NO. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

ALFRED THOMAS, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit, disagreeing with the Seventh Circuit, correctly held that it is permissible in sentencing a defendant for a firearms offense to upwardly depart under U.S.S.G. § 5K2.6 for the severity of the underlying offense, when a defendant has already received a 4-level enhancement under § 2K2.1(b)(6)(B) for that underlying offense, given that § 2K2.1(c) expressly provides that these are alternative and not cumulative sentencing calculations.

LIST OF PARTIES

1. Petitioner – Defendant Alfred Thomas

2. Respondent – Plaintiff United States of America

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PETITION FOR WRIT OF CERTIORARI

Petitioner Alfred Thomas prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion from the United States Court of Appeals for the Second Circuit is United States v. Thomas, 723 Fed. Appx. 60 (2d Cir. 2018) (Summary Order), attached at Appendix A.

JURISDICTION

Jurisdiction in this Court exists pursuant to 28 U.S.C. § 1254(1), as it is a petition from a final decision by the United States Court of Appeals for the Second Circuit issued on May 22, 2018. This petition is timely. See Supreme Court Rule 13(1).

STATUTORY PROVISIONS INVOLVED

U.S.S.G. § 2K2.1(b)(6)(B) provides:

> (b) Specific Offense Characteristics
> ...
> (6) If the defendant--
> (A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or
> (B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

U.S.S.G. § 2K2.1(c) provides:

> (c) Cross Reference
> (1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply--

> (A) § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or
> (B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

U.S.S.G. § 5K2.6 provides:

> If a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others. The discharge of a firearm might warrant a substantial sentence increase.

STATEMENT OF THE CASE

Mr. Thomas was sentenced to 115 months imprisonment for being a felon in possession of ammunition in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2). Mr. Thomas' contention is that the District Court erred by departing upward pursuant to § 5K2.6 of the United States Sentencing Guidelines because the District Court based that upward departure on facts that the applicable Guidelines already fully addressed through § 2K2.1(b)(6)(B)'s enhancement and § 2K2.1(c)'s cross-reference provision. It is unlawful to give a defendant both a § 5K2.6 upward departure and a § 2K2.1(b)(6)(B) enhancement. There is a Circuit Court split on this important federal question. If this Court agrees that the applicable Guidelines already fully addressed the severity of the non-firearm offense through § 2K2.1(b)(6)(B) and § 2K2.1(c), thereby rendering an upward departure pursuant to § 5K2.6 improper, then Mr. Thomas' sentence must be vacated and the case remanded for resentencing.

Mr. Thomas was found not guilty in a New York State jury trial of the January 2014 murder of Martin Faulk. His co-defendant, George Colon, was found guilty. After the verdict, Mr. Thomas made several posts on his Facebook account, which were interpreted by law enforcement as admitting his responsibility for the shooting. As a result, the State District

Attorney's office referred Mr. Thomas' case to the FBI to investigate whether federal charges could be brought for the 2014 shooting.

During its investigation, the FBI came across a dismissed state charge against Mr. Thomas arising out of shots fired in the vicinity of 115 West Bissell Street in Syracuse, New York, in August 2012. According to witnesses, the occupants of a light blue vehicle opened fire with shotguns as the vehicle drove by the West Bissell Street address. At the time of the shooting, there were people both on the porch and within the residence. While shots penetrated the inside of the house, no one was hurt.

The police found Mr. Thomas driving a light blue Volkswagen Passat. When the vehicle stopped, three passengers got out, fled, and were never apprehended. The officers observed two expended 12-gauge shotgun shells on the passenger-side, rear-seat area of the vehicle. During a search of Mr. Thomas, officers recovered two live rounds of Remington 12-gauge shotgun ammunition from his pocket. Mr. Thomas was arrested and charged with 1st degree reckless endangerment in New York State court, which charge was ultimately dismissed.

The instant federal prosecution is based on the August 2012 shooting at 115 West Bissell Street. In 2003, Mr. Thomas had been convicted of felony aggravated robbery in violation of Kan. Stat. Ann. § 21-3716. Consequently, he was a felon in possession of ammunition in violation of 18 U.S.C. § 922(g)(1) when he had the shotgun shells in his pocket in 2012.

Mr. Thomas entered a guilty plea to the § 922(g)(1) charge on December 23, 2016. There was no plea agreement. Probation drafted the Presentence Investigation Report. Mr. Thomas' base offense level was 20 under U.S.S.G. § 2K2.1(a)(4)(A), because he committed the offense subsequent to sustaining one felony conviction for a crime of violence. Probation added a 4-level enhancement under § 2K2.1(b)(6)(B) because Mr. Thomas' possession of the ammunition was in

connection with the felony offense of reckless endangerment for shooting at the 115 West Bissell Street residence. Subtracting 3 levels for acceptance of responsibility, Mr. Thomas' total offense level was 21. Mr. Thomas' total criminal history score was 8, for a criminal history category of IV. Mr. Thomas' Guidelines Range consequently was 57-71 months. The statutory maximum term of imprisonment for his offense was 10 years.

Probation suggested that an upward departure may be warranted pursuant to § 5K2.6, which provides that if a weapon or dangerous instrumentality was used or possessed in the commission of the offense, an upward departure may be appropriate. In particular, Probation identified the 115 West Bissell Street drive-by shooting as potentially warranting an upward departure under § 5K2.6.

Mr. Thomas objected that this was impermissible double-counting. The shooting was the other felony offense which formed the basis for the 4-level enhancement under § 2K2.1(b)(6)(B). The Government's position was that the § 5K2.6 weapons departure and the other felony § 2K2.1(b)(6)(B) enhancement addressed different wrongs and therefore could both be properly applied.

Sentencing before Judge Sannes was on June 5, 2017. Judge Sannes found that an upward departure under § 5K2.6 of three levels was warranted. She rejected Mr. Thomas' double-counting argument, holding that the 4-level § 2K2.1(b)(6)(B) enhancement for possessing the ammunition in connection with the felony offense of reckless endangerment did not take into account the seriousness of the offense "where several shots were fired at a residence where a number of people were outside on the porch." She found "that a three level departure is warranted under 5K2.6 to account for the discharge of a firearm at a residence with people outside, creating a substantial risk to multiple victims of death or bodily injury."

The upward departures resulted in an offense level 24 and criminal history category V for a Guidelines Range of 92-115 months. Judge Sannes, after reciting the consideration of the 18 U.S.C. § 3553(a) factors, imposed a top end term of imprisonment of 115 months—5 months shy of the statutory maximum. Judge Sannes also stated that even if a 3-level departure was not warranted under § 5K2.6, she would have imposed the same sentence under § 3553(a).

On appeal, Mr. Thomas' principal argument was that the District Court erred by departing upward pursuant to § 5K2.6 because the District Court based that upward departure on facts that the applicable Guidelines already addressed in § 2K2.1(c)'s cross-reference provision. United States v. Thomas, 723 Fed. Appx. 60, 61 (2d Cir. 2018) (Summary Order). Mr. Thomas' § 922(g)(1) charge carried an initial offense level of 20. Because he was in possession of the ammunition during the drive-by shooting, *i.e.*, he was in possession of the ammunition in connection with another felony, § 2K2.1(b)(6)(B) operated to increase his offense level to 24. Since Mr. Thomas had possessed the ammunition in connection with another offense, § 2K2.1(c) required the Court to compare Mr. Thomas' offense level of 24 calculated under § 2K2.1(b) with the offense level of the underlying crime of reckless endangerment. Because the total reckless endangerment offense level was 19, § 2K2.1(c) obligated the Court to use the higher of the two offense levels, *i.e.*, the felon in possession offense level of 24.

Taken together, the § 2K2.1(b)(6)(B) 4-level enhancement and the § 2K2.1(c) comparison fully accounted for the severity of Mr. Thomas' particular conduct while in possession of the ammunition. By also utilizing § 5K2.6 to additionally increase Mr. Thomas' offense level due to the severity of the drive-by shooting offense, Judge Sannes ignored § 2K2.1(c)'s alternative calculation structure and improperly increased the length of Mr. Thomas' sentence. § 2K2.1(c) expressly provides that a defendant will either get the higher

offense level associated with the other offense, or the calculation under subsection (b), but not both. See Koon v. United States, 518 U.S. 81, 94-95 (1996)("Even an encouraged factor is not always an appropriate basis for departure, for on some occasions the applicable Guideline will have taken the encouraged factor into account."). Because Mr. Thomas did not raise that argument in District Court, the Second Circuit reviewed it for plain error only. Thomas, 723 Fed. Appx. at 61.

The Second Circuit affirmed Judge Sannes. Like Judge Sannes, the Second Circuit also mistakenly accounted for the severity of the offense twice—once through the operation of § 2K2.1, and once through the application of § 5K2.6. First, the Second Circuit noted that District Courts are authorized to depart from the sentencing guidelines "in cases that feature aggravating or mitigating circumstances of a kind or degree not adequately taken into consideration by the [Sentencing] Commission." Id. (quoting Koon, 518 U.S. at 94). The Second Circuit explained that the Commission provides considerable guidance regarding atypical cases by listing certain factors as either encouraged or discouraged bases for departure. Id. (citing Koon, 518 U.S. at 94). Encouraged factors are those the Commission has not been able to fully capture in formulating the guidelines. Id. (citing Koon, 518 U.S. at 94). The Second Circuit concluded that § 5K2.6 was an encouraged factor. Id.

The Second Circuit went on to note that sometimes the applicable Guideline will have taken an encouraged factor into account, rendering departure inappropriate based on that factor. Id. (citing Koon, 518 U.S. at 94-95). In such a situation, a court may still depart on the basis of such a factor, but only if it is "present to a degree substantially in excess of that which ordinarily is involved in the offense." Id.

Relying on Note 14(D) of Guidelines §2K2.1, the Second Circuit concluded that the District Court did not plainly err by departing upward based on the fact that Mr. Thomas possessed ammunition while taking part in a drive-by shooting, despite having already given the § 2K2.1(b)(6)(B) enhancement for the offense. Id. at 61. Note 14(D) provides that "[i]n a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense ... an upward departure under § 5K2.6 ... may be warranted," which the Court determined applied to Mr. Thomas' circumstances. Id. at 61-62 (citing U.S.S.G. § 2K2.1 cmt. n.14(d)). In so doing, the Second Circuit completely ignored the historical context behind Note 14(D), which was promulgated back when a defendant could not get a § 2K2.1(b)(6)(B) enhancement if the other offense was a firearms or explosive offense.

The Second Circuit incorrectly decided that the general conduct that triggered the § 2K2.1(b)(6)(B) enhancement—simply possessing or using a firearm or ammunition in connection with a felony offense—was distinct from the conduct that triggered the § 5K2.6 upward departure, and thus both could be applied. Id. at 62. According to the Second Circuit, the § 5K2.6 upward departure captured the distinct, firearms-related conduct especially likely to cause great harm, *i.e.*, participating in a drive-by shooting with individuals on the porch at the targeted residence. Because the § 2K2.1(b)(6)(B) enhancement and the § 5K2.6 upward departure served "distinct purposes" and represented "discrete harms" in the eyes of the Second Circuit, the Court determined it was permissible to apply both when calculating Mr. Thomas' Guidelines sentence. Id. (citing United States v. Maloney, 406 F.3d 149, 152 (2d Cir. 2005)). As argued infra, this improperly contravenes the alternative structure of § 2K2.1(c), and conflicts with holdings from other Circuits.

Because this Petition is filed within 90 days of the Second Circuit's May 28, 2018, denial of Defendant Alfred Thomas' Appeal from Judgment and Sentence, it is timely. See Supreme Court Rule 13(1).

REASONS FOR GRANTING THE WRIT

1. This Court should resolve the important federal question and split amongst the United States Courts of Appeals on the question of whether it is permissible in sentencing a defendant for a firearms offense to upwardly depart under U.S.S.G. § 5K2.6 for the severity of the underlying offense, when a defendant has already received a 4-level enhancement under § 2K2.1(b)(6)(B) for that underlying offense, given that § 2K2.1(c) expressly provides that these are alternative and not cumulative sentencing calculations.

In deciding whether to grant a writ, this Court gives priority to cases which present important questions of federal law not yet decided by the Court, see Supreme Court Rule 10(c), and cases raising a conflict between the decisions of two or more United States Courts of Appeal, see Rule 10(a). The instant case involves both, and the writ should be granted.

There is currently a divide among the United States Courts of Appeals regarding whether an upward sentence departure pursuant to U.S.S.G. § 5K2.6, due to the severity of the underlying offense, is permissible when a defendant has already received an enhancement for the offense under U.S.S.G. § 2K2.1. The Seventh Circuit, in United States v. Almaguer, 146 F.3d 474 (7th Cir. 1998), addressed the issue and resolved it in the defendant's favor, holding it was impermissible to depart upwards when the underlying Guideline took the aggravating factor into account. Cf. United States v. George, 56 F.3d 1078, 1086-87 (9th Cir. 1995)(improper to depart upward based on factor taken into account in alternative Guidelines calculation which was not used because resulted in lower range).

Conversely, in the instant case, the Second Circuit concluded that the severity of the offense was not fully captured by §§ 2K2.1(b)(6)(B) and (c), and that an upward departure under § 5K2.6 could also be applied. Thomas, 723 Fed. Appx. at 61-62. See also United States v.

Smith, 196 F.3d 676 (6th Cir. 1999)(upward departure pursuant to §§ 5K2.2, 5K2.6, and 5K2.9 permissible even with application of §2K2.1(c) cross-reference provision). The Second Circuit's reasoning in the present case and agreement with the Sixth Circuit, rather than siding with the rationale elucidated by the Seventh and Ninth Circuits, illustrates the need for this Circuit Court split to be resolved regarding this important federal question.

Upward departures are reviewed under an abuse of discretion standard. United States v. Thorn, 317 F.3d 107, 125 (2d Cir. 2003). "[A] district court by definition abuses its discretion when it makes a mistake of law." Koon, 518 U.S. at 100; United States v. Franklyn, 157 F.3d 90, 98 (2d Cir. 1998). "Because 'the abuse of discretion standard includes review to determine that the [court's discretion in the sentencing determination] was not guided by erroneous legal conclusions,' [the appellate court's] review embraces the question of whether a particular factor is a permissible basis for departure." Franklyn, 157 F.3d at 98 (quoting Koon, 518 U.S. at 100). If the district court bases its upward departure decision on a ground that does not legally support departure, then it has abused its discretion. Thorn, 317 F.3d at 124-128; United States v. Sentamu, 212 F.3d 127, 135-36 (2d Cir. 2000).

Further, the Guidelines intend for departures to be rare. "Departures from the prescribed Guidelines ranges are allowed only in cases that are unusual." Sentamu, 212 F.3d at 134. A departure is proper only if there "exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." U.S.S.G. § 5K2.0 (quoting 18 U.S.C. § 3553(b)). Departures are "appropriate only if the case is atypical or outside of the heartland." United States v. Young, 143 F.3d 740, 743 (2d Cir. 1998).

Following from these general rules, there is a specific rule of particular importance to Mr. Thomas' case. If a Guidelines provision already addresses a factor, that factor clearly cannot be used as a ground for departure, because it has already been taken into consideration in the governing Guidelines provision. As this Court observed in Koon, "[e]ven an encouraged factor is not always an appropriate basis for departure, for on some occasions the applicable Guideline will have taken the encouraged factor into account." 518 U.S. at 94-95.

In Mr. Thomas' case, Judge Sannes violated this rule when she upwardly departed based on the 115 West Bissell Street shooting. This is because the governing Guideline—§ 2K2.1—itself expressly addresses what is to happen by virtue of Mr. Thomas' ammunition being used in the shooting. Accordingly, the shooting cannot serve as the basis for an upward departure, having already been taken into account as a factor in the governing Guideline.

The drive-by shooting of the residence at 115 West Bissell Street was charged in New York State court as reckless endangerment in the first degree, felony offense. As aforementioned, the governing Guideline—§ 2K2.1—took this into account in two ways. First, under § 2K2.1(b)(6)(B), a 4-level enhancement was added because the defendant used or possessed ammunition in connection with another felony offense. Second, § 2K2.1(c) expressly directed the District Court to consider the severity of the other offense. Section 2K2.1(c) provides in relevant part:

> If the defendant used or possessed any firearm or ammunition cited in the offense of conviction with the commission or attempted commission of another offense ... apply (A) § 2X1.1 (Attempt, Solicitation or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or (B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Because, thankfully, no one was killed in the shooting, the homicide Guideline would not be used to calculate Mr. Thomas' offense level under § 2K2.1(c)(1)(B). Rather, under

§ 2K2.1(c)(1)(A), the substantive offense of reckless endangerment would be addressed under the Guideline for the substantive offense of aggravated assault, § 2A2.2. Calculating Mr. Thomas' offense level under § 2A2.2 would result in a total offense level of 19 (base offense level of 14, plus 5-level enhancement because a firearm was discharged). This offense level, however, is lower than the offense level calculated under the possession of ammunition Guideline, which totaled 24. Accordingly, the total offense level of 24 under § 2K2.1 was the one which was properly used.

Judge Sannes—with the subsequent blessing of the Second Circuit—upwardly departed under § 5K2.6 based on the dangerousness of the underlying felony offense of reckless endangerment. She observed that this dangerousness warranted an upward departure beyond the 4-level enhancement in § 2K2.1(b)(6)(B) because the shooting was more dangerous than many other felony offenses. But what Judge Sannes, and the Second Circuit, failed to recognize is that § 2K2.1(c) was included in the Guideline to expressly address the dangerousness of the reckless endangerment felony offense. If use of the firearm caused a death, the court was required to use the applicable homicide Guideline if that resulted in a higher Guidelines Range. § 2K2.1(c)(1)(B). If it did not cause a death, the court was required to calculate what the Guideline would be for the substantive offense, and use this calculation if it resulted in a higher range. § 2K2.1(c)(1)(A). Section 2K2.1(c) squarely deals with the severity of the underlying substantive offense, and consequently an upward departure cannot be based on this severity. Koon, 518 U.S. at 94-95 (cannot upwardly depart based on factor taken into account by the governing Guideline).

Almaguer is illustrative. 146 F.3d at 475. In Almaguer, the defendant pointed a gun at a seven-year-old boy, told him he would shoot, and pulled the trigger. Id. Fortunately, the

revolver's hammer fell on an empty chamber. Id. The defendant pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Id. His base offense level under § 2K2.1 was 20, just like Mr. Thomas. Id. at 476. The district court departed upwards by 3 levels pursuant to § 5K2.6 because the defendant's act of brandishing a gun in front of the young boy was an "an aggravating factor," just as Judge Sannes did to Mr. Thomas. Id. at 477.

The Seventh Circuit reversed, holding that an upward departure was not permitted under § 5K2.6 because the underlying Guideline of § 2K2.1 took the aggravating factor into account. Id. Under § 2K2.1(c), the district court was directed to calculate the Guidelines Range for the underlying felony offense—aggravated assault—and compare it with the range under § 2K2.1(a) and (b), and apply the greater. As in Mr. Thomas' case, the aggravated assault Guideline—§ 2A2.2—resulted in a lower range, and accordingly was not used. But the fact that it was not used did not mean that it was not fully accounted for—it just meant that the Guideline instructed the district court that the aggravated nature of the underlying offense was not aggravated enough to increase the sentencing range beyond what had been calculated under § 2K2.1(c). The fact that the defendant assaulted and threatened the young boy with a gun is conduct "that has been fully taken into account by § 2K2.1(c)'s incorporation of the Guideline for aggravated assault." Id. Accordingly, the district court erred by upwardly departing under § 5K2.6 because the aggravating conduct was taken into account by the applicable Guideline. Id. at 477 (citing Koon). This holding directly applies to Mr. Thomas' case, is persuasive, and requires reversal of Judge Sannes' and the Second Circuit's § 5K2.6 3-level upward departure.

On the other side of the Circuit Split, the Sixth Circuit, in United States v. Smith, 196 F.3d 676 (6th Cir. 1999), aligned itself with the Second Circuit's reasoning in the instant case. In Smith, the defendant pled guilty to "(1) assaulting a federal officer in violation of 18 U.S.C.

§ 111; (2) carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c); (3) being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1); (4) being a fugitive in possession of a firearm in violation of 18 U.S.C. § 922(g)(2); (5) receiving a firearm while being under indictment in violation of 18 U.S.C. § 922(n); and (6) possessing a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k)." Id. at 678. As the sentencing court was instructed that the controlling guideline was that which resulted in the highest offense level, it concluded that § 2K2.1—the controlling guideline for unlawful possession of firearms—was the controlling guideline, as it yielded an offense level of 26, rather than § 2A2.2—the aggravated assault guideline—which only yielded an offense level of 24. The sentencing court then upwardly departed to an offense level of 31 based on §§ 5K2.6 (his discharge of a firearm), 5K2.9 (his criminal purpose), and 5K2.2 (his infliction of serious bodily injury). Id. at 679.

The defendant maintained that the §§ 5K2.6, 5K2.2, and 5K2.9 departures were impermissible double counting, because they had been previously considered under § 2K2.1(c) through a cross-reference to § 2A2.2, the aggravated assault guideline. Id. at 684-85. As an initial matter, the Sixth Circuit deemed that an upward departure pursuant to § 5K2.9 (commission of a felony to conceal another felony) was not double counting, because § 2A2.2 does not take into account the commission of an assault to conceal another offense. Id. at 685. The Sixth Circuit rejected the defendant's other double counting arguments, explaining that even if Smith had not brandished the firearm or caused serious injury to the officer, he still would have been sentenced under § 2K2.1 at the same base offense level, because it would have been higher than the offense level for aggravated assault. Id. at 686. Based on that reasoning, the Sixth Circuit concluded that the defendant's actions in brandishing the firearm and in seriously injuring the officer were never

counted for purposes of his offense level under § 2K2.1, thereby justifying the upward departures under §§ 5K2.6 and 5K2.2. Id.

The Sixth Circuit drew the same mistaken conclusion as the Second Circuit in the instant case. § 2K2.1(c), with its cross-reference to § 2A2.2, fully takes into account the severity of the underlying offense. In Smith, the offense level for aggravated assault, standing alone, was less without the enhancements for brandishing a firearm or seriously injuring an officer. The offense level was higher for aggravated assault with both enhancements. Higher still was the offense level under § 2K2.1, which thus captured the severity of the defendant's particular conduct—namely, his brandishing a firearm and seriously injuring an officer—as evidenced by his even longer sentence. As expressly provided in § 2K2.1(c), the Guidelines calculations are alternative, not cumulative.

The Government and the Second Circuit maintain that the position elucidated in Almaguer is contradicted by the commentary to § 2K2.1. Application Note 14(D), which in discussing the interplay between the "Application of Subsections (b)(6)(B) and (c)(1)," provides:

> In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosive offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under § 5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

The Second Circuit determined that Application Note 14(D) "permits application of both § 2K2.1(b)(6)(B)'s four-level enhancement and the upward departure provision under § 5K2.6. Such reliance on Application Note 14(D) is wrong, because a proper understanding of this comment in fact fully supports Mr. Thomas' position. Note 14(D) does not contemplate both a (b)(6)(B) enhancement and a 5K2.6 upward departure.

To correctly understand Application Note 14(D), one needs to be aware of the context in which it was adopted. This Note was added in 2006. U.S.S.G. Amendment 691. At the time of

this Amendment, the controlling law was that the § 2K2.1(b)(6)(B) 4-level enhancement could not be applied if the "another felony offense" was a firearms or ammunition offense. The definition of "another felony offense" was considered to categorically exclude all firearms and explosive offenses. See, e.g., United States v. Jones, 528 Fed. Appx. 627, 631-32 (7th Cir. 2013); United States v. Valenzuala, 495 F.3d 1127, 1133-34 (9th Cir. 2007)("a defendant's sentence may not be enhanced under § 2K2.1(b)(5) [now (b)(6)] if the other felony offense is a firearms trafficking or possession offense"); United States v. Lloyd, 361 F.3d 197, 201 (3d Cir. 2004)("'firearms possession or trafficking offenses' are categorically removed from the set of crimes that may constitute 'another felony offense'").

It is clear that Application Note 14(D) was added to address this existing problem. Note 14(D) does not address upward departures generally. Rather, it only addresses upward departures "in a case in which the defendant used or possessed the firearm or explosive to facilitate another firearms or explosives offense." Id. (emphasis added). And it was only this limited category of cases for which a (b)(6) [then (b)(5)] 4-level enhancement could not be applied, because this category was excluded. In other words, the Guidelines in Note 14(D) provided upward departure authority only for that category of offenses which could not get a § 2K2.1(b)(6)(B) 4-level enhancement.

Thus understood, Note 14(D) affirms Mr. Thomas' position. Upward departure based on the underlying felony offense is only supportable where the defendant does not get the 4-level § 2K2.1(b)(6)(B) enhancement. If the defendant does get that enhancement, then upward departure is cumulative, directly contravening the alternative directive of § 2K2.1(c).

It is instructive to note that federal district courts routinely factor the aggravating nature of the underlying substantive offense into a § 2K2.1 Guidelines calculation through § 2K2.1(c)'s

instruction to calculate the underlying offense's Guidelines Range and apply the greater of that range or the range calculated under § 2K2.1(a) and (b). This exercise demonstrates the controlling point—which is that the aggravated nature of the underlying offense is expressly addressed in the controlling Guideline, and consequently is an improper basis for upward departure. See, e.g., United States v. Hicks, 4 F.3d 1358, 1363-65 (6th Cir. 1993)(where defendant in illegal possession of firearm shot firearm and seriously injured victim, Guidelines calculation for aggravated assault pursuant to § 2K2.1(c)'s cross-reference was appropriate); United States v. Madewell, 917 F.2d 301, 306-07 (7th Cir. 1990)(defendant's pointing cocked gun at policeman and resulting felon in possession conviction required Guidelines calculation for aggravated assault pursuant to § 2K2.1(c)'s cross-reference); United States v. Shinners, 892 F.2d 742, 743 (8th Cir. 1989)(felon in possession who shot gun in air while struggling with victim properly sentenced under aggravated assault Guideline pursuant to § 2K2.1(c)'s cross-reference).

Finally, the Second Circuit erred in utilizing a plain error review of Judge Sannes' decision. Mr. Thomas expressly objected to the district court upwardly departing under § 5K2.6. He objected when Probation identified the West Bissell Street shooting as a factor that may warrant an upward departure under § 5K2.6. In his Sentencing Memorandum, Mr. Thomas argued that it was improper to upwardly depart under § 5K2.6 for the West Bissell Street shooting when he had already received the 4-level enhancement under § 2K2.1(b)(6)(B) for the same shooting. Mr. Thomas made the same objection at sentencing, arguing that the § 2K2.1(b)(6)(B) enhancement fully took into account the West Bissell Street shooting, and that consequently a § 5K2.6 upward departure was not authorized.

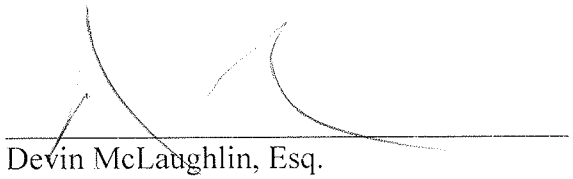
It cannot be disputed that Mr. Thomas argued below that a § 5K2.6 upward departure could not be imposed because he had received the § 2K2.1(b)(6)(B) 4-level enhancement. This is

exactly the same argument he made to the Second Circuit. It is true that the specifics of Mr. Thomas' argument never reached the level of detail put forward on appeal. There was no mention of the impact of § 2K2.1(c), but it should not have resulted in a waiver. The legal issue—whether it is lawful to impose a § 5K2.6 upward departure for the discharge of a firearm where the defendant received a 4-level enhancement under § 2K2.1(b)(6)(B) for that same discharge—was squarely raised. The arguments raised on appeal all effectively rely on the proposition that these cannot be doubly-counted. Requiring more by way of objection, subject to the pains of forfeiture, would be improper. Cf. United States v. Sofsky, 287 F.3d 122, 125 (2d Cir. 2002)(recognizing that plain error review need not be as stringent in the context of sentencing challenges). Instead, as noted above, the Second Circuit should have reviewed the District Court's upward departure decision under an abuse of discretion standard, Thorn, 317 F.3d at 125, which "embraces the question of whether a particular factor is a permissible basis for departure." Franklyn, 157 F.3d at 98 (quoting Koon, 518 U.S. at 100). If the district court bases its upward departure decision on a ground that does not legally support departure, then it has abused its discretion. Thorn, 317 F.3d at 124-128; Sentamu, 212 F.3d at 135-36. Because Judge Sannes based her § 5K2.6 upward departure on the severity of the offense, which was already fully accounted for by the operation of §§ 2K2.1(b)(6)(B) and (c), she abused her discretion.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED at Middlebury, Vermont, this 16th day of August, 2018.



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