Capital Case

Case No. 19-5232

In the Supreme Court of the United States

Ricky Ray Malone,
Petitioner,
v.
Tommy Sharp, Interim Warden,
Oklahoma State Penitentiary,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT S. JACKSON*
Okla. Bar # 22189
925 N.W. 6th Street
Oklahoma City, OK 73106
Telephone: (405) 232-3450
Facsimile: (405) 232-3464
bob@bobjacksonlaw.com

SARAH M. JERNIGAN
Okla. Bar # 21243
Assistant Federal Public Defender
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Telephone: (405) 609-5975
Facsimile: (405) 609-5976
sarah_jernigan@fd.org

* Counsel of Record

COUNSEL FOR PETITIONER, RICKY RAY MALONE

Dated this 22nd day of August, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

REPLY TO BRIEF IN OPPOSITION 1

I. This Court Should Grant the Writ Because Subjecting Legal Claims, Which Already Have Satisfied a Built-in Prejudice Component, to a Second Layer of Harmless Error Analysis Is Fundamentally at Odds with Decisions of This Court 2

A. The First Question Presented in Mr. Malone's Petition for Writ of Certiorari is Not Superfluous. 2

B. Respondent Attempts to Shift Focus From the State Court Decision . 4

C. The State Court Decision is Unequivocal - Mr. Malone's Claim of Instructional Error Was Subjected to Two Levels of Prejudice Review 5

II. This Court Should Grant the Writ Because the Federal Courts Are Inconsistent in Considering the Synergy Amongst Acknowledged Errors When Assessing Whether the Cumulative Effect of the Errors Results in a Violation of Constitutional Rights 8

CONCLUSION 12

APPENDICES TO REPLY TO BRIEF IN OPPOSITION:
(Previous appendices A through I were appended to Cert. Petition)

APPENDIX J: *Pinkney v. State*, No. F-2013-1073 (Okla. Crim. App. Jan. 12, 2015) (unpublished)

APPENDIX K: *Mikado v. State*, No. F-2013-788 (Okla. Crim. App. Dec. 18, 2014) (unpublished)

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Brecht v. Abrahamson, 507 U.S. 619 (1993) 2

Chambers v. Mississippi, 410 U.S. 284 (1973) 10

Davis v. Ayala, __U.S.__, 135 S. Ct. 2187 (2015) 4

Greer v. Miller, 483 U.S. 756 (1987) 7

Harrington v. Richter, 562 U.S. 86 (2011) 4

Kyles v. Whitley, 514 U.S. 419 (1995) 7

FEDERAL CIRCUIT COURT CASES

Albrecht v. Horn, 485 F.3d 103 (3d Cir. 2007) 9

Allen v. Secretary, Florida Department of Corrections, 611 F.3d 740
(11th Cir. 2010) 9, 10

Cargle v. Mullin, 317 F.3d 1196 (10th Cir. 2003) 9, 11

Fisher v. Angelone, 163 F.3d 835 (4th Cir. 1998) 9

Grant (*Donald*) *v. Royal*, 886 F.3d 874 (10th Cir. 2018) 9

Grant (*John*) *v. Trammell*, 727 F.3d 1006 (10th Cir. 2013) 9

Littlejohn v. Royal, 875 F.3d 548 (10th Cir. 2017) 11

Malone v. Carpenter, 911 F.3d 1022 (10th Cir. 2018) 5, 10

Newmiller v. Raemisch, 877 F.3d 1178 (10th Cir. 2017) 5

Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996) 9

Williams v. Anderson, 460 F.3d 789 (6th Cir. 2006) 9

FEDERAL STATUTES

28 U.S.C. § 2254 . . . . 2, 4

STATE COURT CASES

Heathco v. State, F-2013-547 (Okla. Crim. App. Feb. 6, 2015) 6, 7, 8

Hogan v. State, 139 P.3d 907 (Okla. Crim. App. 2006) 5, 6

Malone v. State, 168 P.3d 185 (Okla. Crim. App. 2007) 4, 6, 11

Mikado v. State, No. F-2013-788 (Okla. Crim. App. Dec. 18, 2014) 7, 8

Pinkney v. State, No. F-2013-1073 (Okla. Crim. App. Jan. 12, 2015) 7, 8

REPLY TO BRIEF IN OPPOSITION

Respondent claims the first question presented in Petitioner's Petition for Writ of Certiorari – whether the Oklahoma Court of Criminal Appeals' (OCCA) subjecting a constitutional error to a second layer of harmless error review after that error had already been found prejudicial pursuant to plain error review – is merely a "superfluous" or inconsequential question not deserving of certiorari. Brief in Opposition at 13-17. Next, Respondent claims the second question presented by Mr. Malone, whether federal courts must consider the synergy amongst acknowledged errors upon conducting error review, is merely a request for the court below to write its opinion in a different manner and claims that the habeas context makes this case a poor vehicle to resolve a cumulative error question. Brief in Opposition at 27. Mr. Malone disagrees with Respondent's assertions as to both of his questions presented.

For the reasons urged in his Petition for Writ of Certiorari (Cert. Petition) and herein, Mr. Malone respectfully submits this Court should grant certiorari to emphasize habeas petitioners need not show they have been doubly harmed as a result of a constitutional violation prior to garnering relief and also to seek clarification from this Court as to whether the synergy analysis is a necessary consideration in a federal court's cumulative error analysis conducted under this Court's precedent.

I. This Court Should Grant the Writ Because Subjecting Legal Claims, Which Already Have Satisfied a Built-in Prejudice Component, to a Second Layer of Harmless Error Analysis Is Fundamentally at Odds with Decisions of This Court.

A. The First Question Presented in Mr. Malone's Petition for Writ of Certiorari is Not Superfluous.

Respondent presents a strained argument to support denial of certiorari. That argument alleges Mr. Malone somehow conceded below that the OCCA's subjecting his erroneous jury instructions to a second layer of prejudice review after finding those instructions to constitute plain error, which included a prejudice component, is inconsequential or otherwise superfluous to federal habeas review. Brief In Opposition at 14-15. To the contrary, Mr. Malone has argued throughout federal habeas proceedings that the state court's stacking of prejudice inquiries was contrary to clearly established federal law, and thus, offensive to 28 U.S.C. § 2254(d)(1). *See, e.g.*, Petition for Writ of Habeas Corpus at 27-30 (Doc. 24 Oct. 6, 2014); Case Management Statement of Issues and Request for a Certificate of Appealability at 16-17 (April 21, 2017). It was only when the federal circuit court limited its Certificate of Appealability Grant (COA) grant to "whether giving the erroneous voluntary intoxication instructions was harmless error under *Brecht v. Abrahamson*, 507 U.S. 619 (1993)" that Mr. Malone respectfully curtailed his arguments in accordance with this limited COA. Tenth Circuit Order (June 23, 2017).

Respondent acknowledges the COA was initially limited to not include the matter for which Mr. Malone now seeks certiorari, but somehow faults Mr. Malone for following the circuit court's directive. Brief in Opposition at 14. Many of Mr. Malone's arguments, of which Respondent is critical, were raised in his principal Reply Brief below and aimed at Respondent's apparent disregard for the limited COA. Brief in Opposition at 14-15; *see also* Reply Brief of Petitioner at 1-8 (July 20, 2018). It was only after the Circuit Court expanded the COA and ordered supplemental briefing that Mr. Malone was permitted to present his argument that the OCCA's subjecting an acknowledged constitutional error, which satisfied the built-in prejudice component of Oklahoma's plain error standard, to a second layer of harmless error review pursuant to *Chapman* is contrary to clearly established federal law. *See* Order (expanding Certificate of Appealability) at 1 (July 18, 2018). Just because Mr. Malone's theories of relief were initially limited by the circuit court, he is not now presenting a superfluous or insignificant matter in his Petition for Writ of Certiorari. Instead, he presents the same significant question that he has presented in the federal proceedings below – whether this Court's prior decisions allow a prejudicial constitutional error to subsequently be deemed harmless.[1]

---

[1] Mr. Malone recognizes this question would appear rhetorical in that the concept of prejudicial but harmless constitutional error would seem a true impossibility, oxymoron, non-sequitur, or the like. However, this is the circumstance created by the OCCA's stacking of prejudice inquiries.

B. Respondent Attempts to Shift Focus from the State Court Decision.

Respondent argues that because Mr. Malone's case is not before the Court on direct review, the arguments concerning the state court's double prejudice review are misplaced. Instead, Respondent argues this Court must consider only how the "Tenth Circuit decided an important question of federal law in a way that conflicts with a decision of this Court." Brief in Opposition at 18. The OCCA's decision is critically flawed. That court found the voluntary intoxication instructions to constitute plain error, including a finding that the error affected Mr. Malone's substantial rights – meaning the outcome of trial was affected – and then somehow found the same instructions to be harmless beyond a reasonable doubt. *Malone v. State*, 168 P.3d 185, 201-03 (Okla. Crim. App. 2007).

Understandably, Respondent would like to shift focus away from the state court's flawed analysis. However, the scope of federal habeas review under the AEDPA undermines Respondent's argument. The focus of federal habeas review is on the reasonableness of a state court decision. 28 U.S.C. § 2254(d). The main event for purposes of federal habeas review is the state court decision. *See, e.g.*, *Davis v. Ayala*, __U.S.__, 135 S. Ct. 2187, 2198 (2015) ("Section 2254(d) thus demands an inquiry into whether a prisoner's 'claim' has been 'adjudicated on the merits' in state court; if it has, AEDPA's highly deferential standards kick in.") (citing *Harrington*

v. Richter, 562 U.S. 86, 103 (2011)). Therefore, Mr. Malone's arguments about the state court's analysis are entirely proper for this proceeding.

C. The State Court Decision is Unequivocal - Mr. Malone's Claim of Instructional Error Was Subjected to Two Levels of Prejudice Review.

In Oklahoma, plain error entails: 1) an actual error (i.e., deviation from a legal rule); 2) that is plain or obvious; and 3) that affects a defendant's substantial rights (i.e., affects the outcome of the proceeding). *Hogan v. State*, 139 P.3d 907, 923 (Okla. Crim. App. 2006). Here, the Tenth Circuit determined, albeit erroneously, that the OCCA's finding that the erroneous voluntary intoxication instructions constituted plain error was limited to the subsidiary finding that "the error is plain or obvious." *Malone v. Carpenter*, 911 F.3d 1022, 1032 (10th Cir. 2018). Interestingly, Respondent never took this position below and ostensibly does not even go so far as to now adopt the circuit court's rationale that the OCCA's plain error holding was limited. Instead, Respondent, in a footnote, argues that the circuit court was free to affirm on "any basis supported by the record." Brief in Opposition at 19 n.9 (citing *Newmiller v. Raemisch*, 877 F.3d 1178, 1194 (10th Cir. 2017)). The problem for Respondent's supported-by-the-record argument is that the OCCA was not equivocal in its holding that the jury instructions constituted plain error, nor did the state court limit its findings to only a particular prong of its plain error inquiry. *See* Petition for

Writ of Certiorari at 17 (quoting *Malone*, 168 P.3d at 201-03).

Also, as shown in Mr. Malone's Cert. Petition, the OCCA's subjecting plain error to a second layer of harmlessness review is not limited to Mr. Malone's case. Cert. Petition at 17-18 (citing *Heathco v. State*, F-2013-547 (Okla. Crim. App. Feb. 6, 2015) (unpublished) (previously attached as Appendix I to Mr. Malone's Petition)). Respondent claims *Heathco* is unclear and suggests the OCCA didn't actually mean what it said when it found the alleged error affected Heathco's substantial rights. Brief in Opposition at 20 n.10. Respondent concedes, for purposes of plain error review, a substantial rights violation "mean[s] the error affected the outcome of the proceeding." *Id*. (citing *Hogan*, 139 P.3d at 923). Yet, Respondent claims that despite finding all of the components of plain error in *Heathco*, somehow the OCCA "had not found the entire plain error test satisfied," which purportedly explains the redundant application of a second layer of harmlessness review. *Id*. Mr. Malone respectfully disagrees. In *Heathco* and in this case, the OCCA did exactly what it said it was doing: It found plain error, which includes a prejudice component, and then wrongfully subjected that error to a second round of harmlessness review to deny relief. Respondent does not attempt to counter OCCA Judges Lewis and Johnson's observation in their concurrence to *Heathco* that a second layer of harmlessness review "does not comport with traditional plain error review." *See* Cert. Petition,

Appx. I (*Heathco*, Johnson & Lewis, JJ., concurring in result).

In addition to *Heathco*, two more unpublished opinions demonstrate the OCCA subjects plain error to a second prejudice determination. *See Pinkney v. State*, No. F-2013-1073 (Okla. Crim. App. Jan. 12, 2015) (unpublished) (opinion attached hereto as Appendix J); *Mikado v. State*, No. F-2013-788 (Okla. Crim. App. Dec. 18, 2014) (unpublished) (opinion attached hereto as Appendix K). *Pinkney* and *Mikado* both rebut Respondent's assertion that the OCCA merely "applies *Chapman* to determine whether the [violation of a substantial right] prong of its plain error test is satisfied."[2] Brief in Opposition at 21. In both cases, the state court unequivocally found all prongs of the plain error inquiry satisfied and then subjected those plain errors to a second harmless error determination. *Pinkney* at 3 ("Having determined that plain error occurred, we must determine whether said error was harmless."); *Mikado* at 6-8 (reviewing for harmless error after finding that plain error occurred). And, in both

---

[2] Ostensibly as a fall-back to this position, Respondent seemingly argues that "assuming the OCCA did find all three prongs satisfied, the error could be harmless." Brief in Opposition at 20. Respondent even goes as far as arguing this Court's prior opinions would condone classing as harmless an error which deprives a defendant of a fundamentally fair trial. *Id*. at 21 (citing *Greer v. Miller*, 483 U.S. 756, 765 n.7 (1987)). Respondent misreads *Greer*, which merely posits that if an error were found harmless beyond a reasonable doubt, it goes without saying that the same error did not render a trial fundamentally unfair. 483 U.S. at 765 n.7. In any event, Mr. Malone respectfully disagrees with Respondent and asserts the OCCA's stacking of prejudice inquiries is contrary to *Kyles v. Whitley*, 514 U.S. 419 (1995). *See* Cert. Petition at 13-15.

cases, OCCA Judge Johnson expressed that she could not join in the majority's plain error analysis because "[o]nce a defendant meets his or her burden on the three elements of plain error . . . our plain error review is complete and we may exercise our authority to correct [the] otherwise forfeited error." *Pinkney* (Johnson, J., concurring in part/dissenting in part); *Mikado* (Johnson, J., concur in results). Considering *Heathco*, *Pinkney*, and *Mikado*, it is clear the plain error that occurred in Mr. Malone's case was erroneously subjected to a second layer of prejudice review.

For the reasons presented in his Petition for Writ of Certiorari and herein, Mr. Malone respectfully requests the Court grant certiorari to emphasize habeas petitioners need not show they have been doubly harmed as result of a constitutional violation in order to obtain relief.

II. This Court Should Grant the Writ Because the Federal Courts Are Inconsistent in Considering the Synergy Amongst Acknowledged Errors When Assessing Whether the Cumulative Effect of the Errors Results in a Violation of Constitutional Rights.

Respondent's entire argument centers around labeling Petitioner's question as a search for specific wording, i.e., a rewritten opinion. Brief in Opposition at 27-29. Petitioner seeks no such thing. Instead, Mr. Malone seeks clarification from this Court as to whether the synergy analysis is a necessary consideration in the cumulative error analysis conducted under this Court's precedent. Indeed, simply stating the proper standard of review, as the Tenth Circuit did here, does not ensure

a court has applied that correct standard. And, pursuant Respondent's own acknowledgment, this Court's "power is to correct wrong judgment[s]." Brief in Opposition at 30. Petitioner's question is properly before this Court.

Respondent next claims there is no circuit split on the issue. Respondent acknowledges "the Tenth Circuit recognized its own law that errors might operate in a synergistic fashion." Brief in Opposition at 30 n.15. *See also John Grant v. Trammell*, 727 F.3d 1006, 1026 (10th Cir. 2013) (noting the synergistic effect of errors is grounds for relief); *Donald Grant v. Royal*, 886 F.3d 874, 956 (10th Cir. 2018) (declining to apply the "synergy principle of *Cargle*" due to petitioner's failure to allege same). And, Mr. Malone cited multiple cases by various circuits that incorporated the synergy analysis into any cumulative error review. Cert. Petition at 26-27. Respondent does nothing to distinguish these cases on that fact; the only contention Respondent makes is that case law has not been provided to establish other circuits have either not recognized the synergistic effect analysis or have failed to consistently apply the standard. A cursory search reveals the inconsistent and nonexistent application amongst other circuits. *See*, *e.g.*, *Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2007); *Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998); *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006); *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996); *Allen v. Secretary, Florida Department of*

Corrections, 611 F.3d 740, 749-50 (11th Cir. 2010). And, it is the existence of such variation amongst the circuits that makes Petitioner's question a compelling issue to be answered by this Court's settling hand.

Respondent also takes issue with the question of clearly established law and whether claims of ineffective assistance of counsel can even count in a cumulative error analysis. Brief in Opposition at 30-33. Mr. Malone cited law establishing this right under constitutional due process standards. Petition at 22-23. Respondent premises his distinction of those cases, however, on the proclamation by this Court that its decision in *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) "establish[es] no new principles of constitutional law." Brief in Opposition at 30-32. This is not the distinction for which Respondent had hoped. Indeed, directly preceding that declaration, this Court premised its conclusion on the already-established "traditional and fundamental standards of due process." *Chambers*, 410 U.S. at 302. Thus, it is the traditional and fundamental standards upon which cumulative error review rests. Regardless, however, a definitive answer on the question of clearly established law is not needed. As settled previously, the circuit court's cumulative consideration was *de novo* here and absent AEDPA constraint. Cert. Petition at 22 n.7. *See also Malone v. Carpenter*, 911 F.3d 2011, 1040 (10th Cir. 2018).

Finally, Respondent questions whether claims of ineffectiveness can be included in any cumulative review because OCCA made no separate prejudice finding on these claims. Brief in Opposition at 32. The entire premise of cumulative error review is an extension of the harmless-error analysis and "aggregates all errors found to be *harmless*." *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003) (emphasis added). Thus, any argument that non-prejudicial errors by defense counsel are to be excluded has no basis in law or logic. *Id*. at 1200. After all, if errors were found prejudicial on their own, relief would have been granted and cumulative consideration rendered moot.

Respondent's argument that these three trial errors were not worthy of cumulative relief flies in the face of the OCCA's recognition that these errors had an effect on the "critical question" of Mr. Malone's defense and that "collectively [the errors were] more potent than the sum of their parts." *Malone*, 168 P.3d at 201; *Littlejohn v. Royal*, 875 F.3d 548, 571 (10th Cir. 2017). The circuit courts must provide synergy review to combat usurpation of relief where relief is due. This Court's settling hand is needed.

CONCLUSION

Mr. Malone respectfully requests this Court grant his Petition for Certiorari as to both questions presented. A grant of certiorari is appropriate to emphasize habeas petitioners need not show they have been doubly harmed by a constitutional error in order to garner relief and to make clear the standards upon which the circuit courts must review the combined effect of synergistic constitutional errors.

Respectfully submitted,

s/ *Robert S. Jackson*
ROBERT S. JACKSON*
Okla. Bar # 22189
925 N.W. 6th Street
Oklahoma City, OK 73106
Telephone: (405) 232-3450
Facsimile: (405) 232-3464
bob@bobjacksonlaw.com

SARAH M. JERNIGAN
Okla. Bar # 21243
Assistant Federal Public Defender
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Telephone: (405) 609-5975
Facsimile: (405) 609-5976
sarah_jernigan@fd.org

* Counsel of Record

COUNSEL FOR PETITIONER, RICKY RAY MALONE

Dated this 22nd day of August, 2019

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GEORGE H. PINKNEY,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2013-1073**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JAN 12 2015
MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant, George H. Pinkney, was tried by jury and convicted of Possession of Controlled Substance (Marijuana) in the Presence Of a Minor (63 O.S.Supp.2009, § 2-402(C)) (Count 1); Maintaining Place for Keeping Controlled Substance (63 O.S.Supp.2004, § 2-404(B)) (Count 3), both After Former Conviction of a Felony; Possession of Firearms After Former Conviction of Felony (21 O.S.Supp.2009, § 1283) (Count 2); and Possession of Drug paraphernalia (63 O.S.Supp.2004, § 2-405) (Count 4) in the District Court of Pittsburg County, Case Number CF-2011-322A. The jury recommended as punishment imprisonment for eight (8) years in Count 1; two years, each, in Counts 2 and 3; and incarceration in the county jail for thirty (30) days in Count 4. The trial court sentenced accordingly and imposed court costs and a $250.00 fee for the presentence investigation report. The trial court ordered the sentences in Counts 1, 2, and 3 to run consecutively but ordered the sentence in Count 4 to run concurrently with the sentence in Count 3. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

I. Fundamental error occurred when the jury was incorrectly instructed as to the applicable punishment range for Count 1, Possession of Controlled Substance (Marijuana) in the Presence Of a Minor.

II. The trial court abused its discretion when it refused to consider suspending a portion of Mr. Pinkney's sentence because he exercised his right to a jury trial.

After thorough consideration of these propositions and the entire record before us on appeal including the original records, transcripts, and briefs of the parties, we have determined that Appellant is entitled to relief as to Proposition One and modify his sentence.

In his first proposition of error, Appellant claims that the jury was incorrectly instructed as to the sentencing range for Possession of Controlled Substance (Marijuana) in the Presence Of a Minor After Former Conviction of a Felony in Count 1. Appellant concedes that he waived appellate review of this claim for all but plain error when he failed to challenge the trial court's instruction to the jury. *Romano v. State*, 1995 OK CR 74, ¶ 80, 909 P.2d 92, 120. We review his claim pursuant to the test set forth in *Hogan v. State*, 2006 OK CR 19, 139 P.3d 907. To be entitled to relief under the plain error doctrine, an appellant must prove: 1) the existence of an actual error (*i.e.*, deviation from a legal rule); 2) the error is plain or obvious; and 3) the error affected his substantial rights. *Id.*; *Simpson v. State*, 1994 OK CR 40, ¶¶ 2, 11, 23, 876 P.2d 690, 693-95. If these elements are met, this Court will correct plain error only if the error seriously affects the fairness, integrity or public reputation of

the judicial proceedings or otherwise represents a miscarriage of justice. *Id.* (quotations and citations omitted).

The State concedes that plain error occurred and that Appellant is entitled to relief. As the trial court erroneously instructed the jury as to both the minimum and maximum term of imprisonment for the charged offense, we agree. The trial court instructed the jury that the punishment for Count 1 after one (1) prior conviction was imprisonment in the State penitentiary for a term of six (6) years to life. The statutory range of punishment for the offense under the general enhancement provision of 21 O.S.Supp.2002, § 51.1(A)(3) is imprisonment not exceeding ten (10) years. 63 O.S.Supp.2009, § 2-402(C)(1). Therefore, we find that Appellant has shown the existence of an actual error. *McIntosh v. State*, 2010 OK CR 17, ¶ 9, 237 P.3d 800, 803. Because the statutory range of punishment for the offense is clearly set forth in the applicable statutes, we find that Appellant has shown that the error is plain and obvious. *Scott v. State*, 1991 OK CR 31, ¶ 12, 808 P.3d 73, 77. The improper instruction on the range of punishment affected Appellant's substantial rights. *Id.*; *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923; *Simpson*, 1994 OK CR 40, ¶ 24, 876 P.2d at 699.

Having determined that plain error occurred, we must determine whether said error was harmless. *Id.*; *Simpson*, 1994 OK CR 40, ¶¶ 19-20, 876 P.2d at 698 (reversal is not warranted for plain error if the error was harmless.). Reviewing the entire record, we cannot say that we have no grave doubt that the error had a substantial influence on the outcome of the jury's sentencing

decision. *Simpson,* 1994 OK CR 40, at ¶ 37, 876 P.2d at 702. To the contrary, the error seriously affected the fairness, integrity or public reputation of the trial. *McIntosh,* 2010 OK CR 17, ¶ 10, 237 P.3d 800, 803; *Simpson,* 1994 OK CR 40, ¶ 30, 876 P.2d at 701. Therefore, we find that modification of Appellant's sentence for Possession of Controlled Substance (Marijuana) in the Presence Of a Minor After Former Conviction of a Felony in Count 1 to imprisonment for five (5) years is the appropriate relief. *McIntosh,* 2010 OK CR 17, ¶¶ 10-11, 237 P.3d at 803; *Scott,* 1991 OK CR 31, ¶ 14, 808 P.3d at 77.

As to Proposition Two, we find that Appellant has not shown the existence of plain error in the trial court's sentencing decision. Appellant did not challenge the trial judge's sentencing decision before the trial court. Therefore, we find that he has waived appellate review of the issue for all but plain error. *Simpson,* 1994 OK CR 40, ¶ 23, 876 P.2d at 699. Reviewing Appellant's claim for plain error pursuant to the test set forth in *Hogan* we find that Appellant has not shown the existence of an actual error. *Hogan,* 2006 OK CR 19, ¶ 38, 139 P.3d at 923. We find that Appellant's constitutional rights as set forth in *United States v. Jackson,* 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138, 147 (1968), and *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled in part on other grounds in Alabama v. Smith,* 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989), were not violated. Appellant has not proven that the trial court refused to consider granting a suspended sentence solely on the basis of his request to have a jury trial. *Riley v. State,* 1997 OK CR 51, ¶¶ 18-19, 947 P.2d 530, 534-35; *Doyle v. State,* 1978 OK CR

44, ¶ 11, 578 P.2d 366, 369. Plain error did not occur. Proposition Two is denied.

In reviewing the record of this case, it is apparent there is an error in the District Court's Judgment and Sentence document. The Judgment and Sentence reflects that Appellant's sentence in Count Three is imprisonment for one (1) year. However, at sentencing, the trial court announced Appellant's sentence in Count Three as imprisonment for two (2) years. *See LeMay v. Rahhal*, 1996 OK CR 21, ¶ 18, 917 P.2d 18, 22 (the oral pronouncements of sentence controls over written conflicting orders). This is obviously the result of a clerical error and should be corrected. *Head v. State*, 2006 OK CR 44, ¶ 30, 146 P.3d 1141, 1149; *Arnold v. State*, 1987 OK CR 220, ¶ 9, 744 P.2d 216, 218; *Dunaway v. State*, 1977 OK CR 86, ¶ 19, 561 P.2d 103, 108. Upon remand, the district court is directed to enter an order *nunc pro tunc* correcting the Judgment and Sentence to accurately reflect that Appellant's sentence in Count Three is imprisonment for two (2) years.

DECISION

Appellant's convictions and sentences in Counts 2 and 4 are hereby **AFFIRMED.** Appellant's conviction in Count 1 is hereby **AFFIRMED** but the Sentence is **MODIFIED** to imprisonment for five (5) years. This matter is remanded to the District Court for entry of Judgment and Sentence consistent with the Opinion. Appellant's conviction and sentence in Count 3 is **AFFIRMED** but the district court is instructed to enter an order *nunc pro tunc* correcting the Judgment and Sentence to accurately reflect that Appellant's sentence is for

imprisonment for two (2) years. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PITTSBURG COUNTY
THE HONORABLE THOMAS M. BARTHELD, DISTRICT JUDGE

APPEARANCES AT TRIAL

JEFFREY J. CONTRERAS
ATTORNEY AT LAW
25 EAST CARL ALBERT PARKWAY
MCALESTER, OK 74501
COUNSEL FOR DEFENDANT

JUSTIN GARRETT
DANITA WILLIAMS
ASSISTANT DISTRICT ATTORNEYS
109 EAST CARL ALBERT PARKWAY
MCALESTER, OK 74501
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

RICKI J. WALTERSCHEID
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
JUDY KING
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, V.P.J.
SMITH, P.J.: CONCUR IN RESULTS
JOHNSON, J.: CONCUR IN PART/DISSENT IN PART
LEWIS, J.: CONCUR IN RESULTS

RB

SMITH, P.J., CONCURRING IN RESULT:

I agree that Pinkney's convictions should be affirmed, and that the sentence in Count I should be modified. I disagree with the majority's conclusion that the correct range of punishment for the crime in Count I is determined by the general enhancement provision of Section 51.1 of Title 21.

Pinkney was charged in Count I with Possession of a Controlled Dangerous Substance (Marijuana) in the Presence of a Child, after former conviction of the felony offense of Trafficking in Illegal Drugs. Section 2-402 of the Uniform Controlled Dangerous Substances Act provides that anyone convicted of a first offense of possession of marijuana in the presence of a child shall be punished by up to two years imprisonment. 63 O.S.2011, § 2-402(C)(1). The statute further provides: "For a second or subsequent offense, a term of imprisonment not exceeding three times that authorized by the appropriate provision of this section and the person shall serve a minimum of ninety percent (90%) of the sentence received prior to becoming eligible for state correctional institution earned credits toward completion of said sentence, and imposition of a fine not exceeding Ten Thousand Dollars ($10,000.00)." 63 O.S.2011, § 2-402(C)(2).

Nothing in the plain language of Section 2-402(C)(2) limits the applicability of the specific enhancement provision to a second or subsequent violation of Section 2-402(C). As provided by Section 2-412 of the Act: "An offense shall be considered a second or subsequent offense under this act, if, prior to his conviction of the offense, the offender has at any time been

convicted of an offense or offenses under this act, under any statute of the United States, or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs, as defined by this act." 63 O.S.2011, § 2-412. Thus, Pinkney's prior conviction for Trafficking in Illegal Drugs triggered the specific enhancement provisions of Section 2-402. *Holloway v. State*, 1976 OK CR 17, ¶ 9, 549 P.2d 368, 370; *Faubion v. State*, 1977 OK CR 302, ¶ 11, 569 P.2d 1022, 1025; *Patterson v. State*, 1974 OK CR 166 ¶ 12, 527 P.2d 596, 601. Because the specific enhancement provision was triggered, enhancement under the general habitual offender statute is improper. 21 O.S.2011, § 11(A); *Applegate v. State*, 1995 OK CR 49, ¶ 13, 904 P.2d 130, 135 ("When a specific provision affects punishment, that statute governs over a general punishment provision."); *Novey v. State*, 1985 OK CR 142, ¶ 14, 709 P.2d 696, 699 ("when both the predicate and the new offense are drug offenses, any enhancement must be made pursuant to the provisions of the Uniform Controlled Dangerous Substances Act."). The correct range of punishment for the crime in Count I was up to six years imprisonment. 63 O.S.2011, § 2-402(C)(2).

JOHNSON, JUDGE, CONCURRING IN PART/DISSENTING IN PART:

I concur in the decision to affirm Counts 2, 3 and 4. I cannot join, however, in the majority's plain error analysis in Proposition 1. We explained our plain error review in *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. For relief under the plain error doctrine, a defendant must show: (1) error; (2) that is plain; and (3) that affects substantial rights. *Id.* Under the third element of plain error, the burden is on the defendant to show that the obvious error affected substantial rights. It is in this analysis that a reviewing court considers the prejudicial impact of the alleged error. Conducting a separate harmless error analysis after finding the existence of the three elements of plain error—as the majority does in this case—does not comport with traditional plain error review. *See United States v. Olano,* 507 U.S. 725, 734-35, 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993). Once a defendant meets his or her burden on the three elements of plain error and this Court determines that the plain error affected the fairness, integrity or public reputation of the proceedings or otherwise constitutes a miscarriage of justice, our plain error review is complete and we may exercise our authority to correct otherwise forfeited error.

Nor do I agree with the majority's decision to modify Pinkney's sentence on Count 1 to five years. Considering the defect on the range of punishment for Count 1 in the court's instructions and the jury's decision to sentence Pinkney to terms only slightly above the minimum on each count, I would modify Pinkney's sentence to three years imprisonment.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TRAVIS LENARD MIKADO,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2013-788**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
DEC 18 2014
MICHAEL S. RICHIE
CLERK

OPINION

LUMPKIN, JUDGE:

Appellant, Travis Lenard Mikado, was tried by jury and convicted of Attempting to Elude a Police Officer (Count 1) (21 O.S.2001, § 540A(B)), Possession of a Controlled Dangerous Substance (misdemeanor - Marijuana) (Count 2) (63 O.S.Supp.2009, § 2-402(A)(1)), and Possession of a Controlled Dangerous Substance (Methamphetamine) (Count 3) (63 O.S.Supp.2009, § 2-402(A)(1)), after Former Conviction of Two or More Felonies, in District Court of Oklahoma County Case No. CF-2010-2395. The jury recommended as punishment imprisonment for one (1) year and a $1,000.00 fine in Count 1, a $500.00 fine in Count 2, and imprisonment for nine (9) years in Count 3. The trial court sentenced accordingly and ordered the sentences on Counts 1 and 3 to run concurrently with each other. It is from this Judgment and Sentence that Appellant appeals.

FACTS

On March 28, 2010, two separate Oklahoma City Police Officers observed Appellant drive his Chevrolet Impala across the centerline on Southwest 5th

APPENDIX K

Street in Oklahoma City. The officers engaged the lights in their marked vehicles and followed Appellant into a parking lot at the corner of Southwest 5th and MacArthur Boulevard. Appellant pulled his car into one of the parking spaces but then, without warning, caused his car to accelerate. He jumped the curb and drove off from the parking space. Appellant turned back onto Southwest 5th Street and then sped South on MacArthur. The officers engaged their sirens and pursued Appellant.

Appellant refused to stop. He led the officers on a high speed chase that continued several miles. Ultimately, Appellant was unable to navigate the curve at MacArthur and Regina Avenue. His vehicle struck a curb and flipped several times. Appellant was thrown out the car's window but was conscious and moving about when the officers got to his side. The officers took Appellant into custody and searched his person incident to arrest.

Officers found a small, red-tinted, ziploc baggie containing Methamphetamine and a white plastic baggie containing Marijuana in Appellant's right, front pants pocket. The officers then transported Appellant to the hospital, where, two days later, he confessed that he had some drugs and weed on him.

I.

In Appellant's sole proposition of error, he contends that his convictions for Possession of a Controlled Dangerous Substance in Counts 2 and 3 violate both 21 O.S.2011, § 11 and the constitutional prohibitions against double jeopardy. Appellant failed to raise this challenge before the District Court. As

such, we find that he has waived appellate review of this issue for all but plain error. *Logsdon v. State*, 2010 OK CR 7, ¶ 15, 231 P.3d 1156, 1164; *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144. We review the claim pursuant to the test set forth in *Hogan v. State*, 2006 OK CR 19, 139 P.3d 907.

> To be entitled to relief under the plain error doctrine, [an appellant] must prove: 1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. If these elements are met, this Court will correct plain error only if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice.

Id., 2006 OK CR 19, ¶ 38, 139 P.3d at 923 (quotations and citations omitted).

The first step of plain error review is to determine whether Appellant has shown the existence of actual error. *Id.*, 2006 OK CR 19, ¶ 39, 139 P.3d at 923. Because plain error is not a separate basis of appellate review, the Court turns to the rule of law applicable to the particular claim to make this determination. *Id.*; *Simpson v. State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 701 (finding that plain error is not a separate basis for appellate relief).

Appellant claims that his convictions in Counts 2 and 3 violate the multiple punishment prohibition set forth in 21 O.S.Supp.2011, § 11. He argues that his act of possessing Methamphetamine and Marijuana in his right front pants pocket constituted a single offense. Reviewing the record, we find that he has shown the existence of an actual error.

> The proper analysis of a claim raised under Section 11 is [ ] to focus on the relationship between the crimes. If the crimes truly arise out of one act . . . then Section 11 prohibits prosecution for more than one crime. One act that violates two criminal provisions

> cannot be punished twice, absent specific legislative intent. This analysis does not bar the charging and conviction of separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct.

Davis v. State, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-27. "[W]here there are a series of separate and distinct crimes, Section 11 is not violated." *Id.*, 1999 OK CR 48, ¶ 12, 993 P.2d at 126; *citing Ziegler v. State*, 1980 OK CR 23, ¶ 10, 610 P.2d 251, 254.

This Court has set forth how we interpret the plain language of the Uniform Controlled Dangerous Substances Act (63 O.S.2011, § 2-101, *et seq.*) in light of the prohibition within § 11. In *Watkins v. State*, 1991 OK CR 119, 829 P.2d 42, *opinion on rehearing*, 1992 OK CR 34, 855 P.2d 141, this Court held that the appellant's conviction of two separate counts of conspiracy and two separate counts of possession with intent to distribute, based entirely on the fact that the package he possessed contained two different types of drugs, violated the prohibition against multiple punishment. *Id.*, 1991 OK CR 119, ¶¶ 5-6, 829 P.2d at 44. This result was dictated by the plain language of the statute. *Watkins*, 1992 OK CR 34, ¶ 6, 855 P.2d 141, 142 (*opinion on rehearing*). Because 63 O.S.1991, § 2-401 causes it to be unlawful for any person to possess with the intent to distribute "a controlled dangerous substance," possession of separate types of controlled dangerous substances in the same package constitutes the same act. *Id.*

In *Lewis v. State*, 2006 OK CR 48, 150 P.3d 1060, we similarly held that the appellant's convictions and sentences for possessing trafficking quantities

of cocaine and heroin in a single container subjected him to multiple punishments for the same criminal act in violation of § 11. *Id.*, 2006 OK CR 48, ¶¶9-10, 150 P.3d 1062-63.

> This Court recognized in *Watkins* that "the Oklahoma Legislature has the power to create separate penal provisions prohibiting different acts which may be committed at the same time," but found the Legislature had not created separate criminal offenses of possession regarding different controlled dangerous substances. *Id.* at ¶ 6, 855 P.2d at 142. Our interpretation of the controlled drug possession statute in Watkins applies with equal force to the Trafficking in Illegal Drugs Act. The Legislature has defined "trafficking" as distributing, manufacturing, bringing into Oklahoma, or possessing any of the enumerated controlled drugs in specified quantities. When Appellant possessed almost two kilograms of cocaine and almost twenty-five grams of heroin, he "trafficked" in illegal drugs in violation of the statute. 63 O.S.Supp.2000, § 2–415(C)(2)(b) and (C)(3)(a)(cocaine quantity of 300 grams or more; heroin quantity of 10 grams or more).
>
> However, *Watkins* dictates that Appellant's one act of possessing cocaine and heroin in a single container constituted but one violation of the drug trafficking statute, punishable only once according to 21 O.S.2001, § 11. Under the double jeopardy analysis, *Watkins* compels the conclusion that Appellant's convictions in Counts 1 and 2 are based on the "same evidence"—that he possessed one or more controlled drugs in a trafficking quantity—and thus constitute the same offense.

Id.

In the present case, Appellant was not convicted under either § 2-401 or § 2-415, but instead was convicted of two counts of possession of a controlled dangerous substance pursuant to 63 O.S.Supp.2009, § 2-402(A)(1). The substantive penal provision of the statutory provision provides:

> It shall be unlawful for any person knowingly or intentionally to possess a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course

of his or her professional practice, or except as otherwise authorized by this act.

Id.

We note that § 2-402(A)(1) does not distinguish between types or classifications of drugs. As the statute causes it to be unlawful for any person to possess "a controlled dangerous substance," we find that the Legislature has not exercised its power to inflict multiple penalties based on the number or type of controlled drugs embraced in a single possessory event.[1] *See Missouri v. Hunter*, 459 U.S. 359, 365, 103 S.Ct. 673, 677 74 L.Ed.2d 535 (1983). Thus, we construe § 2-402 consistent with the interpretation that we set forth in *Watkins* and find that possession of separate types of controlled dangerous substances in a single container constitutes but one violation of the statute.

Turning to the record in the present case, we find that Appellant's convictions in Counts 2 and 3 constituted but one violation of § 2-402, punishable only once according to § 11. Appellant possessed a red tinted baggie which contained Methamphetamine and a white plastic baggie which contained Marijuana in his right, front pants pocket.

The State contends that Appellant possessed the two drugs separately because they were each inside a separate plastic baggie. We are not persuaded by this argument. In *Lewis*, we found that the appellant's possession of the cocaine and heroin constituted one act where the two drugs were "packaged separately and stashed in a single travel bag." *Lewis*, 2006 OK CR 48, ¶¶ 2, 10,

---

[1] We have previously given notice to the Oklahoma Legislature of this interpretation in both *Watkins* and *Lewis*. To date, the Legislature has not amended the statutes to make possession of each individual controlled dangerous substance a separate crime. Therefore, we determine that the Legislature concurs with this interpretation.

150 P.3d at 1061, 1063. A pocket is nothing more than "a small bag open at the top or side inserted in a garment." THE MERRIAM-WEBSTER DICTIONARY 381 (Eleventh Edition 2005). Appellant had actual possession of both drugs on his person. As Appellant stashed the separately packaged Methamphetamine and Marijuana in his pants pocket, Appellant committed but one act of possession of a controlled dangerous substance. Therefore, Appellant's convictions and sentences in Counts 2 and 3 subjected him to multiple punishments for the same criminal act.

Turning to the second step of plain error review, we determine whether the forfeited error was quite clear or obvious despite the absence of any objection. *Simpson*, 1994 OK CR 40, ¶ 26, 876 P.2d at 699. Reviewing the record, we find that Appellant has shown that this error was quite clear or obvious despite the absence of an objection. This Court's interpretation of the plain language of the Uniform Controlled Dangerous Substances Act in light of the prohibition within § 11 is well established. *See Lewis*, 2006 OK CR 48, ¶ 5, 150 P.3d at 1062. It was quite clear from the evidence at trial that Appellant committed but one act of possession.

Turning to the third step of plain error review, we determine whether the forfeited error affected Appellant's substantial rights and seriously affected the fairness, integrity or public reputation of the trial. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923; *Simpson*, 1994 OK CR 40, ¶¶ 24-25, 30, 876 P.2d at 699, 701. We have previously determined that double prosecution affects an appellant's substantial rights and seriously affects the fairness, integrity or

public reputation of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 32, 290 P.3d 759, 769. We reach this same conclusion in the present case.

Having determined that plain error occurred, we must determine whether said error was harmless. *Simpson*, 1994 OK CR 40, ¶¶ 19-20, 876 P.2d at 698 (reversal is not warranted for plain error if the error was harmless.). As Appellant was twice convicted and sentenced for one act of possession of a controlled dangerous substance, we cannot find that this error was harmless. Therefore, we find that Appellant is entitled to relief.[2]

DECISION

The Judgment and Sentences of the District Court as to Counts 1 and 3 are affirmed. Appellant's Conviction for misdemeanor Possession of a Controlled Dangerous Substance in Count 2 **REVERSED** with instructions to dismiss. This matter is remanded to the District Court for entry of Judgment and Sentence consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE LISA TIPPING DAVIS, DISTRICT JUDGE

---

[2] As § 11 applies and Appellant is entitled to relief, we do not address his claim that his convictions violate the double jeopardy protections of the Oklahoma and United States Constitutions. *Head v. State*, 2006 OK CR 44, ¶ 11, 146 P.3d 1141, 1145; *Mooney v. State*, 1999 OK CR 34 ¶ 14, 990 P.2d 875, 882-883.

APPEARANCES AT TRIAL

MICHAEL W. NOLAND
ATTORNEY AT LAW
7 MICKEY MANTLE DRIVE, SUITE 377
OKLAHOMA CITY, OK 73104
COUNSEL FOR DEFENDANT

JUSTIN KEMP
CARTER JENNINGS
ASSISTANT DISTRICT ATTORNEYS
320 ROBERT S. KERR, SUITE 505
OKLAHOMA CITY, OK 73104
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

RICKI J. WALTERSCHEID
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
KEELEY L. MILLER
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, J.
LEWIS, P.J.: CONCUR
SMITH, V.P.J.: CONCUR IN RESULTS
A. JOHNSON, J.: CONCUR IN RESULTS

RE

JOHNSON, JUDGE, CONCUR IN RESULTS:

I concur in the decision to affirm Counts 1 and 3. I also agree that Count 2 should be reversed with instructions to dismiss based on our case law in *Lewis v. State,* 2006 OK CR 48, 150 P.3d 1060 and *Watkins v. State,* 1991 OK CR 119, 829 P.2d 42, *opinion on rehearing,* 1992 OK CR 34, 855 P.2d 141. I cannot join, however, in the majority's plain error analysis. We explained our plain error review in *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. For relief under the plain error doctrine, a defendant must show: (1) error; (2) that is plain; and (3) that affects substantial rights. *Id.* This Court exercises its discretion to correct plain error only if the forfeited error "'seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings' or otherwise represents a 'miscarriage of justice.'" *Id.* (citations omitted) Once a defendant meets his or her burden on the three elements of plain error and this Court determines that the plain error affected the fairness, integrity or public reputation of the proceedings, our plain error review is complete and we may exercise our authority to correct otherwise forfeited error as we did in this case.