

No. 19-5959

Supreme Court, U.S.

FILED

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IN THE  
SUPREME COURT OF THE UNITED STATES

LORETTA FERGERSON  
Petitioner

V

UNITED STATES OF AMERICA  
-Respondent-

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIFICATE

LORETTA FERGERSON  
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ORIGINAL

QUESTION PRESENTED FOR REVIEW

Did the Appeals Court err in applying clear error rather than plain error standard when deciding District Court's denial of Petitioner's 2255?

PARTIES TO THE PROCEEDINGS

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#### CITATION OF LOWER COURT DECISION

The report and recommendation of the United States Magistrate Judge for the Middle District of Alabama on Fergerson's Section 2255 motion is unpublished and reported at **Fergerson v. United States**, 2015 U.S. Dist. No. 138184

The opinion and order of the United States District Court for the Middle District of Alabama adopting the United States Magistrate Judge's report and recommendation is unpublished and report at **Fergerson v. United States**, 2015 U.S. Dist. 137430

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished and reported at **Fergerson v. United States**, 2017 U.S. App. No. 9510

#### JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on May 31, 2017, and the order denying the petition for panel rehearing was issued on June 30, 2017.

Jurisdiction in this court exist under 28 U.S.C. 1254(1).

## STATEMENT OF THE CASE

## A. FACTS AND PROCEEDINGS BELOW

## 1. Charged Offenses

On March 23, 2011, Loretta Fergerson ("Fergerson") was charged with conspiracy to defraud the government with respect to claims in violation of 18 U.S.C. 286 (count 1), fourteen counts of filing false claims in violation of 18 U.S.C. 287 (counts 2 thru. 15), three counts of wire fraud in violation of 18 U.S.C. 1343 (counts 16 thru 18), and two counts of aggravated identity theft in violation of 18 U.S.C. 1028A (counts 19 thru. 19).

## 2. Guilty Plea and Sentencing

On January 6, 2012, Fergerson pleaded guilty to counts 1, 17, and 20 of the indictment pursuant to a written plea agreement, which was penned by the government. On the day of plea hearing Fergerson's counsel, Aylia McKee negotiated with the government the removal of paragraphs 19-21. The changes are reflected in the plea hearing transcripts pgs. 12-15. On May 16, 2012 the District Court sentenced Fergerson to 115 months imprisonment. The court imposed concurrent 91 month sentences as to count 1 and count 17, and consecutive 24 months sentence as to count 20. She did not appeal her conviction or sentence.

## 3. Section 2255 Motion

Fergerson timely filed a 28 U.S.C. 2255 motion to vacate due to ineffective assistance of counsel at sentencing. Her motion was denied on October 8, 2015. On October 26, 2015 she filed a motion for re-consideration. The motion was denied on November 2, 2015.

#### 4. Certificate of Appealability

On November 17, 2015 Fergerson filed a certificate of appealability in the District Court on the denial of her 28 U.S.C. 2255 motion and motion for reconsideration. Both motions were denied on November 30, 2015. On December 14, 2015 she filed a motion for certificate of appealability in the Court of Appeals to appeal the denial of her 2255 and motion for reconsideration. On September 23, 2016 the Eleventh Circuit granted Fergerson's certificate of appealability on the following claims:

Whether her counsel was ineffective, in violation of the Sixth Amendment, for failing to object to the use of the 2011 Sentencing Guidelines Manual and to the imposition of a four-level enhancement under U.S.S.G. 2B1.1(b)(2)(B).

All other claims and motion for reconsideration was denied.

#### 5. Appeal

(a) Fergerson submitted her intial brief on October 6, 2016. She argued that the District Court's use of the 2011 Guidelines violated the ex post facto clause. She also argued that the government lacked evidence to prove at least 50 individuals suffered an actual loss under the 2008 Guidelines.

(b) In the government's response it agreed that the District Court's use of the 2011 Guidelines violated the ex post facto clause (Br. for United States at 18-20). It also admitted that it lacked recored evidence to prove a four-level enhancement (Br. for United States at 29). The government did however, dispute that the District Court's erroneous use of the 2011 Guidelines affected Fergerson substantial rights. Fergerson issued a traverse response.

(c) The Court of Appeals issued its decision on May 31, 2017. The court applying de novo and clear error review (Opinion at 2) affirmed

Fergerson's appeal.

(d) Fergerson filed a motion for reconsider on June 5, 2017. The Court of Appeals construed the motion as a petition for panel rehearing and denied it on June 30, 2017.

(e) On July 25, 2016 Fergerson submitted a motion to recall the mandate to the Court of Appeals. In her motion she argued that the court erred in applying clear error rather than plain error standard. The motion is currently pending.

#### SUMMARY OF ARGUMENT

The Court of Appeals erred in applying clear error rather than plain error standard in deciding the District Court's denial of Fergerson's 28 U.S.C. 2255. The government agrees that the correct standard of review in this case is plain error. The Court of Appeals use of clear error standard on an unpreserved error conflicts with its prior precedent's and the Supreme Court's.

The government concedes that Fergerson has meet the first two prongs under plain error. She also meets the last two prongs. Had counsel objected to the District Court's use of the 2011 Guidelines on ex post facto grounds, the government would have been requiried to present record evidence that at least 50 victims suffered an actual loss. The government cannot meet this burden.

The government cannot provide record evidence that at least 50 individuals suffered an actual financial loss. The government has stated the only "victim" to suffer an actual loss is the IRS. It also stated it does not have nor can it obtain record evidence to support a four-level enhancement under 2B1.1(b)(1)(B). At sentencing the District Court determined Fergerson's Guideline range to be 78 to 97 months. Without

the erroneous four-level enhancement her Guidelines range would be 51 to 63 months.

Counsel's failure to object to the miscalculation of Fergerson's offense level was an error sufficiently serious to label him as "not functioning as the 'counsel' guaranteed her by the Sixth Amendment. Further, the error affected her substantial rights. "In most cases a defendant who has shown that the District Court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016). Fergerson has shown plain error that substantially affected her rights and seriously affected the fairness, integrity, and public reputation of judicial proceedings. This court should remand the case the the Court of Appeals to resoleve the latter two questions under plain error standard.

## ARGUMENT

## THE APPEALS COURT ERRED IN APPLYING CLEAR ERROR RATHER THAN PLAIN ERROR STANDARD

The Eleventh Circuit, applying clear error standard (opinion at 2-3) affirmed the District Court's denial of Fergerson's 2255. The court held she did not establish prejudice by her counsel's deficient performance (opinion at 6). In reaching these conclusions, the Eleventh Circuit court of appeals did not apply the appropriate standard of review.

Fergerson's appeal questions whether her counsel was ineffective, in violation of the Sixth Amendment for failing to object to the District Courts's use of the 2011 Sentencing Guidelines and the imposition of a four-level enhancement under U.S.S.G. 2B1.1(b)(1)(B). The Eleventh Circuit reviews under a clear error standard when an error has been preserved. *United States v. Acosta-Gonzalez*, 596 Fed. Appx. 774 (11th cir. 2015) (Per Curiam). However, as in this case, when "a claim of ineffective assistance is based on a counsel's failure to object *the* error must satisfy the standard for prejudice that the Eleventh Circuit employs in its review for plain error." *Gordon v. United States*, 518 F.3d 1291, 1296 (11th cir. 2008); *United States v. Underwood*, 446 F.3d 1340 (11th cir. 2006). The Supreme Court has also held that unpreserved errors are reviewed under plain error. *Puckett v. United States*, 129 S. Ct. 1423 (2009).

The government agrees that the correct standard of review is plain error (Br. for United States at 11-12). The appeals court's use of clear error standard on an unpreserved error conflicts with its prior precedents and the Supreme Court's. The error infected the court's

procedural approach as well as the conclusion it reached. A court "by definition abuses discretion when it makes a clear error of law. **Koon v. United States, 116 S. Ct. 2035 (1996).**

Under plain error standard, Fergerson must show that (1) there is an error (2) that is plain (3) that affects substantial rights and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. **United States v. Olano, 113 S. Ct 1770 (1993).** Fergerson can meet her burden of establishing that an error affected the result of her sentencing. The government concedes the first two prongs under plain error are satisfied (Br. for United States at 18-20). The third error must have affected Fergerson's substantial rights, which in the ordinary case means she must "show a reasonable probability that, but for the error," the outcome of the proceeding would have been different. **United States v. Dominguez-Benitez, 124 S. Ct. 2333 (2004).**

Fergerson's offenses ended in 2008 (indictment at pg. 2; par. 2). Using the 2011 Guidelines, the District Court increased her offense level by four levels, based on its determination that her offense involved 50 or more victims. U.S.S.G. 2B1.1 (b)(2)(B). The 2011 Guidelines expanded the definition of victim to include any person whose means of identification was used unlawfully or without authority. 2B1.1, cmt., n.4(E) (2011). The 2008 Guidelines, which were in effect at the time of Fergerson's offenses, requires that a person suffer an actual loss to qualify as a victim (2B1.1, cmt. n.1 (2008)). The District Court's use of the 2011 Guidelines constituted "an ex post facto violation... that resulted in a substantial risk of a harsher punishment than what she faced when her offense ended in 2008." **Peugh v. United States, 133 S. Ct. 2072 (2013).**

The District Court should have used the 2008 Guidelines in sentencing Fergerson. The government agrees (Br. for United States at 19). Had counsel objected to the District Court's use of the 2011 Guidelines on ex post facto grounds, the government would have been required to present record evidence that at least 50 victims suffered an actual financial loss. The government cannot meet this burden.

The four-level enhancement is grounded in the 135 allegedly fake Id's from Fergerson's client files (PSR at par. 40). The government may be able to show the identities were used and refunds were paid out, but it cannot provide record evidence that the identities were used without consent. As Fergerson argued in the District Court, none of the individuals testified or provided signed affidavits stating they did not authorize Fergerson or any of her employees to prepare their tax return. Nor did any of the individuals state they did not receive any refund payments in connection with the filed tax returns (Doc. 17 at 6). The government also failed to provide record evidence that at least 50 of the individuals suffered an actual financial loss. Such evidence would be, inter alia, copies of re-issued refund checks in at least 50 of the individuals name. The Guidelines have since added: In determining whether the offense resulted in substantial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim: (i) becoming insolvent (ii) filing for bankruptcy (iii) suffering substantial loss of retirement, education, or other savings or investment funds (iv) making substantial changes to employment or (v) living arrangements or (vi) suffering substantial harm to the victim's ability to obtain credit.

The government never interviewed any of the individuals associated with the allegedly fake Id's. At sentencing IRS Agent Christopher Forte

testified that out of the 1,566 filed tax returns, only 40 to 50 were actually investigated. He stated out of the 40 to 50 investigated 15 were identity theft victims (Sentencing Trans. pg. 35: 23-25). Although the investigation revealed 15 identity theft victims, none of the individuals suffered an actual loss. The government has stated the only "victim" in this case to suffer an actual loss is the IRS (Br. for United States at 17-18). The government also stated it does not have nor can it obtain recorded evidence to support a four-level enhancement under 2B1.1(b)(1)(B) (Br. for United States at 29).

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Stricklan v. Washington*, 104 S. Ct. 2052, 2053 (1984). To prove ineffective assistance, a defendant must establish two things (1) Counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. A defendant *satisfies* the prejudice standard of Strickland by establishing "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S., at 694.

Fergerson meets both prongs under Strickland. Counsel's failure to object to the miscalculation of her offense level was an error sufficiently serious to label him as "not functioning as the 'counsel' guaranteed her by the Sixth Amendment." *Strickland*, 466 U.S. at 687. At sentencing the District Court determined Fergerson's offense level to be 28, paired with the criminal history category I, produced a guideline range of 78 to 97 months (Sentencing Trans. pg. 49: 2-7). Without the erroneous four-level enhancement her offense level would be 24, which produces a guideline range of 51 to 63 months. The Guidelines central role in sentencing means that an error related to the Guidelines can be particularly serious. A District Court that incorrectly calculates

the Guidelines range commits reversible procedural error. *Gall v. United States*, 128 S. Ct. 586 (2007).

The Supreme Court recently instructed that, "in most cases a defendant who has shown that the District Court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome." *Molina-Martinez*, 136 S. Ct. 1338, 1346 (2016). The court reasoned that a Guidelines range represents "the lodestar" for sentencing; it informs and instructs the District Court's determination of an appropriate sentence." Id. Thus, A District Courts's "selected Guidelines range" will typically influence the imposed sentence. Id.

"There may be instances when, " this court acknowledged, "despite application of an erroneous Guideline range, a reasonable probability of prejudice does exist" to substantiate a claim for relief because the record establishes that "the District Court thought the sentence it chose was appropriate irrespective of the Guidelines range." Id. at 1346-47. Then again, as in this case, if the record is silent as to what the District Court might have done had it considered the correct Guideline range," this court explained, "the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights." Id. at 1347.

Fergerson has shown plain error that substantially affected her rights and seriously affected the fairness, integrity, and public reputation of judicial proceedings. *Olano*, 113 S. Ct. 1770 (1993). She could be eligible for a sentence reduction of 27 to 34 months. Any amount of jail time has Sixth Amendment significance which constitutes prejudice for purpose of the Strickland test. *Glover v. United States*, 121 S. Ct. 696 (2001). Fergerson respectfully ask this court to remand

the case to the Court of Appeals for it to resolve the latter two questions under plain error standard. After identifying an unpreserved but plain legal error the Supreme Court routinely remand cases so the Court of Appeals may resolve whether the error affected a defendant's substantial rights and implicated the fairness, integrity, or public reputation of judicial proceedings and determine if judgment must be revised. *Hicks v. United States*, 137 S. Ct. 2000 (2017).

#### CONCLUSION

For the foregoing reasons, Fergerson respectfully ask this court to remand the case to the Court of Appeals for it to resolve the latter two questions under plain error standard.

Submitted this 15th day of November 2017

*Resubmitted June 12, 2019*

*Resubmitted July 2, 2019*

Respectfully Submitted,

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