

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

PERENEAL KIZZEE

Petitioner,

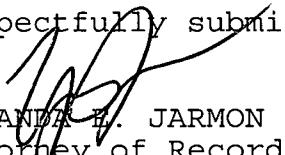
v.

UNITED STATES OF AMERICA,  
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

  
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QUESTIONS PRESENTED

I. On Appeal Kizzee argued that the district court erroneously applied a four-level enhancement to the base offense level for using or possessing a firearm or ammunition in connection with another felony offense, pursuant to U.S.S.G. §2K2.1(b)(6)(B) which no longer applied on remand when the Government dismissed counts two and three, both felony offenses originally used to substantiate the four-level increase.

The Fifth Circuit affirmed the sentence stating that " If Kizzee had objected, the district court could have resolved the factual question whether the preponderance of the evidence supported the finding that he possessed a firearm in connection with a felony offense. United States v. Kizzee, 765 F. App'x 62, 63 (5th Cir. 2019).

This Court has previously opined that: "In the ordinary case, [] the failure to correct a plain Guidelines error that affects a defendant's substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings." Rosales-Mireles v. United States, 138 S. Ct. 1897, 1911, 138 S. Ct. 1897, 1904, 201 L. Ed. 2d 376 (2018) (internal quotation marks omitted).

In light of the foregoing, the question presented is as follows:

Whether the Fifth Circuit violated federal law when it refused to exercise its discretion to correct the forfeited error that seriously affected the fairness, integrity or public reputation of judicial proceedings" as instructed in Molina-Martinez v. United States, 136 S. Ct. 1338, 1343, 194 L. Ed. 2d 444 (2016); and thereby allowed a four-level enhancement pursuant to U.S.S.G. §2K2.1(b)(6)(B) to stand without the necessary conviction to substantiate it.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are named in the caption of the case before the Court.

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Appendix C: Amended Judgment and Sentence of the District Court,  
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PRAYER

The petitioner, PERENNEAL KIZZEE, respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on April 15, 2019.

OPINIONS BELOW

The original judgment reflecting Mr. Kizzee's original conviction and sentence can be found at United States v. Pereneal Kizzee Cr. No. 4:14:CR:601-1 (S.D. Tex. June 16, 2016. (Exhibit A)). However, on December 15, 2017, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion vacating Ms. Kizzee's judgment of conviction and sentence. United States v. Pereneal Kizzee, 877 F.3d 650 (5th Cir. 2017). (Exhibit B).

On remand Counts Two and Three were dismissed by the Government pursuant to United States v. Pereneal Kizzee, 877 F.3d 650. Kizzee was then re-sentenced on the remaining charge, Count One. The district court issued an amended judgment per the Fifth Circuit's decision on appeal. The amended judgment can be found at United States v. Pereneal Kizzee Cr. No. 4:14:CR:601-1 (S.D. Tex. March 30, 2018). (Exhibit C). Kizzee appealed for a second time. The Fifth Circuit's Opinion in the Second Appeal can be found at United States v. Kizzee, 765 F. App'x 62, 63 (5th Cir. 2019). (Exhibit D).

No petition for rehearing was filed.

JURISDICTION

On April 15, 2019, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence in this case. This petition is filed within ninety days after entry of the judgment. See. Sup. Ct. R. 13.1 and 13.3. Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

FEDERAL STATUTES INVOLVED

**18 U.S.C.922(g)(1)**

It shall be unlawful for any person—

1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Section 2K2.1(b)(6)(B) provides in relevant part:

(6) If the defendant--

(A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels.

If the resulting offense level is less than level 18,  
increase to level 18.

STATEMENT OF THE CASE

A. Course of Proceedings

**1. The charges**

The instant petition for writ of certiorari is filed on behalf of **PERENEAL KIZZEE**. Pereneal Kizzee (Hereinafter "Kizzee") was arraigned on a Second Superseding Indictment filed in this case on December 5, 2015. (ROA.220-222). Count One in the Second Superseding Indictment charged Kizzee with possession of ammunition and firearm by convicted felon in violation of 18 U.S.C. § 922(g)(1) on February 5, 2014 and in the Southern District of Texas.

The Superseding Indictment alleged that Kizzee had been found in possession of the following weapons: a Winchester model 190, .22 caliber semi-automatic rifle; Winchester, model 67, .22 caliber semi-automatic rifle; a Winchester, model 94, 30-30 caliber lever action rifle; and a Savage model 1903.22 caliber pump action rifle. (ROA.220-221).

The Second Superseding indictment alleged that on February 5, 2015, and in the Southern District of Texas, Kizzee had been found

in possession of the following ammunition: 71 rounds of Winchester .22 caliber ammunition; 122 rounds of Remington .22 caliber ammunition; 11 rounds of Federal .22 caliber ammunition; 55 rounds of CCI .22 caliber ammunition; 21 rounds of Winchester gauge ammunition; 5 rounds of Remington 12 gauge ammunition; 40 rounds of Federal .45 caliber ammunition; 11 round of Remington .270 caliber ammunition; and 2 rounds of Winchester .270 caliber ammunition, all which had been shipped in interstate and foreign commerce in violation of 18 U.S.C. § 922(g)(1). (ROA.220-221).

Count Two of the Second Superseding Indictment charged Kizzee with knowing and intentionally possessing with intent to distribute a controlled substance with the intent to deliver on February 5, 2014 and in the Southern District of Texas, in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(C).

Count Three of the Second Superseding Indictment charged Kizzee with possessing a firearm during and in relation to a drug trafficking crime, on February 5, 2014 and in the Southern District of Texas, in violation of 18 U.S.C. § 924(c)(1)(A)(i) and 21 U.S.C. §§841(a)(1) and (b)(1)(C). (ROA.221). The Second Superseding Indictment contained a Notice of Criminal Forfeiture as well with respect to the afore-mentioned firearms and ammunition. (ROA.222).

## **2. The trial**

The parties stipulated that Kizzee was a convicted felon at that time of trial. (ROA1399-1400). The key government witnesses were Officer Taylor Wilkins, Detective Lance Schultz, and Agent

Jared Yates. Officer Schultz testified that on February 4, 2014, officers conducted surveillance of a home where Kizzee could be found during the day. (1451-1452). The home was located in Huntsville, Texas within the Southern District of Texas. (ROA. 1456). Detective Lance Schultz and Agent Justin Lehman observed Brown go to the house /structure at issue in this case. (ROA. 1322,1457). After a brief encounter with Kizzee at the home, Brown left in a gold Nissan Pathfinder.

Detective Lance Schultz, an officer conducting the surveillance of Kizzee's home, notified another officer, Taylor Wilkins to establish probable cause in order to stop the gold Nissan Pathfinder driven by Carl Brown. (ROA.1367,1457). Wilkins, complied and conducted a traffic stop on Brown. (ROA.1328-1130,1345). According to Wilkins, he conducted a traffic stop on Brown because Brown allegedly failed to signal within 100 feet from an intersection. (ROA. 1347). After Brown exited the vehicle, he gave Officer Wilkins verbal consent to search his person. (ROA.1351). Brown gave verbal consent for the officer to search his vehicle. The officers found a clear plastic bag that contained several white rocks, inside Brown's baseball cap. (ROA.1351-1352).

After a brief struggle with Officer Wilkins, Detectives Lehman and Schultz, who had arrived at the scene, assisted Wilkins, placed Brown in handcuffs and secured him in the police vehicle. (ROA. 1353,1359,1374). A field test revealed the rocks were crack cocaine. An expert, Jennifer Haas, testified that the crack

cocaine weighed 0.54 grams. (ROA.1547).

Officer Wilkins transported Brown to the station for processing. (ROA. 1354,1375). Detective Schultz questioned Brown further after he arrived at the police station. During the questioning, Brown stated that he had obtained the narcotics found in his hat from Pereneal Kizzee and that he had purchased narcotics from Kizzee on previous occasions. (ROA.1375).

Detective Schultz obtained a search warrant to search Kizzee's home and the warrant was executed on February 5, 2015. (ROA. 1361,1375-1377). Detective Schultz, Officer Taylor Wilkins, and Agent Jared Yates, and other officers participated in the search of the house/structure that day. (ROA.1478-1479). Schultz testified that when the authorities arrived, Kizzee opened the front door and peeked out of the doorway. (ROA.1384,1480). Kizzee then shut and locked the door. (ROA.1385).

The Officers used a ram to forced their way into the home. (ROA.1385,1480). Kizzee was found in the bathroom filling the toilet with water from a five gallon jug. (ROA.1388,1481). The officers took apart the plumbing associated with the toilet and pipes, and searched the sewer lines, but found no narcotics. (ROA. 1446-1448,1500-1501). The officers never tested the toilet or plumbing for any trace of crack cocaine. (ROA. 1427-1428). Agent Yates testified that there was no evidence recovered that would indicate that Kizzee destroyed any evidence in the house/structure. (ROA.1520). Detective Schultz and Agent Yates testified that

there was no evidence of someone using crack cocaine in that house/structure and that there were no items found consistent with the use of crack cocaine in the house/structure. (ROA.1451, 1500, 1515, 1531-1532). Nevertheless, Kizzee was taken into custody. (ROA.1281). Kizzee had \$1,183.00 in his front pockets. (ROA.1391, 1365).

There were racks of women clothing found in the house/structure. Schultz testified that these items would not be the sort of clothing that Kizzee would wear. (ROA.1432). Schultz testified that a clear plastic bag containing less than a gram of crack cocaine was found sticking out of the bathroom sink. (ROA.1389-1390). However, the government's expert, Jennifer Haas testified that it only weighted two-tenths of a gram (0.20). (ROA.1551).

The bathroom also had shelves that contained a microwave, several Pyrex dishes and plastic bowls. There was no testimony that the microwave had cocaine or any other narcotic on it. (ROA.1424). Schultz testified that a Pyrex dish/measuring cup and two plastic bowls contained a white powdery substance on them. (ROA.1393-1396). However, the expert witness for the government, Jennifer Hass testified that no controlled substance was found on the Pyrex dish/measuring cup when tested. Hass also testified that the testing did not confirm any narcotics on the two bowls. (ROA. 1549-1550). Kizzee's fingerprints were not found on the Pyrex or the two bowls. (ROA.1421, 1458).

A box of .270 ammunition was found, but no weapon was found that would have utilized this ammunition. (ROA.1397,1447). There was no testimony that Kizzee's fingerprints were found on any ammunition recovered during the search. (ROA.1445). A black phone was located on the floor. An iPhone was located on an end table. (ROA.1401.) A blue duffle bag was found in a back room. Agent Yates found this bag. (ROA.1493). The duffle bag contained .22 caliber ammunition, a silver Sanyo cell phone, and Kizzee's mail. (ROA.1402-1403,1406,1444,1494).

A safe was found in a utility room in the house/structure, but no money was in it. (ROA.1404). A money counter was found on the safe. However, there was no testimony that Kizzee's fingerprints were found on the money counter or the safe. (ROA.1431-1432). Two .22 caliber rifles were in the corner of a room in the rear of the house/structure. (ROA.1405,1441,1487).

Surveillance cameras were found in the house/structure, but they were not hooked up. (ROA.1411). The surveillance cameras were still inside the box and wrapped in the packaging bubble just like the manufacturer would have placed it. (ROA.1437-1438). There was a metal shed located behind the back of the house/structure and two additional rifles were found inside it. (ROA.1406-1407). An ATF special agent, Gregory Alvarez, testified that the firearms and ammunition traveled in Interstate commerce. (ROA.1568-1569, 1572-1573). However, there was no evidence that Kizzee's fingerprints were found on any weapon recovered during the search.

Schultz and Yates testified that there was no evidence found that would be consistent with anyone using crack cocaine or narcotics at the home at issue. (ROA.1451,1500,1515). Moreover, Yates testified that nothing was found that would be consistent with distribution of narcotics. (ROA.1531-1532).

On December 16, 2015, the Government rested its case in chief. (ROA.1579) Defense counsel for Kizzee lodged a motion for acquittal pursuant or Rule 29 of the Federal Rules of Criminal Procedure. Defense counsel argued that the evidence was insufficient to support convictions for all three charges brought in the Second Superseding Indictment. ROA.1582-1583). The motion for acquittal was denied. (ROA.1586). On December 17, 2015, the Defendant rested after the charging conference. (ROA.1210)

A Presentence Investigation Report (PSR) was prepared using the 2015 edition of the sentencing guidelines. (ROA.1464). The Base Offense Level was set at a level of 20 pursuant to 18 U.S.C. § 922(g)(1) and U.S.S.G. § 2K2.1(a)(4). Because Kizzee had previously been convicted of a crime of violence, assault against public servant in the 278th District Court of Walker County Texas, Cause No. 20909C. Four additional points were added to the Base Offense level pursuant to U.S.S.G. § 2K2.1(b)(6)(B), alleging that Kizzee used or possessed a firearm or ammunition in connection with another felony offense (i.e. Possession of a controlled substance with intent to distribute in this case). The Total Offense Level was set at 24. (ROA.1647,1649).

The Criminal History Category was set at a level III based upon four previous convictions. (ROA.1651). In 2003, Kizzee was found guilty of Possession of a controlled substance and received a sentence of 10 years probation resulting in one criminal history point pursuant to U.S.S.G. § 4A1.1(c). In 2007, Kizzee was found guilty of assault against a public servant, in the 278th District Court, Walker Texas, Cause No. 20902C and received a sentence of 4 years probation resulting in one criminal history point pursuant to U.S.S.G. § 4A1.1(c). (ROA.1649).

In 2000, Kizzee was found guilty of assault causing bodily injury in County Court at Law, Huntsville, Texas, Cause No. 991481 and received a sentence of 15 days imprisonment resulting in one criminal history point pursuant to U.S.S.G. § 4A1.1(c). (ROA.1650). In 2014, Kizzee was found guilty of Endangering a child in the 179th District Court, Harris County, Texas Cause No. 1417211 and received a sentence of 2 years probation resulting in one criminal history point pursuant to U.S.S.G. § 4A1.1(c). (ROA.1651).

With a Criminal History Category of III and a Total Offense Level of 24, the guidelines range resulted in 63-78 months of imprisonment and two to five years of supervised release. U.S.S.G. Chapter 5 Part A; U.S.S.G. §§ 5D1.2(2)(a); U.S.S.G. § 5D1.2(2) (b). The guideline range for the imposition of a fine resulted in \$10,000 to \$1,000,000 pursuant to U.S.S.G. § 5E1.2(c) (3).

In written objections and at sentencing, Kizzee objected to

paragraph 25 of the PSR which set the Base Level for the offense at 20. Kizzee argued that Texas Penal Code Section 22.01 Assault against a public servant is not a "crime of violence" because the offense does not constitute a crime of violence under U.S.S.G. 4B1.2(a). (ROA.1560-1566). He further argued that Section 4B1.2(a) is unconstitutionally vague under Johnson v. United States, 135 S. Ct. 2551(2015). (ROA.1292-1299, 1668-1674).

Next, Kizzee objected to the four-level increase in paragraph 26 of the PSR under §2K2.1(b)(6)(B) arguing that he did not possess a firearm or ammunition in connection with another felony offense.

All objections were denied by the district court. (ROA.1299-1300). At sentencing, the district court adopted the factual findings of the PSR. (ROA.1300-1301). Kizzee was sentenced to 70 months of imprisonment for Counts One and Two of the Superseding Indictment to run concurrently and 60 years as to Count Three to run consecutively to all other counts for a total of 130 months imprisonment. The court imposed a three year term of supervised release as to each conviction to run concurrently. (ROA.1305). The court imposed a \$100.00 special assessment as to each conviction for a total of \$300.00. No fine was imposed. (ROA.1306).

#### **The First Appeal**

Kizzee appealed in United States v. Kizzee, 877 F.3d 650 (5th Cir. 2017). On appeal Kizzee argued that the Count Two of the Second Superseding Indictment, charged possession with intent to

distribute a controlled substance with the intent to deliver and Count Three of the Second Superseding Indictment possessing a firearm during and in relation to a drug trafficking crime should be vacated because of violations of his rights to fair trial under the hearsay rules and Confrontation Clause of the United States Constitution. This Court agreed and remanded to the district court for re-sentencing as to Count One of the Superseding Indictment. Id. at 662-663.

At resentencing, Kizzee was sentenced for the possession of firearm and ammunition conviction in violation of 18 U.S.C. § 922(g)(1), Count One of the Superseding Indictment. Kizzee's trial counsel requested that the Court re-instate the 70 months sentence as to Count One only because Counts Two and Three were dismissed pursuant to the Fifth Circuit's order in United States v. Kizzee, 877 F.3d 650 (5th Cir. 2017). The district court, on remand, adopted the findings in the PSR as its own. The Total Offense Level was set at a 24 with a Criminal History Category of III, resulting in a guideline range of 63-78 months. (ROA.1314). The district court however, re-instated the 70 month term of imprisonment on Count One as requested by trial counsel. (ROA.1312,1314). Kizzee was ordered to serve three years supervised release. (ROA.1315). The special assessment was set at \$100 and no fine was imposed. (ROA.1316-1317). The court district court also ordered that \$200 be refunded to Kizzee for the special assessment fees already paid on the two charges that were

dismissed. (ROA.1317).

### **3. The Second Appeal**

On the second appeal, Kizzee argued that because the convictions on Counts Two and Three of the Second Superseding Indictment were vacated in United States v. Kizzee, 877 F.3d 650 (5<sup>th</sup> Cir. 2017) and the case re-manded; the four point increase to the base offense level pursuant to U.S.S.G. §2K2.1(b) (6) (B) did not apply to him at re-sentencing on remand. Consequently, the Total Offense Level should have been set at a level, 20 rather than a level 24. With a Criminal History Category Score of III and Total Offense Level of 20, the guideline set a range of imprisonment 41-51, rather than the 63-78 months of imprisonment found by the district court in this case. .

The Fifth Circuit affirmed the sentence stating that " If Kizzee had objected, the district court could have resolved the factual question whether the preponderance of the evidence supported the finding that he possessed a firearm in connection with a felony offense". United States v. Kizzee, 765 F. App'x 62, 63 (5th Cir. 2019).

This Court should grant certiorari because the Fifth Circuit rendered only a cursory review of the district court record and ignored the undisputable evidence demonstrating that no factual disputes existed that would substantiate an enhancement under

§2K2.1(b)(6)(B), and because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

BASIS OF FEDERAL JURISDICTION IN THE  
UNITED STATES DISTRICT COURT

This case was brought as a federal criminal prosecution involving a conspiracy to possess with intent to distribute 5 kilograms or more of a mixture and substance, and less than 50 kilograms of marijuana, a Schedule II controlled substance in violation of 18 U.S.C. § 922 (g) (1), 21 U.S.C. §§ 846, 841(a), and 841 (b) (1)(c). The district court therefore had jurisdiction pursuant to 18 U.S.C. § 3231.

## REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the Fifth Circuit rendered only a cursory review of the district court record and ignored the undisputable evidence demonstrating that no factual disputes existed that would substantiate an enhancement under §2K2.1(b)(6)(B), and because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

A. The Fifth Circuit violated federal law when it refused to exercise its discretion to correct the forfeited error that seriously affected the fairness, integrity or public reputation of judicial proceedings." Molina-Martinez v. United States, 136 S. Ct. 1338, 1343, 194 L. Ed. 2d 444 (2016); and thereby allowed a four-level enhancement pursuant to U.S.S.G. §2K2.1(b)(6)(B) to stand without the necessary conviction to substantiate it.

In the Second Appeal Kizzee argued that the district court erroneously applied a four-level enhancement to the base offense level for using or possessing a firearm or ammunition in connection with another felony offense, pursuant to U.S.S.G. §2K2.1(b)(6)(B) which no longer applied on remand when the Government dismissed counts two and three. The Fifth Circuit affirmed the sentence stating that " If Kizzee had objected, the district court could have resolved the factual question whether the preponderance of the evidence supported the finding that he possessed a firearm in connection with a felony offense." The appeals court conducted an inadequate, cursory review of the record when it determined that factual disputes existed in this case; and thereby affirmed Kizzee's sentence imposed when the case went back to the district court on remand.

1. The Fifth Circuit failed to exercise its duty to correct the illegal sentence pursuant to Molina-Martinez v. United States, 136 S. Ct. 1338, 1343, 194 L. Ed. 2d 444 (2016) and Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904, 201 L. Ed. 2d 376 (2018).

Kizzee maintains that his Total Offense Level should have been set at a t level 20, rather than a level 24; and therefore reversible plain error occurred in this case. A Presentence Investigation Report (PSR) was prepared using the 2015 edition of the sentencing guidelines. (ROA.1646). The Base Offense Level was set at a level of 20 pursuant to 18 U.S.C. § 922(g)(1) and U.S.S.G. § 2K2.1(a)(4), because Kizzee had previously been convicted of a crime of violence, assault against public servant in the 278<sup>th</sup> District Court of Walker County Texas, Cause No. 20909C. (ROA.1647). Four additional points were added to the Base Offense level pursuant to U.S.S.G. § 2K2.1(b)(6)(B), alleging that Kizzee used or possessed a firearm or ammunition in connection with another felony offense (i.e. Possession of a controlled substance with intent to distribute in this case). Thus, the Total Offense Level was set at 24. (ROA.1647). Section 2K2.1(b)(6)(B) provides in relevant part:

(6) If the defendant--

(A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or

ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels.

If the resulting offense level is less than level 18,  
increase to level 18.

In this case, Kizzee's convictions on Counts Two and Three of the Second Superseding Indictment were vacated by this Court in United States v. Kizzee, 877 F.3d 650, 662-663 (5<sup>th</sup> Cir. 2017). Thus, on remand, there was no charge of or conviction for possession of a controlled substance with intent to distribute a control substance to substantiate the application of U.S.S.G. § 2K2.1(b)(6)(B), nor was there any charge of possession in furtherance of a drug trafficking crime. There was no conviction to justify the application of U.S.S.G. § 2K2.1(b)(6)(B). Therefore, the four point increase in to the base offense level pursuant to) should not have been applied. Consequently, the Total Offense Level should have been set at a level, 20 rather than a level 24. With a Criminal History Category Score of III and Total Offense level of 20, the 2015 guidelines applied in this case set a range of imprisonment at 41-51 months, rather than the 63-78

months of imprisonment applied by the district court in this case. (ROA.1312). See U.S.S.G. Sentencing Guidelines Chapter 5 Part A.

The United States Supreme Court has opined that although post-Booker, the Sentencing Guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the Guidelines sentencing range. Gall v. United States, 552 U.S. 38, 48-51 (2007). Because Kizzee did not object to this error at sentencing, review is only for plain error. FED. R. CRIM. P. 52 (b). For reversible plain error, a defendant must show a clear or obvious error that affects his substantial rights. Id. citing Puckett v. United States, 556 U.S. 129 (2009). If a defendant does so, this Court has discretion to correct that error, and generally will do so only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Id.

For unpreserved sentencing objections, Federal Rule of Criminal Procedure 52(b) establishes a "plain error" standard. FED. R. CRIM. P. 52 (b) ("A plain error that affects substantial rights may be considered even though it was not brought to the [district] court's attention."). A claimed error must "affec[t] substantial rights" to warrant relief on appeal. FED. R. CRIM. P. 52. United States v. Olano, 507 U.S. 725, 734-35, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). The plain error rule "serves a critical function by encouraging informed decision making and

giving the district court an opportunity to correct errors before they are taken up on appeal." United States v. Peltier, 505 F.3d 389, 392 (5th Cir. 2007).

In Olano, the Supreme Court established three conditions to be met before an appellate court may consider exercising its discretion to correct the error. First, there must be an error that has not been intentionally relinquished or abandoned. Olano, 507 U.S. at 725. A "'[f]ailure to calculate the correct Guidelines range constitutes procedural error.'" Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904, 201 L. Ed. 2d 376 (2018) (quoting Peugh v. United States, 569 U.S. 530, 537, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013)).

Second, the error must be plain—that is to say, clear or obvious." Olano, 507 U.S. at 725. An error is not "clear or obvious" if it is "subject to reasonable dispute." Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009).

Third, the error must have affected the defendant's substantial rights." Molina-Martinez v. United States, 136 S. Ct. 1338, 1343, 194 L. Ed. 2d 444 (2016). To satisfy this third condition, the defendant ordinarily "must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Id. (internal quotation marks omitted). United States v. Randall, 924 F.3d 790, 795-96 (5th Cir. 2019).

In Molina-Martinez, the Court recognized that "[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." 136 S. Ct. at 1345. In other words, an error resulting in a higher range than the Guidelines otherwise would provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than "necessary" to fulfill the purposes of incarceration. Rosales-Mireles, 138 S. Ct. at 1907 (citing 18 U.S.C. § 3553(a)); Tapia v. United States, 564 U.S. 319, 325, 131 S. Ct. 2382, 180 L. Ed. 2d 357 (2011)).

A defendant may not carry his plain error burden, however, if the sentencing court nevertheless concluded the chosen sentence was appropriate regardless of the correct Guidelines range or the sentence was based "on factors independent of the Guidelines." Molina-Martinez, 136 S. Ct. at 1346-47; see also United States v. Hott, 866 F.3d 618, 621 (5th Cir. 2017) (plain error review unsatisfied where record showed district court thought the chosen sentence appropriate irrespective of the Guidelines range and the defendant failed to show a reasonable probability of a different outcome); United States v. Munoz-Canellas, 695 Fed. Appx. 748, 750 (5th Cir. 2017). But here, in Kizzee's case, there is no indication in the record in Kizzee's case that the sentencing court nevertheless concluded the chosen sentence was appropriate

regardless of the correct Guidelines range or the sentence was based "on factors independent of the Guidelines." Therefore, this Court should grant certiorari and upon review, should reverse the judgment of the Fifth Circuit.

This Court has previously opined that "If the first three plain error conditions are met, "the court of appeals should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." Molina-Martinez, 136 S. Ct. at 1343 (internal quotation marks omitted). It has also stated that "[i]n the ordinary case, the failure to correct a plain Guidelines error that affects a defendant's substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings. Rosales-Mireles, 138 S. Ct. at 191.

In Molina-Martinez, Molina-Martinez, through his attorney, filed a merits brief arguing that the Probation Office and the District Court erred in calculating his criminal history points, resulting in the application of a higher Guidelines range. The error, Molina-Martinez explained, occurred because the Probation Office failed to apply §4A1.2(a)(2) of the Guidelines. See USSG §4A1.2(a)(2) (Nov. 2012). That provision addresses how multiple sentences imposed on the same day are to be counted for purposes of determining a defendant's criminal history. It instructs that, when prior sentences were imposed on the same day, they should be

counted as a single sentence unless the offenses "were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense)." *Id.* at 1344 (citations omitted).

Molina-Martinez's presentence report included five aggravated burglary convictions for which he had been sentenced on the same day. The Probation Office counted each sentence separately, which resulted in the imposition of 11 criminal history points. Molina-Martinez contended this was error because none of the offenses were separated by an intervening arrest and because he had been sentenced for all five burglaries on the same day. Under a correct calculation, in his view, the burglaries should have resulted in 5 criminal history points instead of 11. That would have lowered his criminal history category from VI to V. The correct criminal history category, in turn, would have resulted in a Guidelines range of 70 to 87 months rather than 77 to 96 months. Had the correct range been used, Molina-Martinez's 77-month sentence would have been in the middle of the range, not at the bottom. *Id.* (citations omitted).

Molina-Martinez acknowledged that, because he did not object in the District Court, he was entitled to relief only if he could satisfy Rule 52(b)'s requirements. He nevertheless maintained relief was warranted because the error was plain, affected his substantial rights, and impugned the fairness, integrity, and public reputation of judicial proceedings. *Id.* (citations

omitted).

The Fifth Circuit disagreed. It held that Molina-Martinez had not established that the District Court's application of an incorrect Guidelines range affected his substantial rights. It reasoned that, when a correct sentencing range overlaps with an incorrect range, the reviewing court "'do[es] not assume, in the absence of additional evidence, that the sentence [imposed] affects a defendant's substantial rights.'" Id. at 1345 (citations omitted).

In Molina-Martinez, The Fifth Circuit ruled, that he had not put forth the additional evidence necessary to show that the error affected his substantial rights. "The mere fact that the court sentenced Molina-Martinez to a low-end sentence," the Fifth Circuit reasoned, was "insufficient on its own to show that Molina-Martinez would have received a similar low-end sentence had the district court used the correct Guidelines range." Id.

Instead, Fifth Circuit maintained that Molina-Martinez needed to identify "'additional evidence'" in the record showing that the Guidelines had an effect on the District Court's selection of his sentence.. The Fifth Circuit noted that "the district court made no explicit statement suggesting that the Guidelines range was a primary factor in sentencing." And the court did not view as probative "the parties' anchoring of their sentencing arguments in the Guidelines" or "the district court's refusal to grant the government's request for a high-end sentence of 96 months." Id..

This Court granted certiorari to resolve the disagreement among Courts of Appeals over how to determine whether the application of an incorrect Guidelines range at sentencing affected the defendant's substantial rights. Molina-Martinez v. United States, 136 S. Ct. 1338, 1344-45 (2016). Id.

When rendering its decision in Molina-Martinez, this Court stated that "the Court of Appeals for the Fifth Circuit stands generally apart from other Courts of Appeals with respect to its consideration of unpreserved Guidelines errors. This Court now holds that its approach is incorrect." It went on to say that "nothing in the text of Rule 52(b), its rationale, or the Court's precedents supports a requirement that a defendant seeking appellate review of an unpreserved Guidelines error make some further showing of prejudice beyond the fact that the erroneous, and higher, Guidelines range set the wrong framework for the sentencing proceedings. This is so even if the ultimate sentence falls within both the correct and incorrect range. When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." Id. at 1345

This Court also emphasized in Molina-Martinez "[w]here, however, the record is silent as to what the district court might have done had it considered the correct Guidelines range, the

court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights. Indeed, in the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder. Absent unusual circumstances, he will not be required to show more." This Court opined in Molina-Martinez v. United States that the Fifth Circuit's rule to the contrary fails to take account of the dynamics of federal sentencing. Id. at 1347.

In rendering its unfavorable decision at issue in this case, The Fifth Circuit once again failed to take account of the dynamics of federal sentencing and ignored this courts holding in Molina-Martinez v. United States. In the case at bar, the sentencing error should be corrected and this Court should vacate and remand Kizzee's case for re-sentencing. As stated before-hand, because Kizzee failed to object in the district court, the plain error standard of review applies.

Here, Kizzee's convictions on Counts Two and Three of the Second Superseding Indictment possession with intent to distribute a controlled substance with the intent to deliver and possessing a firearm during and in relation to a drug trafficking crime were vacated by this Court in United States v. Kizzee, 877 F.3d 650, 662-663 (5th Cir. 2017). Thus, on remand, there was no charge of or

conviction for possession of a controlled substance with intent to distribute a control substance to substantiate the application of U.S.S.G. § 2K2.1(b)(6)(B), nor was there any charge of possession in furtherance of a drug trafficking crime. There was no conviction to justify the application of U.S.S.G. § 2K2.1(b)(6)(B). Hence, it is clear that the four point increase to the base offense level pursuant to U.S.S.G. § 2K2.1(b)(6)(B) added to the Total Offense Level in the PSR, alleging that Kizzee used or possessed a firearm or ammunition in connection with another felony offense (i.e. Possession of a controlled substance with intent to distribute in this case) did not apply on remand. The misapplication of U.S.S.G. § 2K2.1(b)(6)(B) in this case constitutes clear error because an error occurred and the error is one that can be established under the law applicable at the time of sentencing. Thus, Kizzee has demonstrated that the first and second prongs of the plain error standard of review are met in the instant case.

Additionally, Kizzee can satisfy the third prong of the plain error analysis as well. Kizzee can demonstrate that the error affected his substantial rights. Kizzee can show, that the error affected the outcome of the district court proceedings. Kizzee can show that but for the district court's misapplication of the

Guidelines, he would have received a lesser sentence because (1) the district court mistakenly calculates the wrong Guidelines range, (2) the incorrect range is significantly higher than the true Guidelines range, and (3) Kizzee was sentenced within the incorrect range. In this case, with a Criminal History Score of III, the incorrect Total Offense Level was set at 24, resulting in an incorrect guideline range of 63-78 months. As outlined above, the correct guideline range should have been set at a level, 20 rather than a level 24. With a Criminal History Category Score of III and Total offense level of 20, the correct guideline range of imprisonment 41-51.

Kizzee was sentenced to 70 months imprisonment 19 months higher than the highest end of the correct guideline range. Therefore, under this Court's precedent, Molina-Martinez v. United States Kizzee can also satisfy the fourth prong of the plain error analysis. Under, Molina-Martinez v. United States, the plain error in this case seriously affects the fairness, integrity, or public reputation of judicial proceedings. As stated previously, in Kizzee's case, there is no indication in the record that the sentencing court nevertheless concluded the chosen sentence was appropriate regardless of the correct Guidelines range or the sentence was based "on factors independent of the Guidelines."

Therefore, this Court should grant certiorari and upon review, should reverse the judgment of the Fifth Circuit.

It bear mentioning that the Fifth Circuit also ignored its own established precedent. In United States v. Mudekunye 646 F.3d 281(5th Cir. 2011), the defendant contended that his sentence was procedurally unreasonable because the court erroneously applied two sentencing enhancements for the same conduct. Mudekunye argued that under the Guidelines, where a §2T1.4(b)(1) cmt. n.2 enhancement is applied at sentencing, a § 3B1.3 enhancement should not be applied. Because Mudekunye, did not object at sentencing, the "plain error" standard of review was applied. Id. at 289.

In Mudekunye, the Government conceded that the district court erred in applying both enhancements and that this error was clear. The application of the § 3B1.3 enhancement resulted in a total offense level of 28. Combined with Mudekunye's criminal history category of I, the application of the enhancement resulted in an advisory sentencing range of 78 to 97 months. However, the correct Guidelines resulted in 63 to 78 months. See U.S.S.G. Ch. 5 Pt. A (Sentencing Table). The incorrect Guidelines range (78-97 months) and the correct Guidelines range (63-78 months) overlapped by one month because the top of the correct range and the bottom of the incorrect range were the same: 78 months. Id.

Because Mudekunye established that error occurred and that the error was clear, the court proceeded to answer the third prong of the plain error inquiry: whether the error affected Mudekunye's substantial rights, which ordinarily requires a defendant to show that the error affected the outcome of the district court proceedings. In Mudekunye, the Fifth Circuit reiterated that a sentencing error affects a defendant's substantial rights if he can show a reasonable probability that, but for the district court's misapplication of the Guidelines, he would have received a lesser sentence. It went on to say that, absent additional evidence, a defendant has shown a reasonable probability that he would have received a lesser sentence when (1) the district court mistakenly calculates the wrong Guidelines range, (2) the incorrect range is significantly higher than the true Guidelines range, and (3) the defendant is sentenced within the incorrect range. Id.

Mudekunye's case did not neatly fall into either line of precedent and was therefore a case of first impression because the correct and incorrect sentencing ranges overlapped by one month. Mudekunye was sentenced well outside the one month overlap, 19 months above the correct range. In vacating and remanding Mudekunye's sentence, the court noted that it was not apparent from the record that Mudekunye would have received an above-Guidelines

sentence of 97 months if the district court had calculated the Guidelines correctly. Id. at 290. The court ultimately held that in light of the significant disparity between Mudekunye's sentence and the top of the correct Guidelines range and the absence of any evidence suggesting that the court would have sentenced Mudekunye to 97 months' imprisonment irrespective of the correct Guidelines range, Mudekunye had shown a reasonable probability of a lesser sentence and therefore, demonstrated that the court's clear error affected his substantial rights. Id. at 291.

Having established that the error affected Mudekunye's substantial rights, the court emphasized "where a defendant's substantial rights are violated, the Court retained discretion to correct the reversible plain error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." Ultimately, the Court concluded that the substantial disparity between the imposed sentence of 97 months and the applicable Guidelines range in Mudekunye's case, 63-78 months, warranted the exercise of its discretion to correct the error. Id. at 291. See also United States v. Gonzalez-Terrazas, 529 F.3d 293, 299 (5th Cir. 2008) (concluding also that the imposition of a sentence that was substantially greater than the Guidelines range affected the defendant's substantial rights and the fairness of the

judicial proceedings)).

In Mudekunye, the Fifth Circuit stated that it would correct the error when there is a substantial disparity between the imposed sentence and a sentence within the correct guideline range. In vacating and remanding Mudekunye's sentence, the Fifth Circuit noted that it was not apparent from the record that Mudekunye would have received an above-Guidelines sentence of 97 months if the district court had calculated the Guidelines correctly. United States v. Mudekunye, 646 F.3d 281, 287 (5<sup>th</sup> Cir. 2011).at 290. The Court ultimately held that in light of the significant disparity between Mudekunye's sentence and the top of the correct Guidelines range and the absence of any evidence suggesting that the court would have sentenced Mudekunye to 97 months' imprisonment irrespective of the correct Guidelines range, Mudekunye had shown a reasonable probability of a lesser sentence and therefore, demonstrated that the court's clear error affected his substantial rights. Id. at 291.

Kizzee's case is strikingly similar to Mudekunye. There is no evidence in the record in Kizzee's case, that the district court would have sentenced Kizzee to 70 months if the district court had calculated the Guidelines correctly in the first place.

Like the facts presented in Mudekunye and Gonzalez-

Terrazas, the substantial disparity between the imposed sentence of 70 months and the correct applicable Guidelines range 41-50 months, warrants the exercise of this Court's discretion to correct the error. Thus, Kizzee's sentence must be vacated and remanded with instructions for the district court to correct this plain error.

In denying Kizzee relief, the Fifth Circuit ignored this Court's precedent in Rosales-Mireles v. United States 138 S. Ct. 1897, 1904, 201 L. Ed. 2d 376 (2018) and Molina-Martinez v. United States, 136 S. Ct. 1338, 1343 (2016). Furthermore, as outlined above, the Fifth Circuit also ignored its own Precedent.

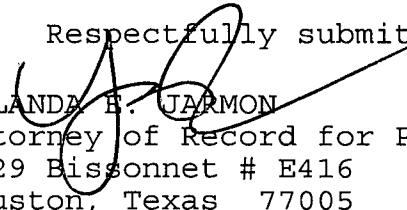
Because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit, this Court should grant certiorari in this case to decide this question and, upon review, should reverse the judgment of the Fifth Circuit.

CONCLUSION

For the foregoing reasons, petitioner PERENEAL KIZZEE respectfully prays that this Court grant certiorari, to review the judgment of the Fifth Circuit in this case.

Date: July 15, 2019.

Respectfully submitted,

  
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