

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Byrion D. Ferguson — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Byrion Demeco Ferguson
(Your Name)

P.O. Box 3000
(Address)

Forrest City, AR. 72336
(City, State, Zip Code)

870-494-4200
(Phone Number)

QUESTION(S) PRESENTED

Whether the trial court committed plain error pursuant to Rule 52(b) by admitting insufficient evidence applied by the pre-amendment 1B1.3 version of the U.S. Sentencing Guidelines instead of using the sufficient 1B1.3 amended 439 version of the U.S. Sentencing Guidelines?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgement is the subject of this petition is as follows:

Petitioner

Byrion D. Ferguson represented by

Kevin Blake Ross
Law Office of Kevin B. Ross, PC
8150 N. Central Expressway
Suite M2070
Dallas, TX 75206
214-736-1447
Fax: 214-594-8988
Email: kbr@rosscrimlaw.com
LEAD ATTORNEY

James Brett Smith
J. Brett Smith
P.O. Box 354
Sherman, TX. 75090
903-868-8686
1-903-870-1446
Email: spinkick65@gmail.com
TERMINATED: 04/04/2017

Plaintiff

USA represented by

Heather Harris Rattan
U.S. Attorney's Office - Plano
101 E. Park Blvd.
Suite 500
Plano, TX. 75074
972-509-1201

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	7
REASONS FOR GRANTING THE WRIT.....	10
CONCLUSION.....	24

INDEX TO APPENDICES

APPENDIX A

U.S. Court of Appeals Decision

APPENDIX B

1. U.S. District Court Verdict Sheet
2. U.S. District Court Docket Sheet
3. U.S. District Court Judgment Sheet

APPENDIX C

Denial of Petition for Rehearing

APPENDIX D

§28 U.S.C. 994(o)

APPENDIX E

U.S. Supreme Court 60 day extension for Petition for Writ of Certiorari.

TABLE OF AUTHORITIES

CASES	PAGE NUMBER
United States v. Rojaz Alvarez, 451 F.3d 320, 333 (5th Cir. 2006).	23
United States v. Andrews, 953 F.2d 1312, 1319 (11th Cir. 1992)....	14
United States v. Bellew, 369 F.3d 450, 452 (5th Cir. 2004).....	23
United States v. Butler, 41 F.3d 1435, 1442 (11th Cir. 1995)10, 13, 14	
United States v. Ellis Jake Gross, 979 F.2d 1048 (5th Cir. 1992).	10
United States v. Ismond 993 F.2d 1498, 1499 (11th Cir. 1993)....	10
United States v. Jose Regolo Flores-Chapa, 48 F.3d 156 (5th Cir. 1995).....	15
United States v. Redd, 355 F.3d 866, 872 (5th Cir. 2003).....	23
United States v. Pettigrew, 77 F.3d 1500, 1521 (5th Cir. 1996)....	23
United States v. Reese, 67 F.3d 902, 908 (11th Cir. 1995).....	15, 13
United States v. Rivera-Maldonado, 194 F.3d 224, 228-229 (1st Cir. 1999).....	19
United States v. Robinson, 935 F.2d 201, 205 (11th Cir. 1991)....	14
United States v. Webster, 54 F.3d 1, 5 (1st Cir. 1995).....	19
United States v. Olano. 507 U.S. 725 L.Ed. 2d 508 (1993).....	11
Molina-Martinez v. United States, 578 U.S. Lexis 2800 (2016)....	11
United States v. Sabillon-Umana, 772 F.3d 1328, 1333 (2014).....	12
STATUTES AND RULES	
§18 U.S.C. 3553(a)(1)(2)(A)	
§18 U.S.C. 3582(c)(2)	
§18 U.S.C. 3742(a)(1-3)	
§21 U.S.C. 841(a)(1)	
§28 U.S.C. 994(a)(1)(A-B)	
§28 U.S.C. 994(o)	
F.R.E. 105	

F.R.E. 401

F.R.E. 402

F.R.E. 403

Rule 52(b)

U.S.S.C. Rule 10(a)(c)

OTHER

5th Amendment

6th Amendment

14th Amendment

U.S.S.G. Manual 1B1.3,commentary,Applic.(n.1)

Blacks Law Dictionary (9th ed.2009)

Hollander-Blumoff, The Psychology of Procedural Justice in Federal Courts. (pg.134)

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

[*] For cases from federal courts:

The opinions of the United States court of appeals appears at Appendix A to the petition and is

[*] reported at 2018 U.S. APP. LEXIS 9036; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[*] is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix N/A to the petition and is

[] reported at N/A; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the N/A court appears at Appendix N/A to the petition and is

[] reported at N/A; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

§18 U.S.C. 3553(a)(1)(2)(A) Imposition of a sentence

(a) Factors to be considered in imposing a sentence

(1) The nature and circumstances of the offense and the history and characteristics of the defendant.

(2) The need for sentence imposed

(A) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.

§18 U.S.C. 3582(c)(2) Modification of an imposed term of imprisonment.

In the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C 994(o).

§18 U.S.C. 3742(a)(1-3) Review of a Sentence

(a) Defendant may appeal of an final sentence if the sentence

(1) Was imposed in violation of the law

(2) Was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) Is greater than the sentence specified in the applicable guideline range.

§21 U.S.C. 841(a)(1) Prohibited Acts

(a) Unlawful acts, Except authorized by this title, it shall be unlawful for any person knowingly or intentionally

(1) To manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense, a controlled substance.

§28 U.S.C. 994(a)(1)(A-B) Duties of the Commission

(a) The commission, by affirmitive vote of at least four members of the commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation system--

(1) Guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case

(A) a determination whether to impose a term of imprisonment

(B) a determination as to the appropriate amount of a term of imprisonment.

§28 U.S.C. 994(o)

The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appears to be warranted and otherwise assessing the Commission's work.

F.R.E. 105

Limiting Evidence that is Not Admissible against Other Parties or for Other Purposes.

If the court admits evidence that is admissible against a party or for a purpose-but not against another party or for another purpose-the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

F.R.E. 401

Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action

F.R.E. 402

General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- The United States Constitution;
- A Federal Statute;
- These rules; or
- Other rules prescribed by the Supreme Court

Irrelevant evidence is not admissible.

F.R.E. 403

Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following; unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

U.S.S.C. Rule 10(a)(c) Considerations Governing Review on Certiorari

- (a) a United States Court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory power.
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

6th Amendment

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation...

14 Amendment

nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws...

Blacks Law Dictionary (9th ed. 2009)

1B1.3,commentary,Applic.(n.1)

"The focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range,rather than on whether the defendant is criminally liable for an offense as a principal,accomplice or conspirator."

Rule 52(b) Plain Error

A plain error that affects substantial rights may be considered even though it was not brought to the courts attention.

STATEMENT OF THE CASE

In November 2012, the Drug Enforcement Administration (DEA) began an investigation into a drug organization operating in the Eastern District of Texas. (ROA. 1373). Quashay Coleman (Coleman) was an organizer and leader of the drug trafficking cell operating in Plano, Texas. (ROA.1374). Coleman was a major supplier of crack cocaine in the North Texas area. (ROA.1374). She stored and distributed crack cocaine from two residences in Plano. (ROA.1374). Six individuals were identified as distributors for Coleman: Hildreth, Carey, Gilliam, Ferguson, Jones, Griggs, and Pippens. (ROA. 822-824, 1374).

During the investigation, law enforcement obtained wire intercepts from Coleman's phone for a 30-day period. (ROA.718-719). Law enforcement also conducted five controlled buys for approximately 2 gram quantities of crack cocaine over a 6-month period where a confidential informant purchased \$100 worth of crack cocaine from Byrion Ferguson on Coleman's behalf.(ROA.553,556-557). Coleman would profit, on a good week, between \$1,500 and \$2,500 and would give Ferguson approximately \$150 to \$300 for distributing the crack from her stash house. (ROA.753-754). Ferguson mainly sold crack in nickel, dime and \$20 quantities. (ROA.930,774,777-779,791-792,862-865).

The jury found Ferguson accountable for 280 grams or more of crack cocaine during his time in the conspiracy which lasted for approximately a little over a year.(ROA.310-311).

On July 15,2015, a sealed indictment was returned against

Ferguson, along with others. Ferguson was charged in Cont 1 for Conspiracy to Manufacture or Distribute or Possess with Intent to Distribute Cocaine, Cocaine Base ("Crack"), or Marijuana, in violation of 21 U.S.C. §846 (21 U.S.C. §841(a)(1)); and in count 5 for Possession of a Firearm in Furherance of a Drug Trafficking Crime, in violation of 18 U.S.C. 924(c)(1). (ROA. 21-23,24-25).

The indictment was unsealed on September 28, 2015, and Ferguson appeared for his initial appearance and arraignment.(ROA.3).

Ferguson pleaded not guilty to counts 1 and 5.(ROA .339).

On October 5, 2015, the Court held Ferguson's detention hearing.(ROA.40). Ferguson was ordered detained.(ROA.40).

A Superseding Indictment was returned against Ferguson on October 14, 2015 but did not change any of the charges against Ferguson.(ROA.64-74). On November 9,2015, the Court issued an order designating the case as complex. (ROA.85-86). On November 16, 2015, Ferguson filed his Waiver of Personal Appearance at Arraignment and Entry of Plea of Not Guilty to the Superseding Indictment.(ROA.90).

On June 24, 2016, Ferguson filed a Pro Se Motion to Appoint New Counsel and a hearing was held on June 29,2016.(ROA.108,110) The Court denied Ferguson's motion to appoint new counsel.(ROA. 111).

On July 13, 2016, a Second Superseding Indictment was returned against Ferguson and others. There were no new charges brought against Ferguson.(ROA.119-126). On October 21,2016, Ferguson again filed his Waiver of Personal Appearance at Arraignment and Entry of Plea of Not Guilty to the Third Superseding Indictment.

With the accomplishments of me dropping out of a conspiracy and consecutively working a job, going to college and starting a family for two years. Then getting indicted two years later and the district and appellate courts look pass appellant being a productive citizen and lookin pass the U.S.S.G. that were set forth and put in effect by the sentencing commission at that current time, to sentence me and others accordint to an outdated version of the U.S.S.G., which allows appellant to get found guilty of an insufficient amount of fabricated and cumulative evidence, which affects the fairness, integrity, or public reputation of judicial proceedings, also disrespectful towards this court and citizens of the United States.

Rule 52(b) Plain Error states:

"A plain error that affects substantial rights may be considered even though it was not brought to the courts attention."

On appeal, such errors not raised in the district court may be remedied under Federal Rule of Criminal Procedure 52(b), provided that, as established in *United States v. Olano*. 507 U.S. 725; (1) the error was not "intentionally relinquished or abandoned," (2) the error is plain, and (3) the error "affected the defendant's substantial rights," (*Molina-Martinez v. United States*, 578 U.S. Lexis 2800 (2016))

If those conditions are met, the court of appeals should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

An error resulting from an outdated historic guidelines usually establishes a reasonable probability that a defendant will serve a prison sentence greater than "necessary" to fulfill the

have known was involved in the conspiracy are not relevant conduct under 439 Amendment 1B1.3(a) of U.S.S.G.

"when the conduct of others does not meet any one of the criteria set forth in subdivision (i) through (iii) the conduct is not relevant conduct under this provision." (1B1.3 (a)(1)(B) (U.S.S.G., 2016))

1B1.3(D) paragraph 3 states:

"With respect to offenses involving contraband (including controlled substances), the defendant is accountable under subsection (a)(1)(A) for all quantities of contraband with which he was directly involved." (ROA 1144) (Exz.133A)

The presentence report held defendant accountable for 561.6 grams of crack cocaine based on "evidence obtained during undercover drug transactions of co-defendants (ROA 1112, 1120, 1130, 1131), wire intercepts and codefendant testimony of what codefendant was purchasing from her supplier." (ROA 1374)

This resulted in defendants base offense level being a level 30 pursuant to U.S.S.G.(2D1.1(c)(5) i.e. if the offense involves at least 280 grams but less than 840 grams of cocaine base (ROA 1375).

The testimony at trial to arrive at drug quantity amounts used extrapolations based on a multiplier. For instance, based on wire intercepts between Coleman and defendant for a mere 27 day period, the government guessed the quantity of crack cocaine discussed on the calls to be 103.65 grams (ROA 931). Next, the government divided the 103.65 grams by 4 weeks to come up with the amount of 25.9 grams of crack cocaine distributed per week (ROA 931). Then the government multiplied 25.9 grams by 2 years (the time period Coleman sid defendant worked for her) and arrived at 2.69 kilos of crack cocaine (ROA 931).

From Coleman's testimony of what she was recieving from her

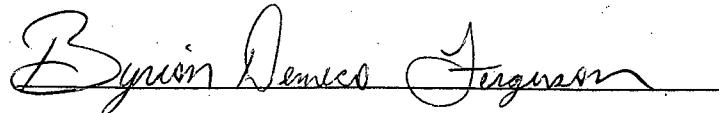
ther, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. "United States v. Bellew, 369 F.3d 450,452 (5th Cir.2004). "The evidence presented must allow the jury to find every element of the offense beyond a reasonable doubt." United States v. Rojas Alvar-
ez, 451 F.3d 320,333 (5th Cir.2006)(quoting U.S. v. Redd,355 F.3
d 866,872 (5th Cir.2003)). "A conviction must be overturned if it is based on speculation alone: [A] verdict may not rest on mere suspicion,speculation,or conjecture,or on an overly attenuated piling of inference on inference." (alteration in original)(quoting U.S. v. Pettigrew, 77 F.3d 1500,1521 (5th Cir.1996). " Accordingly, if the evidence presented, taken in the light most favorable to the government with all inferences drawn favorably in support of the verdict, is not enough for any rational trier of fact to find every element satisfied beyond a reasonable doubt , the convictions must be vacated.

In other words, each court did not consider the scope of each defendant in their cases, such as appellants. Each case in the different circuits was vacated and remanded for resentencing, this is why Rule 52(b) strikes a careful balance between judicial efficiency and the redress of injustice. Therefore, appellant prays for the supervisory power of this court to solve this conflict.

CONCLUSION

The lower courts have departed from the accepted and usual course of judicial proceedings that call for the exercise of this courts supervisory power. The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bryan Dennis Tugman". The signature is fluid and cursive, with "Bryan" and "Tugman" being the most distinct parts.

Date: September 27, 2018