

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-15776
Non-Argument Calendar

D.C. Docket No. 6:14-cr-00137-GKS-DAB-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAUL CRUZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(January 6, 2016)

Before TJOFLAT, WILLIAM PRYOR and JILL PRYOR, Circuit Judges.

PER CURIAM:

Raul Cruz appeals his sentence of 60 months of imprisonment, imposed following his plea of guilty to committing fraud involving transactions with access devices issued to other persons. *See* 18 U.S.C. § 1029(a)(5), (c)(1)(A)(ii). Cruz argues that the district court committed significant errors that make his sentence procedurally unreasonable. Cruz also argues that his sentence is substantively unreasonable because the district court failed to consider his history and characteristics or the nature and circumstances of his offense. Because there are several procedural deficiencies in Cruz’s sentencing hearing that make his sentence procedurally unreasonable, we need not consider the substantive reasonableness of his sentence. We vacate and remand for resentencing.

Our review of a sentence for reasonableness is a deferential standard of review for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 597 (2007). “A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous.” *United States v. Ellisor*, 522 F.3d 1255, 1273 n.25 (11th Cir. 2008) (quoting *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004)). We are required to vacate a sentence if the district court commits “significant procedural error” by “failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous

facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.” *Gall*, 552 U.S. at 51, 128 S. Ct. at 597.

The district court committed at least three procedural errors when sentencing Cruz. First, the district court failed to calculate Cruz’s advisory guideline range. *See id.* “[T]he Guidelines should be the starting point and the initial benchmark” at sentencing, *id.* at 49, 128 S. Ct. at 596, and the failure of the district court to mention Cruz’s sentencing range constitutes “significant procedural error,” *id.* at 51, 128 S. Ct. at 597. Although the district court stated that Cruz “[had] a[maximum] exposure of 15 years in prison” and that “the guidelines are not reasonable in this case,” the district court should have identified the applicable sentencing range before pronouncing Cruz’s sentence.

Second, the record is insufficient to establish that the district court considered all the statutory sentencing factors and made “an individualized assessment based on the facts presented.” *Id.* at 49–50, 128 S. Ct. at 596–97. The parties discussed Cruz’s offense and stated what sentence they thought was appropriate, but the district court did not participate in the discussion or articulate that its decision was influenced by any factor mentioned by either party. Cruz requested a downward variance to a sentence of home detention or confinement for 12 months and one day based on his cooperation, lack of a criminal history, and

familial obligations, and the government recommended a sentence of 18 months. The district court did not address the parties' arguments or mention section 3553(a) before announcing that it was "going to sentence [Cruz] to five years in the Bureau of Prisons." And the district court imposed the sentence without giving Cruz or the government an opportunity to address whether a sentence in excess of the guidelines range was appropriate, even though "[s]ound practice dictates that judges in all cases should make sure that the information provided to the parties . . . in the hearing itself[] has given them an adequate opportunity to confront and debate the relevant issues," *Irizarry v. United States*, 553 U.S. 708, 715, 128 S. Ct. 2198, 2203 (2008). The variance no doubt surprised the parties because Cruz had pleaded guilty in exchange for an agreement by the government to recommend a sentence within the applicable guideline range and Cruz's presentence report did not identify any ground for a variance. The exchange between the district court and the parties does not reveal whether the district court considered all the statutory purposes of sentencing, *see* 18 U.S.C. § 3553(a), before deciding to vary upward 36 months from the high end of Cruz's sentencing range.

Third, the district court failed to adequately explain its chosen sentence. A district court is required to articulate the reasons why it selected a particular sentence. *See* 18 U.S.C. § 3553(c). That explanation is necessary "to allow for meaningful appellate review and to promote the perception of fair sentencing."

Gall, 552 U.S. at 50, 128 S. Ct. at 597. An explanation is particularly important to establish that there are “sufficient justifications” to vary outside the sentencing range provided by the Guidelines, *id.* at 46, 128 S. Ct. at 594, when the variance is based on a disagreement with the policy underlying the Guidelines, *see United States v. Irey*, 612 F.3d 1160, 1188 (11th Cir. 2010). Because the Sentencing Commission formulates the Guidelines using “empirical data and national experience, guided by a professional staff with appropriate expertise,” *Kimbrough v. United States*, 552 U.S. 85, 109, 128 S. Ct. 558, 574 (2007) (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)), a “closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge’s view that the Guidelines range fails properly to reflect § 3553(a) considerations even in a mine-run case,” *id.* at 109, 128 S. Ct. at 575 (internal quotation marks and citation omitted). In contrast, a variance “attract[s] great[] respect when the sentencing judge finds a particular case outside the heartland to which the Commission intends individual Guidelines to apply.” *Id.* at 109, 128 S. Ct. at 574–75 (internal quotation marks and citation omitted). We cannot conduct a meaningful review of Cruz’s sentence because we cannot determine why the district court varied upward from the guidelines range. On the one hand, the decision appears to be based on the determination that Cruz’s offense was “outside the heartland” of cases covered by the Guidelines. *See id.*

Before the district court pronounced its sentence, it chastised Cruz for “fleec[ing] [the public] from both ends” by purchasing stolen credit card information and by selling “unsuspecting people” tickets to the Disney amusement park that “half the time . . . were no good” and blamed him for contributing to the “epidemic in this country” of credit card fraud that generated fear in the public that a “criminal[] like you [will] steal their credit.” On the other hand, the district court also made the “find[ing] that the guidelines are not reasonable in this case because they were set up before this fraud became epidemic.”

Cruz’s sentence is procedurally unreasonable. The district court failed to mention Cruz’s advisory sentencing range, to explicitly consider the statutory sentencing factors, or to adequately explain its chosen sentence. We cannot discern the ground on which the district court based its upward variance, which prevents us from determining how much deference to give to the sentence imposed or whether the variance is supported by “sufficient justifications.” *See Kimbrough*, 552 U.S. at 109, 128 S. Ct. at 574–75; *Gall*, 552 U.S. at 46, 128 S. Ct. at 594. Accordingly, we vacate Cruz’s sentence and remand for resentencing.

VACATED AND REMANDED.