No. _____

In The
Supreme Court of the United States

Larone Frederick Elijah,
Petitioner,
v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 2, 2018

QUESTION PRESENTED

In *Rosales-Mireles*, 138 S. Ct. 1897 (2018), this Court held that "before a court of appeals can consider the substantive reasonableness of a sentence, [i]t must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range." 138 S. Ct. at 1910. The question presented by the Petition is this: When a criminal defendant argues that a district court made an error in calculating his United States Sentencing Guidelines range resulting in a sentence that was a nearly 700% upward variance from the correct range, should an appellate court be permitted to skip right to a substantive reasonableness analysis, presuming for purposes of harmless error review, that the district court would have awarded the same sentence even if it had decided the Guidelines issue in the defendant's favor based only on the district court's conclusory assertion that it would have issued the same sentence as an alternative variance sentence.

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PETITION FOR WRIT OF CERTIORARI BY LARONE FREDERICK ELIJAH

This Court has repeatedly reaffirmed "the essential framework the Guidelines establish for sentencing proceedings." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016). They are intended to "assist federal courts across the country in achieving uniformity and proportionality in sentencing." *Rosales--Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018). As the starting point from which the sentencing analysis begins, "when a Guidelines range moves up or down, offenders' sentences [tend to] move with it." *Molina-Martinez*, 136 S. Ct. at 1346 (internal quotations and citations omitted). Ensuring that courts apply the correct Guidelines range, and that defendants have a meaningful opportunity for review of a purported error, is critical to preserving the "fairness, integrity and public reputation of the proceedings." *Rosales-Mireles,* 138 S. Ct. at 1902.

On appeal of a sentence under the Federal Rules of Criminal Procedure, Rule 52(a), courts generally apply a two-step analysis as the Fourth Circuit did in this case. The first inquiry is whether the district court correctly calculated the Guidelines range and, if not, whether such an error was harmless; in other words, that the error did not affect the defendant's sentence. If the Guidelines were correctly applied, or the error was harmless, the district court then considers whether the sentence was reasonable in light of the factors enumerated in 18 U.S.C. § 3553(a). This Petition concerns the first prong of the analysis.

After the Court's decision in *United States v. Booker*, 543 U.S. 220 (2007), a trend has begun of district courts announcing, without any separate supporting analysis, that it would have issued the same sentence as an alternative variant sentence were it to be found that it had miscalculated the Guidelines range. In certain Circuits—including the First Fourth, Eighth and Eleventh—this conclusory statement is all that is required for the appellate court to hold harmless any error in the Guidelines calculation. Other circuits require more. In the Third, Seventh, and Tenth Circuits, the district court must provide at least some explanation justifying the alternative sentence for the error to be deemed harmless. The Court should grant this Petition to resolve conflicting standards that threaten to undermine the fairness of sentencing proceedings. "[T]he public legitimacy of our justice system relies on procedures that are neutral, accurate, consistent, trustworthy, and fair, and that provide opportunities for error correction." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) (internal quotations and citations omitted). The standard applied by the First, Fourth, Eighth and Eleventh Circuits has in effect deprived defendants of any meaningful appellate review of their Guidelines range calculations.

Indeed, that is precisely what happened in this case. Petitioner Larone Frederick Elijah plead guilty to possession with the intent to distribute cocaine, heroin, and 3,4-Methlylenediocy-N-ethylcathinone and was sentenced by the United States District Court for the Eastern District of North Carolina ("District Court") to 108 months'

imprisonment and three years of supervised release. Petitioner argued that the Guidelines dictated a range of 8 to 14 months' imprisonment. Over Petitioner's objection, the District Court calculated a Guidelines range of 151 to 188 months' and then proceeded to review the 18 U.S.C. § 3553(a) sentencing factors, justifying its downward departure from the Guidelines range and resulting 108-month sentence. After announcing the downward departure, the District Court added the conclusory statement that "if it were to be determined that I miscalculated the advisory guidelines range, I'd impose the same sentence as an alternative variant sentence." Petitioner's Appendix ("Pet. App.") 39. No separate justification was provided supporting a nearly 700 percent increase from what would have been the correct Guidelines range.

Petitioner appealed to the Fourth Circuit, arguing that the District Court applied an incorrect Guidelines range and that his 108-month sentence was a draconian and unsupported 700 percent upward departure from the correct range of 8 to 14 months. The Fourth Circuit affirmed the District Court's judgment. In so doing, the Circuit declined to analyze any potential errors in the district court's Guidelines calculations, holding that "when a sentencing court imposes a Guidelines sentence and states that it would impose the same term as an alternative variant sentence," all that is required is to determine whether the sentence was reasonable. Pet. App. 5. Although the District Court provided supporting analysis for its 108-month sentence only from the standpoint of a downward departure from

the Guidelines, rather than a nearly 700 percent increase, the Circuit found the alternative variance sentence reasonable in light of the § 3553(a) sentencing factors.

With the circuit courts split over whether a district court can insulate itself from appellate review of its Guidelines range calculation with a simple conclusory statement that it would have imposed the same sentence regardless of any errors, the time is ripe for the Court to intervene and make clear that justice requires more. It hardly squares with the aspiration of uniformity in sentencing across the country, and indeed the principles of even-handed justice, for Petitioner to be denied meaningful review of his Guidelines calculation simply because his trial took place in the Fourth Circuit rather than the Third, Seventh, or Tenth Circuits. The Petition should be granted.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") was unpublished, but is reproduced herein at pages App-. 1 to App.-7 of Petitioner's Appendix. The Fourth Circuit denied rehearing on that opinion in an unpublished order which appears in the Appendix at App.-42.

The sentencing order of the United States District Court for the Eastern District of North Carolina ("District Court") was issued orally. A transcript of the sentencing hearing is reproduced in the Appendix at pages App.-8 through App-41.

JURISDICTION

On March 7, 2017, the Petitioner was sentenced to 108 months in prison by the District Court.

The Fourth Circuit affirmed the judgment on February 28, 2018. It denied a petition for rehearing in an unpublished order issued on April 3, 2018. This petition is filed within 90 days of that date and therefore is timely. *See* Sup. Ct. R. 13.1.

The jurisdiction of this Court to review the judgments of the District Court and the Fourth Circuit is now invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal Rule of Criminal Procedure 52(a)

Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

STATEMENT OF THE CASE

Petitioner Larone Elijah is a federal inmate serving a prison sentence for possession with the intent to distribute cocaine, heroin, and 3,4-Methlylenediocy-N-ethylcathinone. He was indicted and pleaded guilty in the District Court and was sentenced to 108 months' imprisonment and three years of supervised release.

After Mr. Elijah's plea, the District Court ordered that a presentence report ("PSR") be prepared to assist the court in sentencing Mr. Elijah. In preparing the PSR, the probation officer determined that Mr. Elijah was a federal career offender under

the United States Sentencing Guidelines ("Guidelines") because he had two qualifying prior felony convictions under U.S.S.G. § 4B1.1(a). As a career offender, the PSR recommended that Mr. Elijah receive a criminal history category of VI and a total offense level of 29, resulting in a guideline range of 151 to 188 months' imprisonment.

At sentencing, Mr. Elijah argued that one of the two convictions used to justify his career offender status—a 1997 conviction in North Carolina Superior Court ("1997 Conviction")—should not have counted as a career offender predicate because his sentence for that conviction was the result of a clear clerical error by the probation officer in calculating his criminal history. Had the 1997 Conviction been properly recorded under North Carolina's structured sentencing regime, it would not have counted towards Mr. Elijah's criminal history category and Mr. Elijah would not have been deemed a career offender. Under those circumstances, Mr. Elijah would have received a criminal history category of III and a total offense level of 9, resulting in a Guidelines range of 8 to 14 months' imprisonment.

At the sentencing hearing, the District Court rejected Mr. Elijah's argument, finding Mr. Elijah to be a career offender and calculating the Guidelines range to be 151 to 188 months' imprisonment. After considering the factors enumerated in 18 U.S.C. § 3553(a), the District Court announced a downward variance from the guidelines, sentencing Mr. Elijah to 108 months' imprisonment and three years of supervised release. The District Court also stated that, "if it were to be determined that I

miscalculated the advisory guidelines range, I'd impose the same sentence as an alternative variant sentence." While a downward variance, this sentence was nearly 700 percent greater than the upper bound of what the Guideline range would have been had Mr. Elijah's argument prevailed.

Petitioner appealed to the Fourth Circuit in part on the grounds that the District Court erred in determining that Mr. Elijah was a federal career offender for purposes of the Guidelines calculation. In addition to re-arguing his contention with the 1997 conviction from the District Court, Mr. Elijah also argued that the District Court erred in determining that he was a career offender because: 1) the 1997 Conviction should not have been treated as a separate sentence under the version of the Guidelines in effect at the time the underlying conduct occurred; 2) the North Carolina statute that was the basis of the 1997 Conviction covers conduct broader than the elements of the generic controlled substance offense found in the career offender provisions of the Guidelines.

The Fourth Circuit held that any error the District Court may have made in calculating Mr. Elijah's Guidelines range was harmless, and therefore they did not need to address the merits of these sentencing arguments. The Fourth Circuit first concluded that the District Court "would have reached the same result even if it had decided the guidelines issue the other way" based solely on the District Court statement that it would have awarded the same sentence even if it miscalculated the Guidelines range. Second, the Fourth Circuit

concluded that, even if the Guidelines issues were decided in Mr. Elijah's favor, the 108-month sentence was substantively reasonable because "the district court carefully reviewed the 18 U.S.C. § 3553(a) (2012) sentencing factors," and found that "a 108-month sentence was sufficient, but not greater than necessary, to promote respect for the law and provide just punishment."

Petitioner filed a petition for rehearing on the basis that the District Court's mere statement that it would have awarded the same sentence even if the Guidelines were calculated differently was not a sufficient explanation by which to conclude that the error was harmless. The petition for rehearing was denied in a summary order.

REASONS FOR GRANTING THE PETITION

1. Review is Necessary to Clarify the Standard for Harmless Error in the Context of Sentencing Guidelines Miscalculations and to Resolve Inconsistent Circuit Opinions

A. This Court Has Not yet Addressed How to Apply Harmless Error Review to Guidelines Calculations

28 U.S.C. § 2111 provides that "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to error or defects which do not affect the substantial rights of the parties." This statue is also codified as Federal Rule of Criminal Procedure 52(a), which states that "[a]ny

error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."

This Court has frequently addressed the harmless error rule, but this has generally occurred in cases where an error was committed at trial, rather than at sentencing. Indeed, while much ink has been spilled regarding how to determine whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," *Chapman v. California*, 386 U.S. 18, 87 (1967), there has been no comparable discussion of how to determine whether a Guidelines error complained of contributed to a defendant's sentence. The Court discussion of harmless error in the sentencing context has been limited to acknowledgments that the harmless error may apply to certain cases involving procedural sentencing errors.[1]

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[1] *See Peugh v. United States*, 569 U.S. 530, 550 n.8 (2013) ("There may be cases in which the record makes clear that the District Court would have imposed the same sentence under the older, more lenient Guidelines that it imposed under the newer, more punitive ones. In such a case, the *ex post* facto error may be harmless); *Puckett v. United States*, 556 U.S. 129, 141 (2009) ("[T]he difficulty of assessing the effect of the error is no greater with respect to plea breaches at sentencing than with respect to other procedural errors at sentencing, which are routinely subject to harmlessness review) (internal quotation marks omitted); *Williams v. United States*, 503 U.S. 193, 203 (1992) ("[O]nce the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e. that the error did not affect the district court's selection of the sentence imposed).

Two recent decisions in the context of challenges under Rule 52(b), however, have affirmed the serious consequences an error in the Guidelines calculations can have on the integrity of judicial proceedings. In *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), the Court contrasted Rule 52(a)'s harmless error standard with the plain error standard under Rule 52(b) in the context of challenges to Guidelines calculations. *Molina-Martinez* involved a challenge to the Guidelines calculation that had not been raised in the district court, and the error in that case was therefore evaluated under Rule 52(b)'s plain error standard. The Court noted that "[a]lthough Rules 52(a) and (b) both require an inquiry into whether the complained-of error was prejudicial, there is one important difference between the subparts—under (b), but not (a), it is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* at 1348 (internal quotation marks omitted). *Molina-Martinez* reversed the Fifth Circuit's holding that a defendant who is sentenced under the incorrect Guidelines range but whose sentence is still within what should have been the correct guidelines range must show "additional evidence" that he was prejudiced to meet the Rule 52(b) plain error standard. 136 S. Ct. at 1345. In so doing, the Court noted that "[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Id.*

In *Rosales-Mireles*, the Court again reversed the Fifth Circuit on a Rule 52(b) challenge. There, while the Fifth Circuit agreed that the district court committed a plain error in its Guidelines range calculation, it upheld the defendant's sentence finding that because his sentence fell within the corrected Guidelines range, the defendant failed to establish that the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Rosales-Mireles v. United States*, 850 F.3d 246, 250 (5th Cir. 2017). This Court rejected that analysis, holding that a "substantive reasonableness determination . . . is an entirely separate inquiry from whether an error warrants correction under plain-error review." *Rosales-Mireles*, 138 S. Ct. at 1910. Indeed, "before a court of appeals can consider the substantive reasonableness of a sentence, [i]t must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range." *Id.* "This makes eminent sense," as the Court put it, because "the district court is charged in the first instance with determining whether, taking all sentencing factors into consideration, including the correct Guidelines range, a sentence is 'sufficient, but not greater than necessary.'" *Id.* (quoting 18 U.S.C. 3553(a)). The Court continued that "[i]f the district court is unable properly to undertake that inquiry because of an error in the Guidelines range, the resulting sentence no longer bears the reliability that would support a 'presumption of reasonableness' on review." *Id.* (citing *Gall v. United States*, 552 U.S. 38, 51 (2007)). This is true regardless of its ultimate

reasonableness—"a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings." *Id*.

Although *Molina-Martinez* and *Rosales-Mireles* both involved an analysis of the plain error standard under Rule 52(b), the same concerns with Guidelines range errors expressed by the Court should apply with equal force to the harmless error standard under Rule 52(a). This is particularly true post-*United States v. Booker*, 543 U.S. 220 (2005). In *Booker*, the Court held that the Guidelines were no longer mandatory, thereby significantly increasing the discretion of district court judges to decide sentences and to deviate from the Guidelines calculations. *Id.* at 259-60. While the Guidelines remain the starting point in any sentencing determination, *see Peugh*, 659 U.S. at 542, 549 (the Guidelines are "the framework for sentencing," and "anchor both the district court's discretion and the appellate review process"), their advisory status post-*Booker* has created an opportunity for district court judges to significantly insulate themselves from appellate review of sentencing determinations through conclusory declarations that any error they may have made in calculating the Guidelines was irrelevant to the final sentence they awarded. *See United States v. Gomez-Jimenez*, 750 F.3d 370, 391 (4th Cir. 2014) (Gregory, J., dissenting in part) ("The evolution of our harmless error jurisprudence has reached the point where any procedural error may be ignored simply because the district court has asked us to ignore it."). Indeed, the District Court in Mr. Elijah's case announced such an "alternative variance sentence."

B. There are Conflicting Approaches Within the Circuits on How to Apply the Harmless Error Rule to Guidelines Errors

The district courts are increasingly resorting to the use of "alternative variance sentences" where a defendant challenges its Guidelines range calculation, often without any separate analysis justifying the variance. And as a result, the Government has seized on this trend and continues to vigorously push harmless error arguments. These developments threaten to undermine the central role the Guidelines are intended to play at sentencing. The circuit courts that have addressed this issue apply different standards, resulting in a split that this Court should resolve to ensure fairness, integrity, and public perception of the proceedings.

The Fourth Circuit has advanced the most complete doctrine on this issue, establishing "assumed harmless error" jurisprudence over a series of decisions. In *United States v. Savillon-Matute*, 636 F.3d 119 (4th Cir. 2011), the Fourth Circuit established a practice for handling procedural challenges to the calculation of the Guidelines range. Rather than "wading into the morass" of the merits of the challenge, the court will first assume that an error was committed and evaluate whether the error was harmless. *Id.* at 123. In performing this analysis, the court applies a two-prong test, requiring the government to prove: "(1) knowledge that the district court would have reached the same result even if it had decided the guidelines issue the other way, and (2) a

determination that the sentence would be reasonable even if the guidelines issue had been decided in the defendant's favor . . . ." *Id.* (internal quotation marks omitted).

This Petition focuses on the first prong, for which the Fourth Circuit requires nothing more than a conclusory statement by the district court that it would have imposed the same sentence absent any guidelines error. *See United States v. Smith*, 701 F. App'x 239, 241 (4th Cir. 2017) ("[T]he court stated that it would have imposed the same 264-month sentence without the enhancement. We thus conclude that the first requirement of the assumed error harmlessness inquiry is satisfied"); *United States v. Gomez-Jimenez*, 750 F.3d 370, 382 (4th Cir. 2014) ("In this case, the district court made it abundantly clear that it would have imposed the same sentence against both Juarez-Gomez and Erasto regardless of the advice of the Guidelines"); *United States v. Hargrove*, 701 F.3d 156, 163 (4th Cir. 2012) ("[W]e have no difficulty in concluding that the district court would have sentenced Hargrove to 60 months even if the guideline range was 0–6 months. The court expressly told us so). Indeed, the District Court's statement in this case that "if it were to be determined that I miscalculated the advisory guidelines range, I'd impose the same sentence as an alternative variant sentence," is nearly identical to a statement by the same district judge in *Gomez-Jimenez*. 750 F.3d at 383.

Several other courts of appeal, including the First, Eighth, and Eleventh, have mirrored the approach of the Fourth Circuit. *See United States v.*

Marsh, 561 F.3d 81, 85 (1st Cir. 2009) ("This Guideline issue is not one we need to resolve. As previously noted, the district court stated that it would have imposed the same sentence as a non-Guideline sentence"); *United States v. Ortiz*, 636 F.3d 389, 395 (8th Cir. 2011) ("[b]ecause the district court stated that 'even in the absence of these departures under the Sentencing Guidelines, [the district court] would [have] impose[d] the same sentence,' any procedural error was harmless as a matter of law"); *United States v. Keene*, 470 F. 3d 1347, 1348–49 (11th Cir. 2006) ("[I]t is unnecessary for us to decide the enhancement issue. . . because the district court told us that the enhancement made no difference to the sentence it imposed").

The Third, Seventh, and Tenth Circuits, meanwhile, have held that a mere conclusory statement by the district court that it would have awarded the same sentence regardless of the guidelines is insufficient to establish that fact without further explanation. *See United States v. Johns*, 732 F.3d 736, 740-41 (7th Cir. 2013) ("[T]he court's statement that 'it would impose the same sentence for the reasons stated . . .'" "falls short of the 'detailed explanation' we have found sufficient to show harmless error. Instead, the court's comment appears to have been 'just a conclusory comment tossed in for good measure'") (internal citations omitted); *United States v. Smalley*, 517 F.3d 208, 215 (3d Cir. 2008) ("Here, the District Court committed procedural error because the alternative sentence is a bare statement devoid of any justification for deviating eight months above the upper-end of the properly calculated Guidelines range."); *United*

States v. Peña-Hermosillo, 522 F.3d 1108, 1117 (10th Cir. 2008) ("Indeed, it is hard for us to imagine a case where it would be procedurally reasonable for a district court to announce that the same sentence would apply even if correct guidelines calculations are so substantially different, without cogent explanation.").

The approach of Third, Seventh, and Tenth Circuits is more consistent with this Court's post-*Booker* pronouncements on the role of the Guidelines. This Court has consistently proclaimed that district courts "must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process," and that the Guidelines "anchor . . . the district court's discretion." *Peugh*, 569 U.S. at 541, 548 (internal quotation marks omitted). Even sentences that depart from the Guidelines range are therefore determined, in part, by the Guidelines calculation. If the district court is truly anchored by the Guidelines, then it is simply not possible to assume the district court would reach the same result from a different Guidelines calculation, absent a compelling justification for how the court would get from that calculation to the resulting sentence.

Further, this Court has emphasized that district courts issuing outside-Guidelines sentences must "consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50. Appellate courts should correspondingly "take the degree of variance into account and consider the extent of a deviation from the Guidelines." *Id.* at 47.

These requirements make Mr. Elijah's case a particularly compelling one and an optimal case for this Court to address this issue. In Mr. Elijah's case, the upward variance from the properly calculated Guidelines range to the sentence actually imposed is quite large, departing upward from a range of 8 to14 months to reach a sentence of 108 months. In this context, the district court's mere conclusory statement that it would have applied the same sentence regardless of the Guidelines calculation is simply not a sufficient justification.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Honorable Court grant a writ of certiorari, vacate the opinion of the court of appeals, and remand the case for further review.

Respectfully Submitted,

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APPENDIX

TABLE OF APPENDICES

Appendix A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4147

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LARONE FREDERICK ELIJAH,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Greenville. James C. Dever III, Chief District Judge. (4:15-cr-00070-D-1)

Submitted: January 29, 2018 Decided: February 28, 2018

Before MOTZ, THACKER, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Providence E. Napoleon, ALLEN & OVERY LLP, Washington, D.C., for Appellant. John Stuart Bruce, United States Attorney, Jennifer P. May-Parker, First Assistant United States Attorney, Kristine L. Fritz, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Larone Frederick Elijah pled guilty, without a plea agreement, to possession with intent to distribute cocaine, heroin, and 3,4 methylenedioxy-N-ethylcathinone, in violation of 21 U.S.C. § 841(a)(1) (2012). The district court sentenced Elijah to 108 months' imprisonment, a downward variance from the career offender Guidelines range calculated by the district court. Elijah appeals, challenging the denial of his motion to suppress evidence seized pursuant to a June 2015 search of his rental car, as well as statements he made as a result of the search. On appeal, he also argues that the district court erred in calculating his Guidelines range, specifically by designating him a career offender. We affirm.

Turning first to Elijah's appeal of the denial of his motion to suppress, "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating

to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *see also Haring v. Prosise*, 462 U.S. 306, 321 (1983). Rule 11(a)(2) of the Federal Rules of Criminal Procedure provides an exception, permitting a defendant who pleads guilty to preserve his right to appeal an adverse ruling on a pretrial motion, but only if he enters a conditional guilty plea. *United States v. Abramski*, 706 F.3d 307, 314 (4th Cir. 2013), *aff'd on other grounds*, 134 S. Ct. 2259 (2014).

"[A]bsent a valid conditional guilty plea, we will dismiss a defendant's appeal from an adverse pretrial ruling on a non-jurisdictional issue." *Id.* (internal quotation marks omitted). In this case, Elijah pled guilty without the benefit of a plea agreement and, more importantly, without entering a conditional guilty plea pursuant to Rule 11(a)(2). At the first plea hearing, upon learning that Elijah was pleading guilty based upon the mistaken notion that his guilty plea would preserve his right to appeal the denial of his motion to suppress, the district court refused to accept the guilty plea, explained that a valid unconditional guilty plea waives appeal of antecedent nonjurisdictional defects, and continued the proceedings to enable Elijah to consult with his attorney and for defense counsel to possibly negotiate a plea deal with the Government that preserved Elijah's right to appeal the suppression order. Elijah was unable to strike such a deal with the Government.

Upon convening the second plea hearing, the district court took pains to reiterate to Elijah that, if his guilty plea was accepted, any nonjurisdictional defects would be waived and, specifically, that this

court would not review the denial of his motion to suppress. Elijah stated under oath that he understood. Furthermore, the court questioned defense counsel to ensure counsel was satisfied that Elijah understood that his guilty plea would waive nonjurisdictional defects occurring prior to the entry of the guilty plea. Counsel confirmed that Elijah understood this and volunteered that, not only did counsel discuss Rule 11(a)(2) with his client and provide him with a copy of the rule, but Elijah conducted his own research into the matter.

Despite these clearly established facts, Elijah insists that he did not understand that, when he pled guilty, he relinquished the right to challenge the denial of his motion to suppress. However, absent extraordinary circumstances, "the truth of sworn statements made during a Rule 11 colloquy is conclusively established." *United States v. Lemaster*, 403 F.3d 216, 221-22 (4th Cir. 2005); *accord United States v. Bowman*, 348 F.3d 408, 417 (4th Cir. 2003) ("[A]n appropriately conducted Rule 11 colloquy can only serve meaningfully if the court is entitled to rely on the defendant's statements made under oath to accept a guilty plea."). We conclude that Elijah's knowing and voluntary unconditional guilty plea waived his right to appeal the denial of the motion to suppress.

Next, Elijah challenges his career offender designation. The Government contends that, even if the district court erred in determining that Elijah was a career offender, the sentence may be affirmed because the district court announced the same sentence as an alternative variant sentence which is supported by the record. We agree.

When a sentencing court imposes a Guidelines sentence and states that it would impose the same term as an alternative variant sentence, "rather than review the merits of each [Guidelines] challenge[], we may proceed directly to an 'assumed harmless error inquiry.'" *United States v. Gomez-Jimenez*, 750 F.3d 370, 382 (4th Cir. 2014) (quoting *United States v. Hargrove*, 701 F.3d 156, 162 (4th Cir. 2012)). An error in the calculation of the Guidelines is harmless if: "(1) 'the district court would have reached the same result even if it had decided the guidelines issue the other way,' and (2) 'the sentence would be reasonable even if the guidelines issue had been decided in the defendant's favor.'" *Gomez-Jimenez*, 750 F.3d at 382 (quoting *United States v. Savillon-Matute*, 636 F.3d 119, 123 (4th Cir. 2011)).

Here, citing *Gomez-Jimenez* and *Hargrove*, the district court explicitly stated that it would have imposed the same 108-month sentence even if it miscalculated Elijah's advisory Guidelines range. We conclude that this statement satisfies the first step of the harmlessness inquiry. *Gomez-Jimenez*, 750 F.3d at 383.

The second step of the inquiry is whether Elijah's sentence would be reasonable even if the Guidelines issues were decided in Elijah's favor—or, in other words, whether Elijah's 108-month sentence is substantively reasonable. *United States v. McDonald*, 850 F.3d 640, 643 (4th Cir. 2017). The record reveals that the district court carefully reviewed the 18 U.S.C. § 3553(a) (2012) sentencing factors. The district court expressly rejected the Government's request for a sentence within the 151- to 188-month career offender Guidelines range

calculated by the court, and Elijah's argument for a 10- to 16-month sentence, finding that a 108-month sentence was sufficient, but not greater than necessary, to promote respect for the law and provide just punishment. Given the district court's reasoning and the deferential standard of review we apply when reviewing criminal sentences, *see Gall v. United States*, 552 U.S. 38, 51, 59-60 (2007), we conclude that Elijah's sentence would be substantively reasonable even if the disputed Guidelines issues were resolved in his favor, *see Savillon-Matute*, 636 F.3d at 123-24. Thus, even assuming for the sake of argument that the district court erred in its Guidelines calculations, in light of the district court's alternative variant sentence, such error is harmless.

Accordingly, we affirm the criminal judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Appendix B

FILED: February 28, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4147
(4:15-cr-00070-D-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LARONE FREDERICK ELIJAH

Defendant – Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

Appendix C

[1] UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NORTH CAROLINA EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
vs.	)	4:11-cr-00070-D-1
LARONE FREDERICK ELIJAH,	)	

SENTENCING HEARING
TUESDAY, MARCH 7, 2017
BEFORE THE HONORABLE JAMES C. DEVER III
CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

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On Behalf of the Defendant:

LARONE FREDERICK ELIJAH, pro se
Also Present: Brian M. Aus.
AMY M. CONDON, CSR, RPR

Official Court Reporter
United States District Court
Raleigh, North Carolina
Stenotype with computer-aided transcription

[2] (TUESDAY, MARCH 7. 2017, at 9:00 a.m.)

PROCEEDINGS

THE COURT: Good morning and welcome to the United States District Court of the Eastern District of North Carolina.

The first matter we'll take up is the sentencing of Mr. Elijah.

Is the United States ready?

MS. MORALES: Yes, Your Honor.

THE COURT: Good morning, Mr. Aus. Is the defense ready?

MR. AUS: Your Honor, I think before we get started we have to address a motion that Mr. Elijah filed, a pro se motion for ineffective assistance of counsel wishing to discharge me and proceed pro se. Document was filed on March 6th of this year.

THE COURT: All right. Mr. Elijah, is it correct that you want to discharge Mr. Aus?

THE DEFENDANT: Yes, sir.

THE COURT: You want to represent yourself?

THE DEFENDANT: Yes, sir.

THE COURT: Stand up if you want to talk to the Court, please.

Have you had any training in the law?

THE DEFENDANT: Somewhat.

[3]THE COURT: Have you gone to law school?

THE DEFENDANT: Yes, sir.

THE COURT: Where did you go to law school?

THE DEFENDANT: Everest University.

THE COURT: Where is that located?

THE DEFENDANT: In Orlando, Florida.

THE COURT: When did you attend?

THE DEFENDANT: I attended it all upon my release, when I got out of prison.

THE COURT: Which time?

THE DEFENDANT: From – I started in 10/13/2014 to Spring 2015 prior to the – right before this incarceration.

THE COURT: I'd like to have you sworn and then I really want you to reflect on what you're telling me.

THE DEFENDANT: Yes, sir.

THE COURT: Because you're going to be under oath and prosecuted for perjury if you tell me that you actually went to law school right after you got out of prison.

THE DEFENDANT: I have the transcript right here, sir.

(The defendant, Larone Frederick Elijah, was duly affirmed.)

THE COURT: Mr. Elijah, do you understand that if you were to lie to me, you would be prosecuted for making a false statement?

[4] THE DEFENDANT: Yes, sir.

THE COURT: I was asking you about this motion that you made to discharge Mr. Aus. And as part of that motion to represent yourself and I will allow Mr. Aus to be relieved of his responsibilities, not because I believe any of the information contained in the motion. Mr. Aus is a distinguished member of the panel and represents defendants here regularly, but it's clear to me that there has been a breakdown of the attorney/client relationship.

You also want to represent yourself, correct?

THE DEFENDANT: Yes, sir.

THE COURT: With respect to that, again, I want to ask you if you've ever attended law school.

THE DEFENDANT: Yes, sir. I have the transcript. Can I put it on record, put it on record?

THE COURT: Mr. Aus can hand it to me.

MR. AUS: May I approach?

(Mr. Aus approached the bench.)

THE COURT: So this purports to be a transcript of some kind where you studied to get an Associate's degree in criminal justice. Is that what you were trying to do?

THE DEFENDANT: Yes, sir.

THE COURT: So it was an undergraduate course?

THE DEFENDANT: Yes, it's undergrad, and I was incarcerated before I could finish it.

THE COURT: So it wasn't law school?

THE DEFENDANT: It was criminal justice, yeah. Criminal justice.

[5]THE COURT: So you took an introduction to criminal justice course and a computer applications course and strategies for success course, composition, fundamentals of interpersonal communications and three other courses.

What other legal training have you had?

THE DEFENDANT: Yes, sir.

THE COURT: Is that it?

THE DEFENDANT: Yeah, that's it.

THE COURT: That's the legal training that you've had?

THE DEFENDANT: Yes, sir.

THE COURT: Are you prepared to go forward today?

THE DEFENDANT: May I ask the Court? I haven't reviewed my presentence report yet. I don't want to postpone it, if I ask the Court may I just like get an hour or so to review it because I just got it March 2nd in the mail, so I never got a chance to review it because the Bureau of Prisons, they had -- a case manager have retrieved it and I couldn't properly review it. So I would just ask the Court to be able to go over any motions that the Government filed, sir.

THE COURT: Ms. Morales, do you have any objection to us postponing this matter for -- we can postpone it until 10:30 **[6]** to give Mr. Elijah an opportunity to review the PSR?

MS. MORALES: No objection, Your Honor.

THE COURT: Okay. Mr. Elijah. I will, as I said, allow Mr. Aus to be excused from further representation.

We will take this matter back up at 10:30. And in between you can review the PSR and then we'll take up the sentencing.

Ms. Morales, do you have -- you have a motion but it's styled in the alternative, isn't it?

MS. MORALES: That's correct, Your Honor.

THE COURT: Okay. Mr. Elijah, do you have a copy of that motion?

THE DEFENDANT: I have it. Now. I want to go through it so I can be properly prepared.

THE COURT: And would you — Mr. Elijah, would you like -- I know that Mr. Aus, I've excused him. I have the ability to have him as stand by. Do you want him to be available to consult with?

THE DEFENDANT: He can stay on standby, I have no problem with that.

THE COURT: Mr. Aus?

MR. AUS: That would be best, Your Honor.

THE COURT: If the marshals will have you all taken someplace where you have time to review it.

Again, Mr. Elijah, you'll be representing yourself. **[7]**I'll allow you to represent yourself in connection with your sentencing and, again, I just want to make sure, have you ever taken any medicine or any substance in the last 4 8 hours?

THE DEFENDANT: No, sir.

THE COURT: And knowingly and voluntarily you want to represent yourself?

THE DEFENDANT: Yes, sir. I want to get anything on the record. I want everything on the record.

THE COURT: I'll have Mr. Aus be stand-by counsel so you'll be able to consult with him on any legal issues if you want to. And I'll have -- is this the only copy of your transcript?

THE DEFENDANT: That's the only copy I have.

THE COURT: Mr. Aus, you may pick this up from Ms. Jenkins and we'll take this matter up at 10:30.

(The proceedings in the case were recessed at 9:09 a.m. and reconvened at 10:30 a.m.)

THE COURT: Good morning and welcome to the United States District Court for the Eastern District of North Carolina.

I'll next take up the sentencing of Mr. Elijah. Good morning Mr. Elijah and Mr. Aus. Is the defense ready?

MR. AUS: Good morning, Your Honor.

THE COURT: Is the Government ready?

MS. MORALES: Yes.

[8] THE COURT: You did give your solemn affirmation earlier so you are still under oath.

The Court, again, has found -- and Mr. Elijah has requested that he represent himself. Mr. Elijah has made a knowingly and voluntary decision to represent himself in connection with this matter. The Court will permit him to represent himself and exercise his right of self-representation.

Mr. Elijah, you're here today having entered a plea of guilty to the charge of possession with intent to distribute a quantity of cocaine, quantity of heroin and a quantity of Methylenedioxy, and the probation office has prepared a presentence report.

In light of some cases from the Supreme Court of the United States, including the *Booker, Rita, Gall, Kimbrough, Spears,* and *Nelson* cases, the sentencing guidelines are no longer mandatory; they're advisory.

Nevertheless, in accordance with those cases and numerous cases from the Fourth Circuit interpreting those, including the *Carter, Pauley,* and *Evans* cases, a sentencing Court still must take into account the now-advisory guidelines.

The Court does this by initially making findings of fact, calculating the advisory guideline range. The Court will then consider any motion that might be made that might move the range either up or down.

[9] I'll then consider all arguments that you make on your behalf, and any statement you'd like to make, all arguments of the Assistant United States Attorney.

I'll then determine your sentence and announce it here in court today.

And Mr. Elijah, have you had time to review the presentence report, sir?

THE DEFENDANT: Yes, sir.

THE COURT: The presentence report will be made part of the record under seal.

In accordance with Rule 32 of the Federal Rules of Criminal Procedure, the Court accepts as accurate the presentence report, except as to matters in dispute as set forth in the addendum.

The addendum does contain numerous objections. We'll take those up now.

The first objection relates to paragraphs 4 and 6. Did you want to be heard any further on that, sir?

THE DEFENDANT: No, sir. You have it up front. You don't need for me to reiterate.

THE COURT: The Court has reviewed that objection and the probation officer's response, and the Court overrules the objection. It doesn't affect the advisory guidelines.

The next objection is page 1, release status, in paragraph 28. Mr. Elijah states that he has been incarcerated **[10]** for conduct which is related to the instant charge. Additionally, he contends that the revocation was based solely on his instant conduct as impermissible double punishment to increase his criminal history score by two levels under Section 4A1.1(d).

Did you want to be heard any further, sir, on that?

THE DEFENDANT: Section 5G1.3 reflects be specifically for the same conduct. And if you look, Your Honor, to my judgment on my sentence I'm serving right now, it specifically states criminal conduct. It doesn't say in breach of duty or anything like that. It states criminal conduct on me so the defendant relies on that to be sufficient for the record.

THE COURT: Ms. Morales, did you want to be heard on that, ma'am?

MS. MORALES: Your Honor, just that section 4A1.1(d), as Your Honor noted, specifically states that if the defendant commits any part of the instant offense while under supervised release, then the defendant's criminal history score could be increased by two points, which was the circumstance here.

The defendant committed the instant offense June 11th, 2015, while he was still on federal supervised release.

THE COURT: The Court has reviewed 5G1.3, it has reviewed the judgment and has reviewed the probation officer's response. **[11]**

I do think the probation officer properly scored the conviction in paragraph 28 -- properly scored paragraph 28 and properly discussed the release status in light of Section 4A1.1(d) in its text as well as the text of 4A1.1(a).

The prior federal sentence was properly assigned three criminal history points under 4A1.1(a).

And 4A1.1(d) states that if a defendant committed any part of the instant offense while under the criminal justice system, including probation, parole, supervised release, imprisonment, work release and escape status, the defendant's criminal history score is increased by two points. A two-level increase under 4A1.1(d) was appropriate.

Alternatively, the Court also notes if he is deemed to be a career offender, the issue is moot. But I do think probation properly responded to that.

So the next objection is objections to paragraph 16, 30 and 65 in the career offender designation.

The report indicates that Mr. Elijah contends that his 1996 North Carolina conviction for

possession with intent to sell or deliver cocaine, 96CRS25243, as noted in paragraph 16, should not be counted. Contends it was not a felony under *United States v Simmons* and that the State Court incorrectly calculated his criminal history score points and the conviction is more than ten years old. **[12]** He contends that he erroneously received an 11 to 14 month suspended sentence after the State of North Carolina erroneously assigned 10 criminal history points.

Based upon his New York convictions for robbery and the sale of controlled substance, he contends that absent the error he should have been assigned only three criminal history points and would have been subject to a sentence of 8 to 10 months custody, which would not meet the definition of a felony under *Simmons* for federal sentencing purposes; and therefore, would not be a predicate for the career offender classification.

He also says if he got a proper sentence of 8 to 10 months custody, the sentence would be outside the applicable ten-year time period for scoring purposes.

Mr. Elijah, did you want to be heard any further on that, sir?

THE DEFENDANT: Yes, sir. If I may address the Court.

In *McLaughlin v California,* the Supreme Court held, a state sentence imposed on the basis of assumptions concerning defendant's criminal record which are materially untrue was inconsistent with due process of the law, whether the result was by cause or carelessness or by design. And then I would like to cite *United States v. Hughes,* the Fourth Circuit, errors that actually affect the outcome of the proceeding are **[13]** prejudicial.

And this is a prejudicial issue right here today, Your Honor.

THE COURT: Thank you, sir.

Ms. Morales, would you like to respond?

MS. MORALES: Thank you, Your Honor. The Fourth Circuit has previously held that when determining whether a defendant is a career offender, a district court must count as a predicate conviction a prior State Court offense that has not been reversed, vacated or invalidated. Here, as detailed in the Government's sentencing memorandum, there is no evidence that that judgment has been reversed, vacated or invalidated.

There is a narrow exception; and that is, when the conviction is obtained in the absence of counsel. There is no evidence of that either.

Finally, the Government would just state that that possession with intent to sell or deliver cocaine conviction is within the 15-year time window. And for that reason, that should qualify as a predicate for career offender.

Thank you.

THE COURT: The Court has reviewed the Government's sentencing memo which does attach some of the documentation associated with the conviction and efforts of Mr. Elijah to get that conviction vacated, which have yet to be successful in State Court.

[14] The Court has considered the entire record, and I'm familiar with *McLaughlin v. California* and *United States v. Hughes*. A defendant is a career offender if an adult defendant convicted of a felony crime of violence or controlled substance offense has at least two prior felony convictions for either crime of violence or controlled substance offense. A felony

conviction is one punishable by death or imprisonment for a term exceeding one year, as described in 4B1.2, Application Note 1.

When determining whether a North Carolina conviction was a conviction punishable by more than one year, the Court refers to the prior record level and aggravation category actually applied by the sentencing Court. See *United States v. Simmons,* 649 F.3d 237, 244-50 (4th Cir. 2011) en banc.

In United States v. Hondo, 366 F.3d 363, 365-66, (4th Cir. 2004), the Fourth Circuit held that a defendant may not collaterally attack a prior conviction in the federal sentencing proceeding unless the conviction was obtained in the absence of counsel, and discusses the Supreme Court's decision in *Custis.* The *Hondo* case also, I believe, discusses *McLaughlin v. California.*

Section 4A1.2, Application Note 6 also states, quote, "This guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized by law.

[15] Again, Mr. Elijah has the right to seek in State Court to collaterally attack that conviction as reflected in the documents attached to the Government's sentencing memo. Those efforts have been unsuccessful to date. Moreover, the record reflects that his conviction that we're discussing was a conviction where he did have the assistance of counsel.

Having fully considered the record and including the time period issue, the objection is overruled. And thus having looked at the -- looking at particular at the convictions in paragraphs 16, which have -

THE DEFENDANT: Your Honor —

THE COURT: One second.

-- which is the one we have been discussing and the one in 23, he is a career offender.

Yes, sir.

THE DEFENDANT: May I address the Court one more time as to that issue to be clear?

THE COURT: Yes.

THE DEFENDANT: When the Government took his position that I raised the position I wasn't appointed counsel, I never raised a position of me not being appointed counsel. That was not my argument.

My argument is that we have a justable [sic] controversy here that needs to be addressed, and I effectively went into the State to resolve the matter and get it corrected. **[16]** And on the face of the record that's before the Court, it's clear that those dates are wrong on that judgment. It's clear.

If I need to submit, I got it right here.

THE COURT: I understand. The Government submitted it and attached it to their memo and Judge Cobb analyzed the issue and then the North Carolina Court of Appeals denied the request for review of that.

And this Court doesn't have the power to review the decision of the North Carolina State Court.

THE DEFENDANT: I fully understand that. I want to submit a part that the Government left out.

THE COURT: Okay, that's fine.

THE DEFENDANT: They didn't submit this part.

THE COURT: Okay. Mr. Aus? Show it to Ms. Morales and admit it as part of the record.

THE DEFENDANT: Yeah.

MR. AUS: May I approach?

THE COURT: You may.

THE DEFENDANT: I don't mean to be repetitive, Your Honor. I just need one more second of your time after you review the document.

THE COURT: Thank you.

Yes, sir. What would you like to say? This will be made part of the record.

THE DEFENDANT: Yes, sir. You all can keep it.

[17] THE COURT: Thank you for that.

THE DEFENDANT: Okay. Just to reiterate a little bit, I'm not going to take up too much of the Court's time. I just wanted to point you to that this error, this prejudicial error is causing me substantial harm today. I should be receiving a 10 to 16 month sentence that's going to be increased by 1200 percent should the Court not favor with me; and from the ruling I just got, you overruled my objection. So I didn't get it sustained.

I just want, for the record, the Court to know that.

I would like to also submit the Greenville judgment and the North Carolina judgments on the record myself to show the inconsistency within the state of the errors that took place and now it's costing me -- that may cost me numerous years in prison of my life that's not warranted.

THE COURT: Okay. Mr. Aus can hand those up after showing those to Ms. Morales.

(Mr. Aus approached the bench.)

THE DEFENDANT: It's the last page, Your Honor.

My stand-by counsel or probation was never able to provide the actual New York judgment to substantiate what's already in front of you.

THE COURT: Okay. Those will be made part of the record.

Would you like to say anything else, sir?

[18] THE DEFENDANT: Yes, Your Honor.

Just to point to that, that predicate, and I stand by this, would not have been had I had effective counsel, which I never stated I never was counseled. I guess the Government took me by me citing the *Tucker* case and quoting *Townsend* that that's what I was inquiring to.

I'm only so much knowledgeable with the law, but I try to do my best. I'm not financially stable to hire a high-priced attorney, but I know when something's wrong, Your Honor, and I know when things being done to me is wrong and I'm just addressing the Court. This is costing me.

I'm a non-violent defendant. I'm just pointing to all the stuff that's important.

I mean, I'm standing here in front of you, my charge, I'm accepting responsibility, I pled out, and I just don't understand how the Government could position me to a de facto career offender, even if you were the one against it. I just don't see -- I didn't go to trial. I accepted responsibility for the offense. I'm a non-violent offender through and throughout. I never hurt nobody in my life.

It's on my record I have a substantial drug problem. That's been my downfall most of my life. I got turned on to drugs when I was 15 years old. And that's already substantiated from my prior presentencing report in front of you from 2006.

[19] So there's no need for me -- I'm just saying that this whole career offender thing with the position under 3553(a) 4A(i) from the Sentencing Commission, the severe sentences and these severe

penalties being handed out for drug offense, are -- I'm not trying to stand here and not accept responsibility but that's a 1200 percent increase in what I'm actually looking at on my offense, Your Honor. I cannot let that go by.

THE COURT: I understand.

These documents -- it's totally preserved. As I said, in citing the *Hondo* case from the Fourth Circuit and the provision in the guidelines and then the records of what were in front of Judge Cobb and the state collateral attack, that that's where you have to try and get that remedy.

THE DEFENDANT: Your Honor, when something affects your substantial right, it means that error was prejudicial or effecting the outcome of the Court proceeding. And from the records in front of you, even though I know you can't deal with them, there was an error and it is substantial because right now here today in Federal Court it's -- it could possibly cost me up to 11 more years of my life from the error that I was 20 years old.

And then I would like to point to the Court opinion about 4A1.2, and 4A1.2(k). To my knowledge on December 9th, the United States Sentencing Commission strick that where you **[20]** could bring a charge that's because of a technical violation because this charge is from a technical violation that's 20 years old, and I want to preserve this in the record. It's a technical violation that's 20 years old and it's being brought into the 15-year window because of a technical violation I will not have it counted toward my criminal history at all.

And the Sentencing Commission from my understanding under -- I want to get it right, Your Honor. Give me a second -- under 3553(a)(4)(A) and

3553(a)(5)(A) and 944(a)(2) helps to further 3553(a)(2), and then I want to also preserve to avoid unwarranted sentences 911(b)(1) and 3553(a)(6), sentencing disparities.

You know, I'm -- this is substantially very severe when I stand in front of you with a guideline that I might face if the Court was to not even -- it would be 15 to 21 months under Category 4; and if it was under Category 3 without the prior offense, it would be only 10 to 16 months.

And I stand before you now being deemed something I am not, and the alternative -- and whatever the original position the Government states or in the alternative.

I'm not a violent defendant. I never hurt nobody in my life. Most of my charges are not even felonies under -- my adult felonies are not felonies, except for the one federal conviction and the conviction I'm fighting to get overturned in the state. And it was just coincidental to me when I filed my **[21]** state documents to get everything resolved. I was trying to get it resolved before I came to court. I get a document. That's why I submitted that on the record to show you that I attached the proper documents for the Court, but somehow, quote, unquote, I didn't attach the documents. And I'm like these documents are sufficient under Rule 901, Federal Rules of Evidence 901, the Federal Court will accept the documents that I submitted to the state. And it's without prejudice, if you notice that, Your Honor.

So it behooves me why would the state dismiss it and then a week later -- I'm served a presentencing report one day and get it out the next day and I didn't have time to prepare for a lot of things, but I did what I could do in the time. My family come from

out of town and I didn't want to drag the Court out and have things, but you got to understand this is my life, Your Honor.

Even though I stand here and know that I committed a crime, I want to receive what the just punishment is for that crime and not some unwarranted sentence that's based on -- you know, my offense is very low level. I'm not trying to mitigate it down to the point where it's nothing. It is. I violated the law and acknowledge that fully, Your Honor.

My thing is you got to look at what I'm saying, 12 to 15 years from 10 to 16 months. It just — I mean, it don't -it's not right. It's not right. And I'm -- the positions that the Sentencing Commission and everything has tooken prior to now, I just don't understand why I'm facing that much time.

[22] I could look back and see that I have 12 years, Your Honor, overrepresent -- I want to also state that it overrepresents -- this whole situation overrepresents me as an individual and my charges.

Did I get it straight?

THE COURT: Yes, sir, thank you.

Ms. Morales, did you want to respond?

I'm going to also let Mr. Elijah -- I'm going to take into account -- because he weaved in some of the 3553(a) discussion, but I'm going to let him say whatever else he wants to say after I establish the advisory guideline.

Did you want to say anything else, ma'am?

MS. MORALES: Nothing further, Your Honor.

THE COURT: Again, we've made those documents a part of the record. And as well, the Government has submitted and attached to its sentencing memo the documentation that it received

from the State Court from Judge Cobb and the North Carolina Court of Appeals concerning those State Court proceedings. I've already referenced and discussed the *Hondo* case from the Fourth Circuit as well as the guideline provision in Application Note 6 at 4A1.2.

So that objection is overruled.

So for purposes of the advisory guideline range – **[23]** again, they're just advisory, and I know Mr. Elijah has weaved in some of his arguments about unwarranted sentencing disparities and some of the other 3553(a) factors. For purposes of the guideline calculation, the Total Offense Level is 29, the Criminal History is 6, the Advisory Guideline Range is 151 to 188 months. Now, that is advisory.

Were there any other objections to the report, Mr. Elijah, that we didn't talk about, sir?

THE DEFENDANT: It was only to the mere fact that I think that conviction was consolidated under *Davis* and it shouldn't have been counted. Also, I made like four or five arguments to that one particular countable judgment, and I think the probation argued a single sentence and it doesn't -- consolidated judgment doesn't comport with a single sentence, a single sentence is a concurrent sentence; it's not a consolidated. If I'm correct, Your Honor, if I'm correct.

THE COURT: Okay. Well, I have reviewed the objections in the addendum and the probation officer's response and the only other one that I didn't think we -- we haven't really talked about is the 5G1.3(b)(2) issue where probation responded that Section 5G1.3, Application Note 4(C) states that subsection (d) applies in a case where the defendant

was on federal or state probation, parole or supervised release at the time of the instant offense and had such probation, parole or supervised release revoked. Consistent with the policies set **[24]** forth in Application Note 4 in subsection (f) of 7B1.3, the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation. Again, that's a discretionary decision but that's what the Commission's recommendation is.

I do recall reading in the papers issues associated with *Davis,* and I don't remember that providing a viable argument.

Did you want to say anything for purposes of preserving the record, Mr. Elijah?

THE DEFENDANT: As to *Davis,* it is in there. I think it's on page 3. It just shows that the charges was consolidated under judgment. And I will come up be a single judgment with the possession of firearm controlling the judgment and it would have been 15 years outside the window based on that because once the State Court -- you know, under *Simmons,* I don't think a Federal Court can manipulate the record of a state record just for the mere fact to enhance a sentence under *Simmons* en banc.

THE COURT: All right. For purposes of the discussion for the career offender calculation, just so the record is clear, it's the convictions in paragraph 16 and paragraph 23 that drive those issues as discussed in paragraph 30 of the PSR and as we've talked about. But the issue is preserved under *Davis.* **[25]** So now I've established the advisory guideline range.

And, Mr. Elijah, I know you already talked somewhat about avoiding unwarranted sentence disparities and talked about you accepted responsibility, pled guilty. You talked about in the grand scheme of things the amount of drugs compared to some other cases. So this is the time if you want to add anything else about the 3553(a) factors. And you've touched on some of those, and I'll consider all those arguments that you've already made but did you want to say anything else?

Then I'm going to hear from Ms. Morales, and then I'm going to give you the last word.

THE DEFENDANT: Okay. You know, if you notice based upon my record, Your Honor, I haven't touched a firearm in 20 years, you know, and my other charges were committed when I was 16 years old. I just want to substantiate for the record I never committed any violent acts or anything of that nature.

You know, 151 or 188 months will put me in my 50s. I'm 41 years old, and, you know, there's statistics that say -I am tired. I am tired. And you get to a point -- just speaking genuinely, you get to a point in your life where you get tired, and I don't want to come home in my 50s.

I mean, I didn't get in prison for all the small quantities of the drugs I had and did almost 17 years in prison and you can't even get two ounces out of the stuff I got caught with and did 17 years in prison.

[26] Not trying to mitigate what I've done; just stating for the record that so you are looking and say, he right. It's clear. It's all in the PSR. There's nothing that I'm hiding that you don't know about.

So what I'm speaking it's done almost 18 years in prison for less. And it's mostly been all part of because I'm an addict and I've never really been the type that been no big time drug dealer or fancy house or car. That's not -- I've had a drug problem since the age of 15. So I'm not trying to justify my actions, but I'm asking for the Court to understand that.

Drug abuse is a disease. It is not nothing. And when people keep throwing you in jail and let you back out -- I mean, prison, we politicize, that's one thing, but people who actually go through it and walk in those shoes, when you go in prison they kicking -- when your day come, you right back out. And it really ain't -- I would like to take the 500-hour program. I'm already at Butner. I would like to stay housed there, and it's just a lot of stuff, man, and, Your Honor, and I want you to just really take it into consideration.

THE COURT: You didn't take the 500-hour last time?

THE DEFENDANT: No, sir, I wasn't eligible to. They just changed all those criterias because I had the robbery too and it stopped me from being able to. It's detainer -- I've been taking drug courses since I've been there. If you look in **[27]** the PSR, it's in there. I just couldn't take the 500-hour class because I had this detainer; and if you have a detainer, that keeps you -- exempts you from the program. So I really do want to participate -- I never took it not in my last nine years and this will be my first time taking it.

And, you know, I was doing good, Your Honor. I went home, I got married, I maintained a job, I figured that I wanted better for my life. I went back

to school, I got fiberoptics and cable network. And this can be verified through my probation officer John Cooper. He got everything on record. It's all verifiable. I'm not standing here and telling you something that doesn't exist. All it takes is that one time for you, Your Honor, to get off on that binge and you off to the races, man.

So I'm not sitting here trying to mitigate or make myself seem innocent, but I'm asking for leniency, Your Honor, and I'm asking you to take all those things into consideration before you sentence me, Your Honor.

THE COURT: Thank you, Mr. Elijah. I will take all of that into account.

I'll now hear from Ms. Morales on behalf of the United States.

MS. MORALES: Thank you, Your Honor.

The Government recommends the middle of the guideline range in this case. The defendant has committed criminal **[28]** conduct over the past two decades since he was 14 years old beginning in 1990.

The Government estimates he's engaged or rather committed approximately 19 felonies and 9 misdemeanors. A majority of those, Your Honor, were drug offense.

Those convictions are similar in nature to the instant offense for which he's being sentenced. And that similarity is indicative of his propensity to commit future drug offenses.

Additionally, Your Honor, as you well know, he committed this instant offense while on federal supervised release. He had been released from federal prison on May 23rd, 2014. Just over a year later in June 2015 the defendant is back caught with drugs again.

The defendant's history of criminal conduct reflects a persistent unwillingness to conform to the law.

So the Government respectfully requests the middle of the guideline range.

THE COURT: At this time I'll hear from Mr. Elijah, if you'd like to say anything else, sir.

THE DEFENDANT: Yes, Your Honor.

Again, I would point to those charges that are not felony offenses. We're going back to my juvenile history.

My propensity of being manipulated into doing things was easy back then. As I became older, I changed my ways. And **[29]** like I told you, I had a bad drug problem. So just pointing to those few things. And I was only arrested ten times in my life. So the 19 felonies she's talking about has been comported and stretched out. In like -- instant offense may have one charge, maybe consist of five felonies, you know. And one of the charges I had a residue charge and they charged me with nine felonies with residue.

And when you don't know the law, Your Honor, and that's one thing I took pride in trying to educate myself on, when you don't know the law you can be taken advantage of. And that's what happened to me most of my life with the court system.

A lot of thing you may have viable defenses for. You know, our ignorance is sometimes bliss to the situations we're in. So we get taken advantage of a lot.

So I stood up firmly in this situation to defend myself properly. Even though I was wrong, I still have a right to defend myself against things that are untrue. And the person -- and that position -- the

person that the Government says I am is all paper. It's remedial.

Until you walk in those actual shoes, you don't know how hard my life been. My life been hard, very hard.

I come from a neighborhood where when you a child growing up, the only thing you know is what you see growing up so you think that is right. And I think society sometimes gets **[30]** a break when it's easier to blame you when it wasn't ways for you to try to -- you know, you try. I struggle hard to do what's right. I struggle hard.

Ain't nobody in this courtroom perfect from my understanding what I read in the Bible and understand God. I'm not a perfect man. I made mistakes, but my mistakes for what I'm in here for should not cost me 16 or 17 years of my life for what I did. I'm just speaking genuinely, Your Honor.

Thank you.

THE COURT: Thank you, Mr. Elijah.

All right. Mr. Elijah, the Court recognizes its obligation to impose a sentence sufficient but not greater than necessary to comply with the purposes set forth in the statute.

I have considered all arguments that you've made, sir. I have considered the position of the United States. I have considered the advisory guideline range.

Among other things, I'm to consider the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment; the need for the sentence imposed to deter others who might choose to engage in the

behavior that brings you here; the need for the sentence imposed to protect the public from further crime by you; the need for the sentence imposed to provide you with **[31]** needed educational and vocational training, medical care, or other correctional treatment in the most effective manner; the need for the sentence imposed to avoid unwarranted sentencing disparities.

The statute lists numerous other factors. I have considered all those factors, although I won't mention each one individually.

As for the nature and circumstances of the offense, you did plead guilty to charge one in Count 1, and the offense conduct is described in the PSR in paragraphs 4 and 5.

It is a serious offense. I've taken into account that it's certainly not the largest by far of drug cases that I've dealt with here; but as you acknowledge, it is serious and you shouldn't have engaged in that behavior because you otherwise seem to be doing well. You got married, you attended school, you've been working and then you got back into this, which you know.

As for your history and characteristics, you are 41 years old. You're an intelligent man. You have a GED, some college. You handed me a transcript. You got some good grades. So you're intelligent. So you're intelligent.

And I recognize what you say about a child learns what he lives or she lives, but we also all become adults and then see, I shouldn't be doing that or that's not right. If it's happening on my block in Queens, it's not how -- what I'm **[32]** supposed to engage in. And that's part of the way I have to balance all of these interactions and I look at the

adult interactions with the criminal justice system. And I recognize that some of these occurred when you were a younger man, like the one in paragraph 10, paragraph 11 and 12, 13, and 14 you had not even gotten to be 20 yet. Paragraph 15, you were 20. Paragraph 16, you were 20, and that was after you had moved down here to North Carolina for a better environment. I think the report said you came down to live with your aunt.

And so I've taken that into account, but then we have these continuing things even into the mid twenties of paragraph 19 and paragraph 20 and paragraph 28 and -- excuse me, 21 and paragraph 22 when you're getting close to 30.

And then the one in paragraph 23 when you were in Federal Court, we were here together, and you accepted responsibility and pled guilty in that case and then got out and were on supervision. And as I said, at least initially, seemed to be doing well. I mean, you had transitioned. You were employed.

The report doesn't indicate when you met Ms. Gibbs, but you met Ms. Gibbs and you all got married. You act as a father figure for her son. You also have a daughter. And then you kind of went back to this.

The report does reflect that you've had issues with drugs for a long time as a user in paragraph 40.

[33] The Court has taken into account the need to deter and to incapacitate.

One of the things that we deal with is trying to find out the sentence that is sufficient but not greater than necessary in a particular case, and the Government here has asked for midpoint of the advisory guideline and they are at 151 to 188. I'm not going to go as high as the Government suggests,

but I do think that a sentence that is sufficient but not greater than necessary is one that's going to have an appropriate level of incapacitation and deterrence taking into account the chances and the chance that you'll figure it out and do better. I mean, statistics would have told me that you would have been tired before doing this this time, but you did it. So it kind of defies -- there's a component of defying the statistics that basically a man who has lived the life you lived, especially having a supportive woman in your life and family obligations and a job, all these positive things, and yet you get drawn back in to it, and there's consequences for that. And there need to be consequences for that, I think, because, as you know probably better than anyone here, the effects of these narcotics have on people and on families and on communities as you build out, so you've seen it and yet you get back in and say, I'm going to get some money doing this and that. So it needs to be deterred. It needs to be punished.

So I balanced your acceptance of responsibility, **[34]** which I give you credit for; that you pled guilty, you have accepted responsibility.

I'm not going to go as high as the Government wants. I'm going to vary down, but I'm not going to vary down anywhere like what you're talking about because I don't think that would show -- be a sentence that would promote respect for the law.

I think a person who had gotten out in the last situation where you were, they need to know it's like there's -- you can't -- the consequences will be serious but I think fair.

And so the sentence that I'm going to impose is going to be sufficient but not greater than necessary, and I think it's going to be just punishment.

Having fully considered the entire record, all arguments of Mr. Elijah and the Assistant United States Attorney, having considered the advisory guideline range, pursuant to the Sentencing Reform Act of 1984 as modified by the Supreme Court's decision in *United States v. Booker,* it's the judgment of the Court that the defendant, Larone Frederick Elijah, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for 108 months.

The term of imprisonment will run consecutively to any other term of imprisonment.

Upon release, you'll be on supervised release for three years. Again, you're going to be out. You're going to **[35]** live this out. You're going to get out, have a chance to work with a probation officer again, and that probation officer is not looking to revoke you. They're trying to help you. But again, you've got to help yourself too in what you do.

I'm going to make all the recommendations you asked for. I'm going to recommend Butner. I'm going to recommend intensive drug treatment, 500-hour program. I'm going to recommend all the vocational and educational opportunities so you can use your intelligence to strengthen those skills so when you get out, you can be productive and law abiding and not get back into this cycle.

Within 72 hours of release, you'll report in person to the probation office in the district to which you're released. While on supervised release, you shall not commit another federal, state, or local crime or possess a controlled substance that's illegal. You shall not possess a firearm or destructive device.

You'll comply with the standard conditions and the following additional conditions:

You'll participate in a narcotic addiction treatment program. You'll consent to a warrantless search. You'll cooperate in the collection of DNA. You'll submit to urinalysis testing. You'll pay a special assessment of $100.

I'm not going to impose a fine to the extent that you -- well, you will have a job while you're incarcerated. I **[36]** expect you to help support your dependent while you're incarcerated. I'm going to, as I said, recommend FCI Butner because I think that's -- that's where you want me recommend.

THE DEFENDANT: Yes.

THE COURT: I'm going to recommend intensive substance abuse treatment. I'm going to recommend vocational and educational opportunities.

I do think I've properly calculated the advisory guideline range. However, I announce, pursuant to *U.S. v. Gomez-Jiminez,* 750 F.3d 370 (4th Cir. 2014) and *U.S. v. Hargrove,* 701 F.3d 156 (4th Cir. 2012), that if it were to be determined that I miscalculated the advisory guidelines range, I'd impose the same sentence as an alternative variant sentence.

I think this is the sentence that is sufficient but not greater than necessary for Mr. Larone Frederick Elijah in light of the totality of the record and my discussion of the 3553(a) factors.

Mr. Elijah, you can appeal your conviction if you believe your guilty plea was somehow unlawful or involuntary or if there's some other fundamental defect in the proceeding that was not waived by a guilty plea.

You also have a statutory right to appeal your sentence under certain circumstances, particularly if you think your sentence is contrary to law.

[37] With few exceptions, any Notice of Appeal must be filed within 14 days of the judgment being entered on the docket in your case. If you're unable to pay the cost of an appeal, you may apply for leave to appeal in forma pauperis.

If you so request, the Clerk of Court will prepare and file any Notice of Appeal.

Did you want me to make any other recommendations to BOP?

THE DEFENDANT: No. That was it.

THE COURT: Anything else from the United States?

MS. MORALES: Nothing further.

THE COURT: I do thank Mr. Elijah for his advocacy. That will conclude the matter involving Mr. Elijah. Good luck to you, sir.

We'll be in recess until 9:00 a.m. tomorrow.

(The proceedings concluded at 11:25 a.m.)

[38] UNITED STATE DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

CERTIFICATE OF OFFICIAL REPORTER

I, Amy M. Condon, RPR, CSR, Federal Official Court Reporter, in and for the United States District Court for the Eastern District of North Carolina, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 4th day of May, 2017.

/s/ Amy M. Condon

Amy M. Condon, CSR, RPR

U.S. Official Court Reporter

Appendix D

FILED: April 3, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4147
(4:15-cr-00070-D-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LARONE FREDERICK ELIJAH

Defendant – Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Thacker and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk