevant statements:

> "I think a sentence in this case is going to be driven in part by why he did this.... You have a whole range on these cases - and Mr. Coward I'm not saying this is what you did it for – this is an example, somebody who does it to engage in terrorist related activities. I mean that person is a very different person than somebody who does it with no intent to commit any other crime. * * * ... I do think that's going to be a real important matter at sentencing in this case, it seems to me, as to essentially whether there is any intent to commit any underlying crime here that I need to be aware of."

[ER II 71-72].

D. Sentencing.

1. The Presentence Investigation Report & the Parties' Positions.

On December 30, 2009, Probation interviewed Mr. Coward in the presence of his legal counsel, Matthew Winter. [PSR ¶ 18]. During the interview Mr. Coward accepted responsibility for committing the offense and expressed remorse for his actions. [PSR ¶ 18].

In calculating Mr. Coward's offense level under the Sentencing Guidelines, Probation noted that there were no identifiable victims for the offense, and no indication that Mr. Coward obstructed or attempted to obstruct the investigation, prosecution and sentencing proceedings in the case. [PSR ¶ ¶ 16, 17].

Probation made the following determinations:

- Concerning the base offense level for violation of 18 U.S.C. § 1542, Probation found applicable U.S.S.G. § 2L2.2, which section sets a base offense level of 8. U.S.S.G. § 2L 2.2 (a). [PSR ¶ 20]. 8

- As to specific offense characteristics, pursuant to U.S.S.G. §2L2.2 (b)(3)(A) where a defendant fraudulently obtained or used a U.S. passport, the base offense level should be increased by 4 levels. Probation found that in this case Mr. Coward falsified Form DS-11, U.S. Passport Application, and was issued a fraudulent U.S. passport on July 26, 1977. [PSR ¶ 21]. Mr. Coward used the passport to travel to Germany and England, and to apply for a new passport on September 16, 2008. [PSR ¶ 21]. Probation added a 4-level increase. [PSR ¶ 21]. +4

- Concerning adjustment for acceptance of responsibility, pursuant to U.S.S.G. §3E 1.1 (a) Probation acknowledged that Mr. Coward demonstrated an acceptance of personal responsibility for his criminal conduct based on the statements he provided at the Change of Plea hearing on December 16, 2009. [PSR ¶ 26]. -2
  Probation applied a two-level reduction. [PSR ¶ 26].

- Probation found a total offense level (TOL) of 10. [PSR ¶ 27, ¶ 29]. 10

With respect to Mr. Coward's criminal history, Probation found neither juvenile adjudications nor adult convictions that scored under the Guidelines. [PSR ¶¶ 30-32]. Consequently, Probation found a total criminal history score of zero, with the corresponding Criminal History Category of I (CHC I) under the Sentencing Table at U.S.S.G. Chapter 5, Part A. [PSR ¶ 32].

As to custody options, pursuant to 18 U.S.C. §1542 the maximum term of

imprisonment was 10 years. [PSR ¶ 76]. Under the Sentencing Guidelines, based on a TOL of 10 and a CHC I, the Guidelines range for imprisonment was 6-to-12 months. [PSR ¶ 77]. According to the Sentencing Table, since this range is in Zone B of the Sentencing Table, the minimum term could be satisfied in three different ways:

- imprisonment;
- a sentence of imprisonment that included a term of supervised release with the condition that substitutes community confinement or home detention, according to the schedule in U.S.S.G. §5C1.1(e), provided at least one month is satisfied by imprisonment;
- the court could impose a sentence of probation that included a condition or combination of conditions that substituted intermittent confinement, community confinement, or home detention for imprisonment, according to the schedule in U.S.S.G. §5C 1.1(e).

[PSR ¶ 68].

As to supervised release, Probation noted that if a term of imprisonment is imposed, the court could impose supervised release of not more than three years, pursuant to 18 U.S.C. §3583 (b)(2). [PSR ¶ 80]. Under the Guidelines, Probation noted that the range for supervised release was at least two years, but not more than three years. U.S.S.G. §5D 1.1 (b). [PSR ¶ 81]. If the court imposed a term of imprisonment of one year or less, pursuant to U.S.S.G. §5D 1.1 (b), a term of supervised release was not required, but optional. [PSR ¶ 81].

As to probation, since the applicable range was in Zone B a sentence of probation was authorized, provided the court imposed a condition or a combination of conditions requiring intermittent confinement, community confinement, or home detention for at least 6 months, pursuant to U.S.S.G. § 5B 1.1 (a) (2). [PSR ¶ 83].

On February 26, 2010, the Government filed a Sentencing Memorandum stating it had no objections to the PSR, however the Government submitted additional information relating to Mr. Coward's job applications from the 1970s to 2006. [PSR, Addendum 1A-2A]. Also, the Government argued that in October 2008, during the investigation of this case, Mr. Coward used his uncle's identity. [PSR, Addendum 2A]. As a result, the Government requested that the Court impose a sentence of imprisonment at the high-end of the recommended Guidelines range. [PSR, Addendum 2A].

After Probation submitted the draft PSR on February 12, 2010, on March 4, 2010, Matthew Winter withdrew as counsel, and the court appointed attorney Randall Oyama. [PSR, Addendum 1A]. On May 11, 2010, Mr. Oyama filed on Mr. Coward's behalf a Sentencing Statement representing that after reviewing the factual information contained in the draft PSR Mr. Coward, "[did] not have any objections and [ ] submitted corrections/modifications to Mona Godinet at the

United States Probation Office." [ER II 46]. Mr. Oyama sent the corrections to Probation on May 11, 2010, as well as letters of support on May 21, 2010.[4] Otherwise Mr. Coward represented that he "does not object to the sentencing classifications/guideline ranges set forth in the aforementioned Proposed Presentence Report and reserves the right to request a downward departure." [ER II 46].

On May 12, 2010, Mr. Coward filed a Motion for Guidelines Reduction Based on Mitigating Circumstances (Motion). [ER II 38-44]. He sought a two-level reduction pursuant to 18 U.S.C. § 3553, and sought a sentence pursuant to a base offense level of six. [ER II 43]. Mr. Coward asked the court to consider that:

- in 1990 he attempted to resolve the erroneous birth date when he applied for driver's license from the State of Hawai`i;
- at that time he sought to utilize his true 1947 birth date;
- however state authorities told him to apply for and obtain a Hawai`i driver's license utilizing the erroneous 1934 birth date that was already in the system;
- the instant offense arose when friends invited him to spend the holidays in Mexico;
- he had no malicious intent in renewing his passport, and used information from his original 1977 passport application;

[4] Attached to the PSR and filed under seal.

- once officials informed him of the discrepancy with the birth date, he withdrew his application and "voluntarily reported the discrepancy to the National Passport Agency in an attempt to resolve the matter."

[ER II 40-41].

In the Motion Mr. Coward noted that since Pretrial Services supervision began in August 2009 he had weekly sessions with psychologist Dr. Gregory Turnbull. [ER II 41]. Prior to sentencing on May 4, 2010, Dr. Turnbull submitted to Mr. Oyama a report discussing Mr. Coward's mental health, background, and the underlying incident. Mr. Oyama attached Dr. Turnbull's report to the Motion.[5]

Dr. Turnbull recounted that Mr. Coward was the product of a union between his mother and his paternal 'grandfather'. [PSR, Turnbull Attachment]. Hence, his biological father was also the biological father of the man his mother married, Lony Coward. [Id.]. Mr. Coward was raised in his biological father's household, along with a half-brother known as "William James Coward", also referred to as "Billy", who was 13 years older than Mr. Coward. [Id.].

After World War II, Billy went to graduate school in Texas but could not complete the program. [Id.]. Mr. Coward and Billy entered an agreement in which Mr. Coward would move to Texas and "take his [Billy's] place" at the school,

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[5] This confidential document is attached to the PSR and filed with the court under seal.

which Mr. Coward did, eventually completing the course work and obtaining multiple graduate degrees on Billy's behalf. Mr. Coward began using the wrong 1934 birth date in all documentation. [Id.]. This included using the 1934 birth date to obtain the original passport in 1977. [Id.].

Dr. Turnbull reported that over the years Mr. Coward began "to believe the lie". [Id.]. Moreover, Mr. Coward now faced an enormous dilemma: "[he] can not use his real birth date (e.g., to apply for a driver's license or State ID), because the true date would contradict the long-standing documentary record and raise legal red flags." [Id.].

According to Turnbull, Mr. Coward is suffering from the psychological phenomenon known by the French term *idee fixe*, or fixed obsession.

> "In my opinion, Mr. Coward found emotional 'legitimacy' in taking on the role of Billy Coward. This made him 'as good as' Billy. Very shortly thereafter, this became the same thing as actually being Billy since Billy was not actually competing with Mr. Coward academically or professionally. It's not a case of multiple personalities.... Mr. Coward is not insane in the conventional sense of lacking competency. However, he has enjoyed the luxury of being both of the William Cowards (Willie and Billy) for over 40 years. It has not been a functional problem except for the extremely rare occasions when he has to swear to his lineage on paper. Further, his fixed idea has become more and more entrenched over time and reinforced in his thinking by the multiple diplomas, licenses, leases, credentials, titles and such that bear the name 'William Coward' and the wrong birth date.... [I]t has in fact been much easier for Mr. Coward to stay consistent with his paper history since college than it would be to try and make a documented cleanup of the mess."

[Id.].

To correct the situation, in the Motion Mr. Coward sought the district court's assistance in providing "some kind of authority to utilize his true birthday". [ER II 43]. "Defendant is seeking an order from this court that will allow the amendment of government records to reflect Defendant's true birthday." [ER II 43].

2. The Sentencing Hearing.

At the sentencing hearing on May 17, 2010, the court adopted the factual findings in the PSR, as well as the application of the Sentencing Guidelines, noting the TOL of 10, a CHC I, the Guidelines range of 6-to-12 months, supervised release of 2-to-3 years and a $100 special assessment. [ER I 10]. The court acknowledged sentencing memoranda, as well as Mr. Coward's Motion. [ER I 11].

Mr. Oyama argued on behalf of the Motion, relying Turnbull's conclusion that Mr. Coward is suffering from *idee fixe* wherein he came to believe that his birth date was in 1934. [ER I 15]. In addition, he noted that Mr. Coward used the false statement to obtain a new passport to go to Mexico for *vacation*, not for a criminal purpose. [ER I 16]. Turnbull's diagnosis of *idee fixe* justified a two-level Guidelines departure that would result in a TOL of 8. Otherwise, Mr. Coward

sought a sentence of straight probation, or in the alternative six months home detention as part of probation. [ER I 17-18].

Mr. Coward personally addressed the court and apologized:

> "I had no intention whatsoever to defraud or do anything to this government. I only copied the information from my old passport to my new passport to go to Mexico. I'm sorry about all of this. And I am trying to work with the psychological treatment that I need to be able to remedy some of these problems"

[ER I 18-19].

Mr. Oyama explained the difficult dilemma Mr. Coward faces should he use his correct 1947 birth date:

> "When he does that, it's not allowed, they're thinking he is committing fraud at that time because in their database they already have the old dates.
>
> So I think those kinds of incidents repeatedly and coupled with the fact that he is so used to using that other date, I think habitually he goes into these modes. I don't think it's because he's trying to defraud anyone, because he is not benefitting by doing these things, but he is getting rejected from his objectives by using his real birth date. [Paragraph break] ... I don't know if the court would be inclined to give an order or some kind of order asking these agencies to look into the correct address, birth date for my client so he can actually do these things. Because he tried to get a driver's license, and he can't do it."

[ER I 24-25]. The court replied that such order would be "beyond the purview of my jurisdiction here". [ER I 25].[6]

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[6] Yet, among the conditions of supervised release, the court prohibited Mr. Coward from possessing or using any false identification or documents that did

The court reviewed the sentencing factors under 18 U.S.C. § 3553(a), stating that it was keeping in mind the parsimony clause and that it must impose a sentence sufficient but not greater than necessary to comply with the purposes of § 3553 (a)(2). [ER I 25-26]. The court acknowledged that there were no ulterior or illicit motives on Mr. Coward's part in submitting the false application. [ER I 26]. And the court acknowledged Dr. Turnbull's diagnosis that Mr. Coward, "was fixated on this and wanted to be Uncle Billy and become Uncle Billy and had a very hard time moving away from that identity as the years progressed." [ER I 26]. However, the court found it problematic that after Mr. Coward was interviewed, according to Probation he continued to lie and claim that he was William James Coward with the 1934 birth date, and that he did not have a birth certificate. [ER I 26-27].

The court acknowledged that Mr. Coward had an entrenched problem that required treatment:

> "So there's something embedded in there, and I'm glad to hear, Mr. Coward, that you recognize the need to get treatment for this. Because it's pretty deeply embedded in you that you just can't tell the truth. You want to be somebody else, and you go around perpetuating that falsity at the drop of a hat. It's just easy for you."

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not belong to him. [ER I 31].

[ER I 27].

Notwithstanding Mr. Coward's zero criminal history score, the court focused on old 1980-convictions that did not score under the Guidelines and concerned distribution of Valium and Tylenol IV. [ER I 28]. As to that conviction, the court noted that while incarcerated at O`ahu Community Correctional Center (OCCC) in 1985/1986, Mr. Coward allegedly had a "poor attitude and incurred misconducts." [ER I 28]. Yet the court failed to acknowledge Probation's report that during incarceration Mr. Coward was sexually assaulted. [PSR ¶ 52].

The court found that Mr. Coward was at risk to reoffend: "I have serious concerns as to whether you can really comport your conduct to what the law requires at this point in time. You've lived this life in this life for so long and it's so ingrained that, as I said, it's just too easy for you." [ER I 28]. Again, the court acknowledged the "fixation component" discussed in Dr. Turnbull's report, and that Mr. Coward had no "underhanded" purpose when he sought to renew his passport in 2008. [ER I 28-29].

With respect to the Motion seeking a two-level reduction, the court deemed the same misnamed under the "old guideline system". [ER I 29]. The court refashioned the motion as:

> "a request to sentence outside of the guideline range of variance and for me to take into account the various 3553 (a) factors. [Paragraph break.] So I want the record to reflect I've considered your motion; I've considered it fully. But I typically don't rule on those in the context of where we were six years ago, where I would have actually ruled on it. [Paragraph break.] ***Instead, I look at it as a request to sentence in a particular way taking into account the 3553 (a) factors and mitigating factors that you bring forward.***"

[ER I 29-30, emphasis added].

Without articulating its decision or rationale, the court denied the refashioned motion. The court did not address Mr. Coward's request for an alternative imprisonment options provided under § 5C1.1(e) for a Guidelines range within Zone B of the Sentencing Table. [PSR ¶ 78].

The court stated its intended sentence of eight months incarceration, followed by three years supervised release, a $100 special assessment, and no fine because the court did not believe that Mr. Coward had the ability to pay the same. [ER I 30]. As justification for the sentence that the court acknowledged was "harsher and longer than you'd hoped for", the court stated:

> "this has been going on for some 30 years, Mr. Coward, and that it has been so consistent and so embedded for so long, and that you continue to lie – not just once but several times – in the course of this matter, that is, after the application was submitted, and the fact that you do have a criminal history, I do believe that the eight-month sentence is appropriate in this case."

[ER I 32].

Acknowledging ongoing physical therapy treatments relating to a car accident on April 23, 2010, the court extended mittimus for three months, requiring self-surrender on August 17, 2010. [ER I 35-36]. On July 21, 2010, the court granted Mr. Coward's Motion to Stay Sentence Pending Appeal. [ER II 37.1].

SUMMARY OF ARGUMENT

The issue presented in this appeal is whether the district court failed to consider the sentencing options for the Guidelines range that was within Zone B of the Sentencing Table, and failed to consider the totality of the circumstances, resulting in a procedurally defective and unreasonable sentence that must be vacated? Mr. Coward argues that the answer must be yes.

The legal basis for this argument lies in the sentencing procedure set forth in Carty. United States v. Carty, 520 F.3d 984, 991-994 (9th Cir. 2008) (*en banc*). As argued below, the sentencing record shows that the court failed to consider the relevant § 3553(a) factors required in Carty, that the court consider the "kinds" of sentences for which Mr. Coward was eligible under Zone B of the Sentencing Table, including the alternatives to imprisonment. Further, under the totality-of-the-circumstances standard, the court erred in imposing an unreasonable sentence

of eight months, which does not take into account Mr. Coward's significant health problems, and which is based upon the court's unsupported determination that Mr. Coward is at risk to reoffend.

ARGUMENT

A. The District Court Failed to Consider the Sentencing Options for the Guidelines Range That Was Within Zone B of the Sentencing Table, Pursuant to U.S.S.G. § 1B1.1(h) and § 5C1.1, and Failed to Consider the Totality of the Circumstances, Resulting in a Procedurally Defective and Unreasonable Sentence that Must Be Vacated.

1. Standard of Review.

"Appellate review is to determine whether the sentence is reasonable; only a procedurally erroneous or substantively unreasonable sentence will be set aside." Carty, 520 F.3d at 993.

2. Discussion.

A.

In Carty this Court provided the sentencing procedure to follow that encompasses the Supreme Court's decisions in Rita, Gall and Kimbrough. Carty, 520 F.3d at 991-994*, citing* Rita v. United States, 551 U.S. 338, 127 S.Ct. 2456, 2465, 168 L.Ed.2d 203 (2007); Gall v. United States, 551 U.S. 1113, 127 S.Ct. 2933, 168 L.Ed.2d 261 (2007); Kimbrough v. United States, 552 U.S. 85, 128

S.Ct. 558, 564, 169 L.Ed.2d 481 (2007). We quote the relevant text:

> "• All sentencing proceedings are to begin by determining the applicable Guidelines range....
>
> • The parties must be given a chance to argue for a sentence they believe is appropriate. [Footnote omitted.]
>
> • The district court should then consider the § 3553(a) factors to decide if they support the sentence suggested by the parties, i.e., it should consider the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed; ***the kinds of sentences available***; the kinds of sentence and the sentencing range established in the Guidelines. . . . 18 U.S.C. § 3553(a)(1)-(7); [Citation omitted].
>
> • The district court may not presume that the Guidelines range is reasonable. [Citation omitted]. Nor should the Guidelines factor be given more or less weight than any other....
>
> • The district court must make an individualized determination based on the facts. However, the district judge is not obliged to raise every possibly relevant issue sua sponte. [Citation omitted].
>
> * * *
>
> • Once the sentence is selected, the district court must explain it sufficiently to permit meaningful appellate review. A statement of reasons is required by statute, § 3553(c), and furthers the proper administration of justice. See Rita, 127 S.Ct. at 2468 (stating that '[c]onfidence in a judge's use of reason underlies the public's trust in the judicial institution'). An explanation communicates that the parties' arguments have been heard, and that a reasoned decision has been made. It is most helpful for this to come from the bench, but adequate explanation in some cases may also be inferred from the PSR or the record as a whole."

Carty, 520 F.3d at 990-992 (emphasis added).

This Court found that it would be procedural error for a district court, "to fail to consider the § 3553(a) factors". Id. at 993. Concerning reasonableness of the sentence, the Court will consider the "totality of the circumstances". Id. "[A] procedurally erroneous or substantively unreasonable sentence will be set aside. Id.

B.

"The Sentencing Commission directs courts to apply the guidelines provisions in a specific order." United States v. Doe, 564 F.3d 305, 311 (3d Cir. 2009). A sentencing court must determine the Guidelines range in Part A of Chapter 5 by first calculating the base offense level under Chapter 2; then the court adjusts that level for various factors listed in Chapter 3; then the court determines the criminal history category under Part A of Chapter 4 and any adjustments under Part B of Chapter 4. U.S.S.G. § 1B1.1(a)-(g). United States v. Tolliver, 570 F.3d 1062, 1065 (8th Cir. 2009).

Once these determinations are completed, § 1B1.1(h) instructs: "For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution." Chapter Five, Part C, addresses imprisonment options in terms of the applicable zones in the Sentencing Table.

For example, a sentence of imprisonment is not required if the applicable Guidelines range is in Zone A, while a sentence of imprisonment is required if the applicable Guidelines range is in Zone D. U.S.S.G. § 5C1.1(b), (f).

C.

In this case Probation found, and the court adopted, the Guidelines TOL of 10, the CHC I, and an imprisonment range of 6-to-12 months. [PSR ¶ 77]. This resulted in a sentence within Zone B of the Sentencing Table. For offenders falling within Zone B, like Mr. Coward, either probation, intermittent confinement, community confinement, or home detention may be substituted for a sentence of imprisonment. U.S.S.G. § 5C1.1 (c). *See* United States v. Malley, 307 F.3d 1032, 1035 (9th Cir. 2002). Section 5C1.1(c) states:

> "If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by – (1) a sentence of imprisonment; or (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or (3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e)."

Probation applied § 5C1.1(c) in the PSR, noting that Mr. Coward was eligible for sentencing options beyond straight imprisonment. [PSR ¶ 78]. In that light, at sentencing on May 17, 2010, Mr. Coward asked for six months of home

detention "as a part of probation." [ER I 18].

The court, however, did not acknowledge the sentencing options under § 5C1.1 (c) for which Mr. Coward was eligible, or his request for home detention. The court commenced the hearing by stating:

> "[T]he Court will adopt the factual findings in the report as its own as well as application of the guidelines. [Paragraph break.] What we have then is a total offense level 10, criminal history category 1, advisory guideline range of six to 12 months, supervised release of one to three years, fine range of two thousand to $20,000, and a $100 special assessment."

[ER I 10]. Hence, the court only acknowledged the applicable advisory Guidelines range of 6-to-12 months.

Later when the court imposed the eight-month sentence, the court only stated its rationale behind selecting the eight-month prison term. [ER I 25-30]. There is no indication that the court considered the other sentencing options available pursuant to § 5C1.1 (c)(1). Similarly, the court did not rule on Mr. Coward's request for probation, which request was within the Guidelines range of sentencing options pursuant to § 5C1.1 (c). It appears that the court assumed that the only custodial option concerned the prison range of 6-to-12 months, since there is no acknowledgment of the alternative custodial options Mr. Coward sought and was entitled to under § 5C1.1 (c).

The court's failure to acknowledge and consider alternative kinds of

sentences to which Mr. Coward was eligible violates 18 U.S.C. § 3553(a)(3). That Section mandates that: "The court, in determining the particular sentence to be imposed, shall consider— * * * (3) the kinds of sentences available". 18 U.S.C. § 3553(a)(3). As the Court found in Carty, failure to follow sentencing procedure results in a procedurally erroneous or substantively unreasonable sentence, which must be set aside. Carty, 520 F.3d at 993.

D.

Moreover, failure to consider the range of custodial options, including Mr. Coward's eligibility of probation, cannot be considered harmless. Mr. Coward is a 63-year-old man suffering from a host of health problems. As to his mental health, the PSR apprised the Court that Mr. Coward had been under the care of Dr. Turnbull since October 22, 2009. [PSR ¶¶ 49, 50]. Dr. Turnbull diagnosed Mr. Coward as suffering from acute anxiety and recurrent depression, in addition to the *idee fixe* discussed supra. [See PSR, Turnbull Attachment]. Further, Dr. Turnbull found that Mr. Coward exhibited poor reasoning ability and a tendency to use 'an impressionistic, rather than logical thinking style.'" [PSR ¶ 49]. And the PSR apprised the Court that Mr. Coward has suffered from depression since 1978, and had been under the care of various physicians in this regard. [PSR ¶ ¶ 51, 51a].

Concerning his physical health, the PSR likewise reported numerous problems. Mr. Coward suffers from high blood pressure, high cholesterol, an enlarged prostate, bleeding ulcers and loss of vision in his right eye due to cataracts. [PSR ¶ 47]. Further, Mr. Coward notified the Court during the sentencing hearing that on April 23, 2010, he was injured in an automobile accident, for which he was taking pain medication and attending physical therapy sessions. [ER I 34-35].

Aside from Mr. Coward's health issues, the record clearly showed the court that he has never been a danger to the community. The Court itself acknowledged at sentencing:

> "there was no ill-motive behind the action he took. In other words, he was not intending to use the passport for some other illicit purpose. [Paragraph break omitted]. This isn't a case of a drug dealer who wanted to obtain a passport to travel under some false identity. So if he was caught with the drugs they would know who he was. It wasn't that sort of thing. Certainly not a terrorist. At the far end of the spectrum of how someone would abuse this process. We have nothing like that."

[ER I 26].

In fact, the court permitted Mr. Coward to remain free on an Appearance Bond at the commencement of this case in September 2009, and there is no indication that he did not fulfill all the conditions in the Order Setting Conditions of Release. These conditions included the prohibition from using any false

identification or ID cards that did not belong to him. Indeed, on July 21, 2010, the court granted Mr. Coward's Motion to Stay Sentence Pending Appeal.

Given these considerations, it appears that Mr. Coward was the perfect candidate for one of the alternatives to imprisonment available under U.S.S.G. § 5C1.1(c), including probation. However, the record indicates that the Court assumed as reasonable an imprisonment range of 6-to-12 months, which represents a substantively unreasonable sentence for a defendant like Mr. Coward. Carty, 520 F.3d at 993.

E.

As justification for the eight-month sentence, the court stated:

> "this has been going on for some 30 years, Mr. Coward, and that it has been so consistent and so embedded for so long, and that you continue to lie – not just once but several times – in the course of this matter, that is, after the application was submitted, and the fact that you do have a criminal history, I do believe that the eight-month sentence is appropriate in this case."

[ER I 32]. The court's rationale is based upon a selective use of the record that does not withstand scrutiny. Mr. Coward made clear to the court his attempt to correct his Hawai`i driver's license in 1990, but that such efforts were thwarted by government bureaucrats. [ER II 40]. He even pleaded with the court for assistance in rectifying this long-standing, entrenched problem, only to be rebuffed by the court. [ER I 24-25].

As to his criminal history, Mr. Coward has no convictions that score under the Guidelines. [PSR ¶ 32]. The court, however, seemed to disregard this essential fact and instead focus upon Hawai`i Paroling Authority reports that while incarcerated at OCCC in 1985/1986 Mr. Coward purportedly exhibited a "poor" attitude toward the staff, "submitted numerous grievances against them", and "incurred misconducts". [ER I 28; PSR ¶ 33a]. Yet the court failed to acknowledge Pretrial Service's records indicating that Mr. Coward was raped and sodomized while incarcerated at OCCC [PSR ¶ 52], and the reasonable inference that such abuse was likely related to Mr. Coward's alleged "poor" attitude and submission of grievances.

Otherwise, the court failed to acknowledge that while incarcerated at OCCC, Mr. Coward "had a good work line performance" and upon release the same Paroling Authority reports the court relied upon showed no violations throughout his parole period until discharge. [PSR ¶ 33a]. Since being released from OCCC in 1989, he committed no further criminal offenses until the instant offense. In short, the record does not support the court's "serious concern" that Mr. Coward will reoffend. [ER I 28].

F.

In Carty, this Court stated that in sentencing appeals, it would "first

consider whether the district court committed significant procedural error, then we consider the substantive reasonableness of the sentence." Carty, 520 F. 3d at 993. Among the forms of procedural error identified by the Court, it found that it would be procedural error for a district court, "to fail to consider the § 3553(a) factors". Id. Concerning reasonableness of the sentence, the Court will consider the "totality of the circumstances". Id. A procedurally erroneous or substantively unreasonable sentence will be set aside. Id.

Based the record, the district court committed procedural error by failing to consider the relevant § 3553(a) factor, that is the kinds of non-custodial alternative sentences available under § 5C1.1 (c). Otherwise, under the totality-of-the-circumstances standard the district court erred by imposing an unreasonable sentence of eight months based on factors not supported by the record, and without adequately considering Mr. Coward's numerous and acute health problems, lack of danger to the community and low risk of reoffending.

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CONCLUSION

This appeal presents one issue for consideration: Whether the district court's failed to consider the sentencing options for the applicable Guidelines range that was within Zone B of the Sentencing Table, and failed to consider the totality of the circumstances, resulting in a procedurally defective and unreasonable sentence that must be vacated?

The answer must be, yes. The record reflects that the district court failed to consider the relevant § 3553(a) factor pursuant to U.S.S.G. § 1B1.1(h) and § 5C1.1 and, otherwise, imposed an unreasonable sentence.

Hence, Mr. Coward requests that this Court vacate the sentence, and remand the case for resentencing.

DATED: Wailuku Maui, Hawai`i, August 25, 2010.

/s/ Georgia K. McMillen
GEORGIA K. MCMILLEN
Attorney for Defendant-Appellant

STATEMENT OF RELATED CASES

Upon information and belief, there are no other cases in this Circuit, or elsewhere, relating to the defendant-appellant and the matters discussed herein.

DATED: Wailuku Maui, Hawai`i, August 25, 2010.

/s/ Georgia K. McMillen
GEORGIA K. MCMILLEN
Attorney for Defendant-Appellant

C.A. No. 10-10262

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