No. _____

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Respondent,

v.

MARCEL HENDERSON,
Petitioner.

(*United States v. Marcel Henderson*,
C.A. 1, No. 17-1362)

**MOTION FOR LEAVE TO FILE
PETITION FOR WRIT OF CERTIORARI AND
PROCEED IN FORMA PAUPERIS**

Marcel Henderson, petitioner-appellant in the above-captioned case from the United States Court of Appeals, First Circuit ("First Circuit"), moves that the Court grant him leave to proceed in forma pauperis and to file the attached Petition For a Writ of Certiorari.

The grounds for this motion are that Mr. Henderson is indigent. Both the United States District Court, Massachusetts and the First Circuit appointed defense

counsel to Mr. Henderson under the Criminal Justice Act, 18 U. S. C. § 3006A, after finding him indigent. See Rule 39. The First Circuit appointed current appellate defense counsel on October 3, 2017. Mr. Henderson remains indigent.

The granting of the attached request is in the best interests and fair administration of justice.

Respectfully submitted,

DAVID A.F. LEWIS, Esq.
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One Mifflin Place, Suite 400
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617.571.3085

Certificate of Service

I hereby certify that I have, on March 19, 2019, served two copies of the attached Petitioner's Motion to Proceed In Forma Pauperis upon opposing counsel by postage prepaid mail addressed to:

Solicitor General
Department of Justice
950 Pennsylvania Avenue NW, Room 5614
Washington, D.C. 20530-0001

_____
David Lewis

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Respondent,

v.

MARCEL HENDERSON,
Petitioner.

Petition for Writ of Certiorari to the
United States Court of Appeals, First Circuit

(C.A. 1, No. 17-1362)

PETITION FOR WRIT OF CERTIORARI

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March 19, 2019

Question Presented

Were the petitioner's Fifth and Sixth Amendment rights violated by the ambiguity of the *Dixon* standard as applied regarding what constitutes a "well-founded" fear of imminent threat—a standard that appears to vary between Circuit Courts of Appeal—that barred him from raising a justification defense when (1) the gang responsible for shooting and disabling him were known to be acquiring guns to kill him and (2) the Government believed the threat imminent enough to follow the petitioner and intervene?

List of Parties

The parties before the Court are the Marcel Henderson and the United States.

The parties before the First Circuit Court of Appeals were Marcel Henderson and the United States.

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Petition for Writ of Certiorari

Petitioner Marcel Henderson ("petitioner" or "Henderson") respectfully petitions for a writ of certiorari to the United States Court of Appeals, First Circuit ("First Circuit") in *United States v. Marcel Henderson*, No. 17-1362

Opinions Below

The opinion of the First Circuit is published and is attached. A:1[1]. *United States v. Henderson*, 911 F.3d 32 (2018).

Jurisdiction

The First Circuit rendered its decision on December 19, 2018. A:1. This Court has jurisdiction in the petitioner's case under 28 U. S. C. § 1254.

[1] "A:1" refers to page one of the attached appendix.

Relevant Constitutional and Statutory Provisions

United States Constitution Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution Sixth 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; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Statement of the Case

On the day of Marcel Henderson's arrest, members of the Brown Gang Organization intended to kill him. T:01-04-13 (#82)[2], p.93. As a Boston Police Department (BPD) detective acknowledged, the BPD and FBI had intercepted telephone conversations indicating that the Brown Gang Organization was actively trying to get guns so that they could kill Henderson. Id.

The BPD knew that the threat was not an idle one. They were aware that three years earlier the Brown Gang Organization was responsible for an attack and shooting that left Henderson partially paralyzed. T:01-04-13 (#82), pp.44, 77-78, 94; T:01-25-13, pp.92-97.

The Brown Gang Organization's threat against Henderson was active and had not subsided on the day he was arrested. See T:01-04-13 (#82), p.81 (Henderson lived or living in same neighborhood as Brown Gang Organization).

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[2] "T:01-04-13 (#82)" refers to the January 4, 2013 transcript which is document #82 on the district court docket.

Henderson was clear that all he was trying to do was protect himself and his family against the threat of being shot again by the people in his neighborhood who had shot and disabled him several years earlier. See T:02-23-2017, pp.24-25 (#270).

I carried a gun on this case, I did. I never denied that. I said that in suppression. But I carried a gun out of self-defense. I got shot two and a half years prior to that. I didn't use no guns no time during that. You know what I'm saying? I was just making sure no guns was going to be used against me again. You know what I'm saying? And there was threats. And there was a lot of threats. You know what I'm saying?

It wasn't just threats that they just heard. We all heard threats. My family, me, everybody. You feel what I'm saying? So I was just trying to protect myself. I couldn't go to the police. They was with the police. You know what I'm saying? It's hard to go to the police. They're with the police. I can't go there. I can't do nothing. The only thing I can do is defend myself the best way I can.

I'm not causing strifes. I'm not running around here. I wasn't threatening people like he said. I wasn't doing none of that. I was really trying to be out of the way. You know what I'm saying? And just trying to live. My

Henderson was convicted on October 26, 2016 in United States District Court, Massachusetts after a three-day trial before a jury with Rya W. Zobel, J., presiding ("district court"). RA:35[3]. The jury convicted the petitioner of being a felon in possession of a firearm. Add:01 (64)[4] (18 U. S. C. § 922 (g) (1)). The district court sentenced Henderson on February 23, 2017 to time served plus three weeks. Add:02 (65).

Henderson filed a timely notice of appeal on April 10, 2017. Add:07 (70). The First Circuit affirmed his conviction on December 19, 2018. A:1.

[3] "RA" refers to the record appendix that Henderson filed in the First Circuit with his brief.

[4] "Add:01 (64)" refers to the addendum included with Henderson's brief, page one (page 64 of the combined brief and addendum pdf document).

Reasons for Granting the Writ

1. The ambiguity of the *Dixon* standard as applied regarding what constitutes a "well-founded" fear of imminent threat for a defendant charged with 18 U. S. C. § 922 (g) to raise a justification defense violates his Fifth and Sixth Amendment rights.

1.1 Standard of Review

A criminal defendant has broad rights to present a defense. *In re Oliver*, 333 U.S. 257, 273-74 & n.31 (1948). But those rights are not without limits—any defense presented must be both relevant to the circumstances presented in a case and sufficient as a matter of law. See *United States v. Bailey*, 444 U.S. 394, 414-15 (1980)(finding it "essential" that proffered evidence on a defense meet a minimum standard as to each element before that defense may be submitted to jury). Cf. *United States v. Amparo*, 961 F.2d 288, 291 (1st Cir. 1992)(describing burden of producing sufficient evidence to support a finding of duress).

These standards must be met when a criminal defendant would like to present a necessity defense. See

United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1991); *United States v. Dorrell*, 758 F.2d 427, 430 (9th Cir. 1985).

The district court's decision to bar the presentation of a defense of justification is reviewed de novo. *United States v. Castro-Gomez*, 360 F.3d 216 (1st Cir. 2004), citing *United States v. Maxwell*, 254 F.3d 21, 26 (1st Cir. 2001).

1.2 The First Circuit and several other Circuits allow defendants charged with 18 U. S. C. § 992 (g) to presented a justification defense.

A number of Circuit Courts of Appeal have recognized the defense of justification in a prosecution of 18 U. S. C. § 922 (g):

1st Circuit	*United States v. Leahy*, 473 F.3d 401, 409 (1st Cir. 2007)
2d Circuit	*United States v. Agard*, 605 F.2d 665, 667 (2d Cir. 1979)
3d Circuit	*United States v. Paolello*, 951 F.2d 537, 540-41 (3d Cir. 1991)
4th Circuit	*United States v. Mooney*, 497 F.3d 397, 403-404 4th Cir. 2007).

5th Circuit	*United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982)
6th Circuit	*United States v. Singleton*, 902 F.2d 471, 472 (6th Cir. 1990)
9th Circuit	*United States v. Gomez*, 92 F.3d 770, 774-75 (9th Cir. 1996)
10th Circuit	*United States v. Patton*, 451 F.3d 615, 637 (10th Cir. 2006)
11th Circuit	*United States v. Deleveaux*, 205 F.3d 1292, 1297 (11th Cir. 2000)

Most of the cases——and if they do not then their progeny ——rely on the Court's *Dixon* decision. *Dixon v. United States*, 548 U.S. 1, 4 n.1 (2006). In *Dixon*, the Court stated that for defendants charged with 18 U. S. C. § 922 (g) to raise a claim of justification at trial they first needed to establish that they were carrying a firearm while under an "unlawful and imminent threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury." *Id.*

The Circuit Courts of Appeal that allow a justification defense when a defendant has been charged with 18 U.S.C. § 922 (g) generally follow this requirement, but not in the same way.

1.3 While the Circuit Courts of Appeal agree that a threat must be "imminent," they do not all require that the threat against a defendant be "sufficient to induce a well-founded fear of impending death or serious bodily injury."

Circuits that require *Dixon's* standard of "well-founded fear."

1st Circuit	*Leahy*, 473 F.3d at 409 ("a threat sufficient to induce a well-founded fear of impending death or serious bodily injury").
2d Circuit	*United States v. Hernandez*, 894 F.3d 496, 503 (2d Cir. 2018)(same).
3d Circuit	*United States v. Taylor*, 686 F.3d 182, 186 (3d Cir. 2012)(same).
5th Circuit	*United States v. Waller*, 605 Fed. Appx. 333, 337 (5th Cir. 2015) (same).
9th Circuit	*United States v. Lopez*, 913 F.3d 807, 813 (9th Cir. 2019)(same).
10th Circuit	*United States v. Dixon*, 901 F.3d 1170, 1176 (10th Cir. 2018)(same).

Circuits that appear to not apply *Dixon's* standard of "well-founded fear."

4th Circuit	*Mooney*, 497 F.3d at 406 (4th Cir. 2007 (standard does not include "well-grounded fear" requirement).
6th Circuit	*United States v. Alson*, 526 F.3d 91 (3rd Cir. 2008)(same).
11th Circuit	*Deleveaux*, 205 F.3d at 1297 (same).

1.4 The First Circuit denied Henderson's claim of justification because it held that the threat against him was not "imminent," but did not consider if his fear was well-founded.

Henderson, 911 F.3d at 35-36:

B.

We turn next to Henderson's challenge to the District Court's grant of the government's motion in limine to preclude him from raising a justification defense. Henderson opposed the government's motion on the ground that he had made a sufficient showing to raise a necessity defense at trial because members of the Academy Homes Street Gang had threatened to kill him imminently.

The District Court granted the government's motion. In doing so, it concluded that Henderson had failed to offer sufficient evidence "to establish that [he] was under an 'unlawful and imminent threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury' at the time he was found in possession of a firearm on January 2, 2011." See Dixon v. United States, 548 U.S. 1, 4 n.2 (2006); United States v. Leahy, 473 F.3d 401, 409 (1st Cir. 2007). In reaching this conclusion, the District Court noted that "imminence" requires a real emergency giving rise to immediate danger to oneself or to a third party. See United States v. Maxwell, 254 F.3d 21, 27 (1st Cir. 2001).

Reviewing de novo, see United States v. Lebreault-Feliz, 807 F.3d 1, 4 (1st Cir. 2015), we agree with the District Court. The record simply does not support Henderson's assertion that he faced an imminent threat to his life.

1.5 The ambiguity of the *Dixon* standard as applied, its unequal application between Circuit Court's of Appeal, and the prejudicial disparity between what constitutes a "well-founded" fear of imminent violence depending on whether you are a defendant or the government requires the Court to grant certiorari to clarify the proper standard to ensure its fair application.

Henderson's possession of a firearm was a direct response to the threats from and previous attacks by the Brown Gang Organization. He had been threatened, shot, and disabled by members of the Brown Gang Organization. His belief that without some kind of protection he, his fiancée, and young child could be imminently harmed was reasonable.

Courts have found that it may be necessary for a felon to possess a firearm "to avoid being shot himself" including when a defendant has a fear that the person making the threats will "send his 'friends' after [the defendant]." *Paolello*, 951 F.2d at 542.

The Government, in fact, agreed that this was such a case—at least for them: the BPD and FBI believed a real

risk of danger existed and that violence was imminent enough for them to intervene by stopping the petitioner. The standard—in addition to being applied unevenly between Circuit Courts of Appeal—is also applied differently depending on who has the "well-founded" fear of violence. As evidenced by Henderson's case, something that is "imminent" for the government may not be and probably is not "imminent" for a defendant. *Henderson*, 911 F.3d at 35-36.

The uneven application of the *Dixon* language between Circuit Courts of Appeal and with the relative definition of what constitutes a "well-founded" fear of imminent violence depending on whether it is a defendant's fear or the government's requires the Court to grant the petition.

Conclusion and Relief Sought

The defendant respectfully requests that the Court grant the defendant's petition for writ of certiorari for the reasons set forth.

Respectfully submitted,

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Appendix Index

911 F.3d 32 (1st Cir. 2018)

UNITED STATES of America, Appellee,

v.

Marcel HENDERSON, Defendant, Appellant.

No. 17-1362

United States Court of Appeals, First Circuit

December 19, 2018

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. Rya W. Zobel, *U.S. District Judge*] [Hon. Joseph L. Tauro, *U.S. District Judge*]

David A. F. Lewis on brief for appellant.

Andrew E. Lelling, United States Attorney, and Michael J. Crowley, Assistant U.S. Attorney, on brief for appellee.

Before Lynch, Stahl, and Barron, Circuit Judges.

OPINION

BARRON, Circuit Judge.

Marcel Henderson ("Henderson") was indicted in the United States District Court for the District of Massachusetts in April 2011 on one count of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). He was convicted of that offense after trial in October 2016, following intermittent pre-trial proceedings, and, in February 2017, he was sentenced to time served plus three weeks of imprisonment and three years of supervised release. Henderson now challenges his conviction and his sentence. For the reasons that follow, we affirm.

I.

Henderson was arrested in Boston, Massachusetts on January 2, 2011 after law enforcement found a firearm on his person pursuant to a traffic stop and pat-down frisk. Henderson filed a motion to suppress evidence of the firearm, for which the District Court held a three-day evidentiary hearing. Based on testimony, call transcripts, and other evidence adduced at the hearing, the District Court made the following findings of fact.

During an investigation of the Academy Homes Street Gang, law enforcement officials, including a detective with the Boston Police Department ("BPD"), intercepted a string of phone calls -- from December 30, 2010 to January 1, 2011 -- that suggested that Henderson was armed and committing violent crimes targeting members of that gang. The intercepts also revealed that the gang may also have been targeting Henderson, who had earlier been shot

by the gang. The detective briefed other officers on the morning of January 2, 2011 about the information gleaned from the phone calls and the potential danger that Henderson posed. The

detective specifically alerted team members that he expected Henderson to be armed. Officers soon thereafter "established surveillance" near Hendersons fiancées residence in Boston, where Henderson often stayed.

That same afternoon, the detective and a special agent with the Federal Bureau of Investigation ("FBI") observed Henderson exit his fiancées residence and engage in an "animated conversation" with another man on the public street in front of the residence. They saw Henderson reach toward his waist with his right hand, at which point the other man threw his hands up and backed away.

The detective broadcast his observations of the altercation, and his belief that Henderson possessed a firearm, by radio to a BPD police officer and a lieutenant with the Massachusetts State Police ("MSP"). They were each stationed nearby and had taken part in the detectives earlier briefing. Immediately after the altercation, the BPD officer and MSP lieutenant saw Henderson, his fiancée, and their child enter a car. The BPD officer and MSP lieutenant followed the car until it made an illegal U-turn and pulled over to the side of the road. When Henderson exited the vehicle, the officers activated their emergency lights and pulled up behind the car.

After the MSP lieutenant informed Henderson of the traffic violation, the BPD officer conducted a pat-down frisk. The FBI special agent exited his own vehicle to assist the two officers, and the three of them pulled a firearm away from Henderson and arrested him on the scene.

II.

Henderson challenges his conviction on two grounds. The first concerns the District Courts denial of his motion to suppress evidence of the firearm. The second concerns the District Courts grant of the governments motion to bar him from asserting a necessity defense.

A.

Henderson argues that, contrary to the District Courts ruling denying his motion to suppress, the stop and frisk violated the Fourth Amendment to the United States Constitution. The Supreme Court has held that, under the Fourth Amendment, a law enforcement officer may conduct a brief, investigatory stop of a person, as well as a protective frisk, when the officer effecting the stop has reasonable suspicion to believe that "criminal activity may be afoot and that the persons with whom [the law enforcement officer] is dealing may be armed and presently dangerous[.]" *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The Court has further explained that reasonable suspicion entails a "level of suspicion [that] ... is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause." *Navarette v. California,* 572 U.S. 393, 397, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014) (quoting *United States v. Sokolow,* 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)). We review the District Courts legal conclusion that there was the requisite reasonable suspicion de novo and its factual findings and credibility assessments underlying that conclusion for clear error. *See United States v. Flores,* 888 F.3d 537, 543 (1st Cir. 2018).

Henderson does not dispute that, if we accept the District Courts factual findings, there was reasonable suspicion. After all, the District Court found that the law enforcement

officials who conducted the stop and frisk -- and subsequently effected the arrest -- had been

briefed on the contents of a wiretap that indicated that Henderson was involved in dangerous criminal activity. And, the District Court found, the officials also had knowledge of -- and direct observation of, in the FBI agents case -- Hendersons altercation with another man, in which Hendersons actions implied that he was armed.

But, Henderson does contend that the factual findings were clearly erroneous in key respects and thus that the District Courts denial of the motion to suppress must be reversed. He does so first by making much of the fact that the District Court refused to credit the testimony by law enforcement officers that they had witnessed Henderson driving the vehicle on the day of his arrest. The District Court instead credited Hendersons and his fiancées testimony that Henderson was physically incapable of driving.

Henderson contends that, by finding that the officers were not credible in this one way, the District Court clearly erred in finding that they were credible in other key ways. And, Henderson contends, if that key testimony was not credible, then the District Court lacked any basis for concluding that the officers had the requisite reasonable suspicion to effect the stop and perform the pat down.

The District Court gave cogent reasons, however, for its decision not to credit the testimony about whether Henderson drove the car that do not in any way cast doubt on its reasons for finding the officers testimony otherwise credible.[1] And, as we have explained before, "[t]he fact that the district court disbelieved one part of the officers testimony but credited other parts does not render suspect the district courts credibility finding." *United States v. Ivery,* 427 F.3d 69, 72 (1st Cir. 2005).

Henderson separately challenges the District Courts factual findings on a number of specific grounds. In particular, he argues that the officers lied when they testified that Henderson was "waving his arms around before he got into the car," that there existed an affidavit that confirmed Hendersons version of events and thus undermined the account given by the officers, that the officers vantage point would not have allowed them to observe Henderson having a conversation or getting into the car, that the officers notes from the arrest did not reflect a belief that Henderson was armed, and that the government allegedly conceded that there was no traffic violation even though the officers had testified that there was. But, Hendersons assertions either mischaracterize the record or provide one of "two competing interpretations of the evidence, [such that] the district courts choice of one of them cannot be clearly erroneous." *United States v. Cruz Jiménez,* 894 F.2d 1, 7 (1st Cir. 1990). Accordingly, we reject his challenge to the denial of his motion to suppress.

B.

We turn next to Hendersons challenge to the District Courts grant of the governments motion in limine to preclude him from raising a justification defense. Henderson opposed the governments motion on the ground that he had made a sufficient showing to raise a necessity defense at trial because members of the

Academy Homes Street Gang had threatened to kill him imminently.

The District Court granted the governments motion. In doing so, it concluded that Henderson

had failed to offer sufficient evidence "to establish that [he] was under an unlawful and imminent threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury at the time he was found in possession of a firearm on January 2, 2011." *See Dixon v. United States,* 548 U.S. 1, 4 n.2, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006); *United States v. Leahy,* 473 F.3d 401, 409 (1st Cir. 2007). In reaching this conclusion, the District Court noted that "imminence" requires a real emergency giving rise to immediate danger to oneself or to a third party. *See United States v. Maxwell,* 254 F.3d 21, 27 (1st Cir. 2001).

Reviewing de novo, *see United States v. Lebreault-Feliz,* 807 F.3d 1, 4 (1st Cir. 2015), we agree with the District Court. The record simply does not support Hendersons assertion that he faced an *imminent* threat to his life.

III.

Finally, we turn to Hendersons sentence. He contends that the District Court erred in concluding that either of his prior Massachusetts convictions, for, respectively, armed robbery and armed assault, qualified as a conviction for a "crime of violence" for purposes of U.S.S.G. § 2K2.1(a)(4)(A). *See* U.S.S.G. § 2K2.1(a)(4)(A) (applying a base level offense of 20 for "[u]nlawful receipt, possession, or transportation of firearms or ammunition," if "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of ... a crime of violence" as defined by § 4B1.2(a), *see* U.S.S.G. § 2K2.1 cmt. 1). Henderson preserved this challenge below, and thus our review is de novo. *See United States v. Benítez-Beltrán,* 892 F.3d 462, 465-66 (1st Cir. 2018).[2]

The District Court did conclude that his prior Massachusetts armed robbery conviction qualified as a "crime of violence" for purposes of § 2K2.1(a)(4)(A). And, on that basis, the District Court assigned Henderson a base offense level ("BOL") of 20. *See* U.S.S.G. § 2K2.1(a)(4)(A).

The government concedes on appeal that Hendersons armed robbery conviction does not qualify as a "crime of violence" for purposes of that guideline. The government also makes no argument that his armed assault conviction does so qualify. Thus, the government does not dispute that the District Court committed a "significant procedural error" by calculating Hendersons Guidelines sentencing range ("GSR") based on the BOL of 20 that it assigned him pursuant to § 2K2.1(a)(4)(A). *See Gall v. United States,* 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007) (stating that improper calculation of the Guidelines range constitutes "significant procedural error").

Nevertheless, the government argues, the District Courts GSR calculation error was harmless. In pressing this contention,

the government proceeds on the understanding that, absent the District Courts application of § 2K2.1(a)(4)(A), Hendersons BOL would have been as low as 12. And, it would appear that -- assuming Hendersons criminal history category remained the same -- the lower BOL would have resulted in Hendersons GSR being less than half of the GSR that the District Court assigned to him. U.S.S.G. ch. 5, pt. A (sentencing table). Moreover, the government does not disagree that remand is often appropriate when the District Court incorrectly calculates the GSR. *See Williams v. United States,* 503 U.S. 193, 203, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992).

Still, the government is right that remand is not appropriate when there are sufficient

indications in the record that, "despite application of an erroneous Guidelines range," there is no "reasonable probability of a different outcome." *See Molina-Martinez v. United States,* __ U.S. __, 136 S.Ct. 1338, 1346, 194 L.Ed.2d 444 (2016). And, the government argues, that is the case here because the District Courts sentencing rationale was expressly based on its concerns about permitting Hendersons immediate release from prison and thus would not have changed even if the GSR had been lower.

The government emphasizes in this regard that the District Court explained at sentencing that, because Henderson had just spent six years in prison, it was "not appropriate" for him to leave prison immediately and that instead, his sentence would provide a "structured transition." And, the government notes, the District Court expressly found that this "structured transition" required keeping Henderson in prison for three additional weeks in order to "allow probation to find a bed for [Henderson] in a halfway house in a residential re-entry," where Henderson would then serve the first three months of his three-year supervised release period.

To be sure, the District Court never expressly stated that it would have imposed the same sentence even if the GSR were the lower one that would have applied but for the application of § 2K2.1(a)(4)(A). *Cf., e.g.*, *United States v. Acevedo-Hernández,* 898 F.3d 150, 172 (1st Cir. 2018) ("In light of this clear indication in the record that the court would have imposed the same sentence even without any of the alleged errors, we find that any errors in calculating [the defendants] GSR would have been harmless."). But, the District Courts clearly stated sentencing rationale -- that the sentence of time served and supervised release of three years was necessary for Hendersons "structured transition" from prison and that the additional three weeks imprisonment was necessary so that the Probation Office could find Henderson space at a halfway house -- could equally apply to sentencing under a lower BOL of 12. Henderson has failed to show prejudice or to rebut the governments argument that any error was harmless.

IV.

For the foregoing reasons, Hendersons conviction and sentence are affirmed .

Notes:

[1] Four months after the District Courts denial of his motion to suppress, Henderson filed a motion for reconsideration. The District Court denied that motion for reconsideration, but Henderson does not challenge that ruling on appeal.

[2] We note that, below, Henderson objected to the Probation Offices determination, in its presentence report, that he was an armed career criminal based on three prior convictions that the Probation Office classified as predicate offenses for purposes of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). The District Court agreed with Henderson, finding that at least one of his three convictions did not qualify as an ACCA predicate, and thus did not sentence Henderson as an armed career criminal under ACCA. Therefore, although Henderson presses in his briefing to us that his other two convictions also did not qualify as ACCA predicates, we may bypass that question. *See United States v. Starks,* 861 F.3d 306, 315 n.10 (1st Cir. 2017).

Certificate of Service

I hereby certify that I have, on March 19, 2019, served two copies of the attached Petitioner's Petition for Writ of Certiorari upon opposing counsel by postage prepaid mail addressed to:

Solicitor General
Department of Justice
950 Pennsylvania Avenue NW, Room 5614
Washington, D.C. 20530-0001

_____
David Lewis