No. _____

In the

Supreme Court of the United States

_____

Timothy Paul Malone,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

I. Whether the lower court has misconstrued and misapplied U.S.S.G. Chapter 5, Part A, Application Note 2 by failing to limit the offense level to a level 43 before granting a reduction in the offense level for acceptance of responsibility.?

PARTIES TO THE PROCEEDING

Petitioner is Timothy Paul Malone, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Timothy Paul Malone*, 758 Fed. Appx. 354 (5th Cir. March 20, 2019) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on March 20, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This Petition involves the application of U.S.S.G. Chapter 5, application note 2, which provides states:

> In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.

This Petition also involves 18 U.S.C. § 3553(a)(5) which provides that a sentencing court shall consider:

> (5) any pertinent policy statement –
>
> > (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28 United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such

> amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of Title 28); and
>
> (B) that, except as provided in section 3752(g), is in effect on the date the defendant is sentenced.

18 U.S.C. § 3553(a)(5).

The Fifth Amendment to the United States Constitution provides the following:

> 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.

STATEMENT OF THE CASE

Appellant Timothy Paul Malone was indicted on two counts of sexual exploitation of children and one count of attempted exploitation of children, in violation of 18 U.S.C. § 2251(a) and (e). (ROA.9-13).[1] On November 8, 2017, Malone pleaded guilty to all three counts of the indictment without a plea agreement. (ROA.38-48). Malone stipulated in a factual resume that he produced separate visual depictions of two separate minors engaging in sexually explicit conduct. (ROA.39-43). Malone also stipulated that he attempted to create a video of a third minor engaging in sexually explicit conduct. (ROA.42).

After the guilty plea, a pre-sentence report (PSR) was prepared. The three counts were not grouped. Regarding Count 1, the PSR found an adjusted offense level 38. (ROA.150). Regarding Count 2, the PSR found an adjusted offense level 40. (ROA.151). Regarding Count 3, the PSR found an adjusted offense level 38. (ROA.151). The PSR added three units to the adjusted offense level of 40 for a combined adjusted offense level 43. (ROA.152).

The PSR then added five levels for a pattern of prohibited sexual activity, pursuant to U.S.S.G. § 4B1.5. (ROA.152). This increased the combined adjusted offense level to a level 48. After a three-level downward adjustment for acceptance of responsibility, the PSR found that Malone's total offense level was a level 43 (the top of the sentencing table). (ROA.152). Mr. Malone had 0 criminal history points, and therefore received a criminal history category I. (ROA.154). At a criminal history

[1] For the convenience of the Court and the parties, counsel is including citations to the record on appeal in the court below.

category I and a total offense level 43, Mr. Malone's advisory Guideline imprisonment range was Life Imprisonment. (ROA.160). However, since each of the three counts of convictions carried a statutory maximum sentence of 30 years, Mr. Malone's advisory imprisonment range was 1080 months imprisonment. (ROA.160). The PSR recommended consecutive sentences on all three counts, pursuant to U.S.S.G. § 5G1.2(d). (ROA.160).

Mr. Malone objected to the offense level used by the PSR. Specifically, Malone objected to the PSR's decision to continue adding offense levels beyond level 43 before applying a three level reduction for acceptance of responsibility. Malone's position was that the probation officer should have used a level 43 and reduced that level by three levels for acceptance of responsibility, resulting in a total offense level of 40. (ROA.173). That would have reduced Malone's imprisonment range to 292-365 months, rather than 1080 months.

The probation officer filed an addendum rejecting this objection. (ROA.190). Malone persisted in this objection at sentencing, and the district court overruled it. (ROA.120). The district court sentenced Malone to 360 months imprisonment on each of the three counts of conviction, to run consecutively to each other, for a total aggregate sentence of 1080 months. (ROA.60,136-37). After the imposition of sentence, the defendant re-urged his objections to the sentence. (ROA.138).

REASONS FOR GRANTING THIS PETITION

I. This Court should grant review to decide whether U.S.S.G. § Chapter 5, application note 2 requires the lower courts to limit the offense level to a level 43 before applying the reduction for acceptance of responsibility.

Chapter 5, Part A of the Guideline Manual contains a table specifying the recommended sentence depending on the defendant's total offense level and criminal history category. The highest offense level recognized by the table is 43. And an application note states as follows:

> In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.

USSG Ch. 5A, comment (n. 2).

Here, the district court subtracted three points for acceptance of responsibility from an offense level that exceeded 43 (Level 48) , rather than subtracting it from level 43 (the top of the sentencing table). *See* (ROA.152). The Fifth Circuit has approved that practice in *United States v. Wood,* 48 F.3d 530, 1995 WL 84100 (5th Cir. 1995)(unpublished), However, it admitted that "the Sentencing Guidelines cannot be championed as a model of clarity and simplicity in statutory language" on this point. *Wood,* 1995 WL 84100, at *6.[2]

[2] Because *Wood* was decided prior to January 1, 1996, this case is binding precedent in the Fifth Circuit. *See* Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit, Rule 47.5.3.

Malone contends that the Fifth Circuit has misapplied Chapter 5 and the application note 2 for following two reasons.

First, the Note distinguishes between a "total offense level" and an "offense level." It limits the "total offense level" to no less than 1, but caps the "offense level" at 43. This demonstrates that the Commission knew how to specify the end result of the Guidelines' arithmetic operations when it wished to do so. Its failure to specify that the "total offense level" would not exceed 43 strongly suggests that it intended to cap the offense level at 43 at any point in the process of calculation.

Second, the interpretation of the Guideline applied in *Wood* would eliminate any value to the defendant for pleading guilty in cases where the offense level reaches 46 or higher. This would frustrate the "legitimate societal interests" recognized in U.S.S.G. § 3E1.1, such as rewarding efficiency and giving value to meaningful remorse. U.S.S.G. § 3E1.1, comment. (*backg'd*).

Had the court subtracted three levels from 43 rather than a higher offense level of 48, the final total offense level would have been 40, the criminal history category would have been I, and the Guideline imprisonment range would have been 292-365 months. Just as important, once the advisory imprisonment range was reduced to 292-365, then this Court would not have had to run the sentences consecutively to achieve the total aggregate sentence. *See* U.S.S.G. §5G1.2(d). In other words, a sentence of up to 360 months could have been achieved by imposing that sentence on all three counts and running them concurrently. A sentence of 365 months (the top of the advisory range) could have been achieved by imposing a 360-month sentence on

all three counts to run concurrently except that 5 months on one of the counts would have been ordered to run consecutively. In fact, this is exactly the result Chapter 5 would have recommended. *See* U.S.S.G. § 5G1.2.

The applicable language in Chapter 5A and the application notes of the Guidelines, unambiguously calls on the Court to apply an offense level of 43 when the offense level exceeds 43. The language unmistakably limits the offense level to 43. Section 3E1.1 specifically directs that the reduction for acceptance of responsibility is to be subtracted from "the offense level." U.S.S.G. §3E1.1. The district court and the Fifth Circuit have misapplied the clear language of the Guidelines. Malone was substantially harmed and prejudiced by the misapplication of the guidelines in this case. With a correct application of the guidelines, his imprisonment range would have been limited to 292-365 months. Instead, he received a sentence of 1080 months – 90 years. This simple misapplication has resulted in a grossly unjust sentence and a violation of due process.

This Court has previously stated that it disfavors the resolution of Guideline issues in its *certiorari* docket. *See Braxton v. United States*, 500 U.S. 344, 348 (1991). However, there are special reasons why the Court should address this issue. First, this Court's rationale for withholding review of guideline issues is that the Sentencing Commission can address inconsistencies and misapplications of the guidelines and application notes. However, this application note in question has been in place since the inception of the guidelines in November 1987.

Second, the courts of appeals who have addressed this issue consistently seem to ignore the plain language of application note 2. *See United States v. Caceda*, 990 F.2d 707, 710 (2d Cir. 1993) ("We believe it evident that downward adjustments must be from the total base offense level plus upward adjustments even if that total exceeds 43.); *United States v. Walpole*, 543 Fed. Appx. 224, 226 (3d Cir. 2013) (applying the downward adjustment for acceptance of responsibility before reducing the offense level to 43); *United States v. Houser*, 70 F.3d 87, 92 (11thCir. 1995) (applying the level 43 cap after all the upward and downward adjustments are made); *United States v. Randall*, 924 F.2d 790 (5th Cir. 2019) (applying the three level reduction for acceptance of responsibility before adjusting the level to the cap of 43); *United States v. Craig*, 808 F.3d 1249, 1253 (10th Cir. 2015); *United States v. Brown*, 843 F.3d 74, 79 (2d Cir. 2016) (applying the reduction for acceptance of responsibility before reducing the offence level to the cap of 43).

Third, the misapplication of Chapter 5 and application note 2 has a devastating effect on a defendant's guideline sentence – as has been best illustrated here by Mr. Malone's case. Rather than Mr. Malone looking at a 30-year sentence, he is now facing a 90-year sentence. Not only did he receive no benefit from pleading guilty, he actually was punished by a 300 percent increase in his sentence, simply because the courts below will not apply the plain language of the application note. This case is a rare situation where review is not only warranted, it is compelled by fairness and due process.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 18th day of June, 2019.

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