

NO. 19-7884

Supreme Court, U.S.  
FILED

FEB 03 2020

OFFICE OF THE CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

"IN RE JAMES ERNEST FRYE JR."

AKA "JAMES EDWARD FRYE" - PETITIONER

VS.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR EXTRAORDINARY WRIT SEEKING  
MANDAMUS AND INJUNCTIVE RELIEF PURSUANT  
TO 28 U.S.C. § 1651(a) ALL WRITS ACT

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPEAL NO. 18-60551

**ORIGINAL**

JAMES ERNEST FRYE JUNIOR  
INMATE REGISTER NO. 98362-024  
FCC COLEMAN/USP II  
POST OFFICE BOX 1034  
COLEMAN, FL 33521-1034

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QUESTIONS PRESENTED FOR REVIEW

- 1) Is Mandamus and Injunctive Relief warranted in the instant request for the issuance of the All Writs Act 28 U.S.C. § 1651(a), due to the lower courts' (U.S. Court of Appeals for the Fifth Circuit and the U.S. District Court for the Southern District of Mississippi) continued denial of Petitioner's retained enumerated constitutional rights?
- 2) Does the First Amendment right to petition the Government for redress of grievances allow Petitioner Frye to petition the lower Court of Appeals for the Fifth Circuit, for a plain error review pursuant to Federal Rules of Criminal Procedure 52(b) for a record of fact of an incorrect calculation of the U.S.S.G., as decided by this U.S. Supreme Court in Rosales-Mireles v. U.S., 585 U.S. \_\_\_, 138 S.Ct. \_\_\_, 201 L.Ed.2d 376, 2018 U.S. LEXIS 3690?
3. Did the lower courts' order[s] in Petitioner Frye's diligent filing for a plain error review deprive Frye of his substantial Fifth Amendment rights of life and liberty, without due process of law, as this Court held in Rosales-Mireles v. U.S., 585 U.S. \_\_\_, 138 S.Ct. \_\_\_, 201 L.Ed.2d 376, 2018 U.S. LEXIS 3690?
4. Does Article Six Section Two of the United States Constitution require the lower courts in this case to afford Petitioner Frye his procedural due process (the minimal requirements of Notice and a Hearing guaranteed [a plain

error review] by the Due Process Clause of the Fifth Amendment, especially if the deprivation of a significant life or liberty interest may occur)?

- 5) Was the lower courts' inconsistent application of this Court's and their own holdings of the requirement of review as to plain error a violation of the Ninth Amendment of the United States Constitution, which states that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the People?

### Relief Sought

Petitioner-Applicant Frye respectfully requests that this United States Supreme Court compel the United States Court of Appeals for the Fifth Circuit to perform their discretionary duties correctly, by applying a plain error review pursuant to Fed. R. Crim. P. 52(b), to Petitioner-Applicant's record of fact and the incorrect application of the U.S.S.G. in his sentencing, in accordance with this Court's announcement in Rosales-Mireles v. U.S., 585 U.S. \_\_\_, 138 S.Ct. \_\_\_, 201 L.Ed.2d 376, 2018 U.S. LEXIS 3690.

Petitioner-Applicant Frye respectfully asserts that injunctive relief is also warranted; to stop the United States Court of Appeals for the Fifth Circuit from continuing to deny Petitioner-Applicant Frye's substantial constitutional rights and provide the requested plain error review of the unauthorized and unconstitutional application of the career criminal status and subsequent career criminal enhancements.

More specifically, Petitioner-Applicant Frye respectfully requests that this Court remand this case back to the U.S. Court of Appeals for the Fifth Circuit, and Order the fifth Circuit to review Petitioner-Applicant's claim pursuant to Fed.R.Crim.P. 52(b) Plain Error and to stop the manifest injustice and continued denial of Petitioner-Applicant's substantial constitutional rights.

Exceptional Circumstances that Warrant the Exercise  
of This U.S. Supreme Court's Discretionary Powers

Petitioner-Applicant Frye respectfully asserts that the exceptional circumstance(s) in this case are that the U.S. Court of Appeals for the Fifth Circuit's deviant and conflicting application of Fed.R.Crim.P. 52(b) Plain Error; which conflicts with Congress-enacted legislation, this U.S. Supreme Court's announced standards, and the Fifth Circuit's recent decisions (see relied-upon cases cited herein).

The Fifth Circuit Court of Appeals in Petitioner-Applicant's appeal has decided an important federal question (a plain error review under Fed.R.Crim.P. 52(b)) in a way that conflicts with relevant recent decisions of this U.S. Supreme Court and their own court standards.

The Fifth Circuit Court of Appeals in Petitioner-Applicant Frye's appeal has so far departed from the accepted and usual course of judicial proceedings, as to the discretionary application of Fed.R.Crim.P. 52(b) Plain Error that the exercise of this U.S. Supreme Court's supervisory power is warranted under this Court's Rule 20.1, 28 U.S.C. § 1651(a) All Writs Act Extraordinary Writ seeking Mandamus and Injunctive Relief.

Petitioner-Applicant Frye maintains that the Fifth Circuit Court of Appeals' wantonness, their prejudicial orders, and vexatious denial of Petitioner-Applicant's appeal meets the exceptional circumstance requirements.

How the Writ will be in aid of the  
Court's appellate jurisdiction

Petitioner-Applicant Frye respectfully asserts that granting this Extraordinary Writ seeking mandamus and injunctive relief will end the continuation of a manifest injustice and end the denial of Petitioner-Applicant's substantial constitutional rights.

Petitioner-Applicant Frye respectfully asserts that the United States Constitution, Article Three Section Two, vests appellate jurisdiction, the power of this U.S. Supreme Court to review and revise a lower court's decision.

For this U.S. Supreme Court to use that power here in Petitioner-Applicant Frye's case where it is warranted will be in aid of this Court's appellate jurisdiction.



Why Adequate Relief Cannot Be Obtained  
In Any Other Form Or From Any Other Court

Petitioner-Applicant Frye contends that, according to the legal application of a writ of mandamus and injunctive relief, relief ordering a lower court (in this case, the Fifth Circuit Court of Appeals) to perform their Article Six Paragraph Two of the United States Constitution duties can only be obtained by this "Superior Court" (the United States Supreme Court).

A petition for a plain error review for the incorrect application of the United States Sentencing Guidelines is not appropriate according to the U.S. District Court. Petitioner-Applicant contends that, according to this Court's announcement in Rosales-Mireles, supra, an incorrect application of the U.S.S.G. should be corrected by a U.S. Court of Appeals.

Therefore, adequate relief cannot be obtained in any other form or from any other court.

LIST OF PARTIES IN COURT BELOW

1. James Ernest Frye Junior  
aka "James Edward Frye"

Petitioner

2. United States Court of Appeals for the Fifth Circuit

Respondent

3. United States District Court for the Southern District of Mississippi, Eastern Division

Respondent

4. United States of America

Respondent

5. Gregory Layne Kennedy  
United States Attorney

Respondent

6. Jerry Lynn Rushing  
Assistant United States Attorney

Respondent

# CORPORATE DISCLOSURE STATEMENT

Petitioner/Applicant filing brief is not a non-governmental corporation. Corporate disclosure statement is inapplicable.

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## JURISDICTIONAL STATEMENT

This Court has jurisdiction to proceed pursuant to the authority provided by 28 U.S.C. § 1331 and United States Supreme Court Rule 10(a) and 20.1.

The Judgment/Decision to be reviewed was entered on December 3, 2019: See Appendix #B, pages 2-3. Also, the orders to take no action entered December 3, 2019 and December 16, 2019. See Appendix #N, page 70, and Appendix #P, page 84.

## CITATIONS OF LOWER COURT DECISIONS

The decisions of the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Southern District of Mississippi, Eastern Division, are detailed in the Written Orders attached to this petition (see Appendix).

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## CONTROLLING PROVISIONS, STATUTES, AND REGULATIONS

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, of the right of the people to peaceably assemble, and to petition the government for a redress of grievance.

Section 1607(a)(1) of Title 18 of the United States Code provides:

### § 1607 Rules of Construction

(A) Constitutional Rights. Nothing in this Act shall be construed to prohibit or interfere with:

- (1) The right to petition the government for redress of grievance;
- (2) The right to express a personal opinion; or
- (3) The right to association.

Protected by the First Amendment to the U.S. Constitution.

The Fifth Amendment to the United States Constitution provides:

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

Article Six, Clause II, to the United States Constitution provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and all judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

Procedural Due Process provides:

The minimal requirements of Notice and a Hearing guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution, especially if the deprivation of life, liberty, or property interest may occur.

The Ninth Amendment to the United States Constitution provides:

That the enumeration in the U.S. Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People.

Seciton 1651(a) of Title 28 of the United States Code provides:

§ 1651 Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a Justice or Judge of a court which has jurisdiction.

Rule 10(A) of the United States Supreme Court provides that

... The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) A United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a state court of the last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Rule 10(c) of the United States Supreme Court Rules provides that:

... The following, although neither controlling nor fully measuring the Court's discretion indicate the character of the reasons the Court considers:

(C) A state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

Rule 20.1 of the United States Supreme Court Rules provides:

Rule 20. Procedure on Petition for an Extraordinary Writ

.1) Issuance by the court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that it will be in aid of the Court's appellate jurisdiction, that exceptional circum-

stances warrant the exercise of this Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

Federal Rules of Appellate Procedure 2 provides:

Rule 2 Suspension of Rules

On its own or a party's motion, a Court of Appeals may—to expedite a decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs except as otherwise provided in Rule 26(d).

Federal Rules of Criminal Procedure 52(b) provides:

Rule 52 Harmless and Plain Error

(B) Plain Error—A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Section 1607(a)(1) of Title 18 of the United States Code provides:

§ 1607 Rules of Construction

(a) Constitutional Rights.—Nothing in this Act shall be construed to prohibit or interfere with:

- (1) The right to petition the government for redress of grievance;
- (2) The right to express a personal opinion; or
- (3) The right to association.

Protected by the First Amendment.

## STATEMENT OF THE CASE AND GOVERNING FACTS

On April 21, 2005, U.S. District Court Judge William H. Barbour, in the U.S. District Court for the Southern District of Mississippi, imposed a sentence on Petitioner/Applicant Frye for the crime of carjacking, 18 U.S.C. § 2119(3), etc., which took place on April 3, 1999.

Petitioner/Applicant Frye's sentence is supported by impermissible factors which incorrectly allowed the assignment of Career Offender status, resulting in United States Sentencing Guidelines miscalculations of the U.S.S.G. Sentencing Table in both the Criminal History category and the Offense Level, which are clear plain error that affect Petitioner/Applicant Frye's substantial rights.

After the pronouncement of this U.S. Supreme Court holding in Rosales-Mireles v. U.S., 2018 BL 214344 U.S., No. 16-9493 (6-18-2018), Petitioner-Applicant Frye made diligent attempts to receive a plain error review from the fifth Circuit Court of Appeals. Frye attempted to receive an appellate plain error review by filing a notice of appeal on 7-13-2018 based on 18 U.S.C. §§ 3742, 3742 (a)(2), Federal Rules of Criminal Procedure 52(b), and 18 U.S.C. §§ 3742(F)(1) and (F)(2). Petitioner/Applicant Frye diligently pursued this appeal, even attempting to receive a hearing en banc upon this appeal's dismissal because the provisions of F.R.Crim.P. 52(b) were clearly held by this Court to be sufficient to receive a Plain Error review, although § 3742 was relied upon in error by Petitioner/Applicant Frye.

Petitioner/Applicant Frye subsequently filed a motion pursuant

to § 3582 seeking correction of sentence upon Plain Error review, which was dismissed by the U.S. District Court and that dismissal order attempted to sanction Petitioner/Applicant Frye by ordering pre-approval by the court for any subsequent filings.

\* On 3-22-2019, Petitioner/Applicant Frye filed an Application for Leave to Appeal Pursuant to F.R.Crim.P. 52(b), which was construed by the court clerk as a Notice of Appeal. Petitioner/Applicant Frye was advised by Clerk Rebecca Leto that the application had been unsigned.

On 4-1-2019, Petitioner/Applicant Frye resubmitted a signed Application for Leave to Proceed on Appeal Pursuant to F.R.Crim.P. 52(b) with a Judicial Notice which made it unequivocally clear that the appeal was based on F.R.Crim.P. 52(b) seeking a Plain Error review, annexed thereto. (See: Application for Leave to Proceed on Appeal Pursuant to F.R.Crim.P. 52(b) Plain Error, Appendix #F, pages 21-38, and #G, pages 39-40.)

A review of the court-docketed record shows that no action will be taken at this time on the judiciary notice received because the case is under jurisdictional review. Docket Entry dated 4-1-2019 (See: Docket Record, Appendix Y, page 93).

On 4-12-2019, the U.S. Court of Appeals Order issued stating that Petitioner/Applicant Frye was to provide a showing of Good Cause/Excusable Neglect, for the untimely Notice of Appeal or the appeal would be dismissed. This notice of the deadline to show cause was received by Petitioner/Applicant Frye with only six (6) days remaining before the court-imposed deadline. (See: Docket Record Notice/Order to Show Cause, Appendix #Y, page 93.)

Upon completing a hasty response, Petitioner/Applicant Frye made it clear that the response provided was a showing of good cause for the Application for Leave to Proceed on Appeal Pursuant to F.R.Crim.P. 52(b)—Plain Error, Docketed #19-60185 (See: Docket Entry Response to Show Cause Order, Appendix #Y, page 93).

\* On 6-11-2019, U.S. District Court Order was issued, which determined that Petitioner/Applicant Frye had shown good cause/excusable neglect for the failure to file a timely appeal. (See: Docket Record District Court Order dated 6-11-2019, Sppendix #Y, page 93.)

\* On 7-3-2019, Fifth Circuit U.S. Court of Appeals Deputy Clerk Rebecca Leto dismissed Petitioner/Applicant Frye's appeal pursuant to Fifth Circuit Rule 42 for failure to pay fee, even though the motion to proceed in forma pauperis and all required supporting financial affidavits were filed and docketed on 6-18-2019. (See: Notice dated 7-3-2019, Appendix #I, page 42.)

\* After confirming docketed motion requesting leave to proceed in forma pauperis being previously filed and docketed, Deputy Clerk Rebecca Leto reinstated appeal and issued Notice. (See: Notice dated 7-3-2019, Appendix #I(1), page 43.)

\* On 8-1-2019, U.S. District Court Order issued denying Petitioner/Applicant Frye's in forma pauperis status, stating that appeal was not taken in good faith and, therefore, frivolous. (See: Court Order dated 8-1-2019, Appendix #C, pages 4-8.)

\* On 8-9-2019, Briefing Notice was issued and Appellant's Brief due 9-11-2019, Motion to Proceed In Forma Pauperis was submitted by Appellant on 8-14-2019. Petitioner/Applicant Frye filed Brief



for Appeal Pursuant to F.R.Crim.P. 52(b) Plain Error on 8-24-2019. (See: Applicant's Brief on Appeal dated 8-24-2019, Appendix #K, pages 50-72.)

\* On 11-26-2019, Petitioner/Applicant Frye, using due diligence, obtained a copy of the Offense Level computation from the Pre-sentencing Report showing, on the record, that the specific sentencing enhancement error was based on an unauthorized and impermissible Career Offender enhancement, which resulted in an excessive Criminal History enhancement of 3-4 levels, and an Offense Level increase of 25 levels. These enhancements are a clear result of plain error. This Presentence Report record was annexed to a Supplement filed on 11-26-2019 pursuant to Fed.R. Crim.P. 15(d). (See: Supplement dated 11-26-2019, Appendix #M, pages 74-78.)

\* On December 3, 2019, the Fifth Circuit Court of Appeals issued an order denying in forma pauperis status and dismissing the appeal, stating "Because Frye has not shown that he will raise a nonfrivolous issue on appeal, his motion to appeal IFP is denied and the appeal is dismissed." (See: USCA Order dated 12-3-2019, Appendix #B, pages 2-3.)

\* On December 3, 2019, the Fifth Circuit Court of Appeals stated in writing that the court had received the Petitioner's Motion to Supplement and "in light of the court's opinion of this date, we are taking no action on this motion." (See: USCA Notice dated 12-3-2019, Appendix #N, page 79.)

\* On December 10, 2019, instead of filing a Motion for Panel Rehearing or Hearing En Banc, Petitioner/Applicant Frye filed a

Judicial Notice and Motion to Suspend Any Appellate Rules in Appeal Proceedings #19-60185 and to Expedite a Plain Error Decision for Good Cause and to Prevent a Manifest Injustice Pursuant to Rule 2 (Suspension of Rules) of Federal Rules of Appellate Procedure. This Rule, by definition, would allow Petitioner/Applicant Frye to finally receive a Plain Error decision. (See: Motion to Suspend Rules and Expedite a Plain Error Decision dated 12-10-2019, Appendix #O, pages 80-83.)

\* On December 17, 2019, the U.S. Court of Appeals for the Fifth Circuit sent notice that stated "We have received your Judicial Notice and Motion to Suspend Any Appellate Rules and Expedite a Plain Error Decision for Good Cause and to Prevent a Manifest Injustice Pursuant to Rule 2, in light of the Court's opinion of 12-3-2019 we are taking no action on the documents." (See: USCA Notice dated 12-17-2019, Appendix #P, page 84.)

Petitioner/Applicant Frye's due diligence is expressed in this instant extraordinary writ which is required in this exigent circumstance where the lower courts are unwilling to provide relief of a plain error decision which affects Petitioner/Applicant Frye's substantial rights, where to provide relief will prevent a manifest injustice from occurring is indisputably clear. This will be demonstrated specifically in the Argument section of this instant petition.

## ARGUMENT

### I. EXTRAORDINARY RELIEF IS WARRANTED PURSUANT TO 28 U.S.C. § 1651(a).

#### A. Supporting Law to the Facts

1) Here, Petitioner/Applicant contends that extraordinary relief is warranted pursuant to 28 U.S.C. § 1651(a) due to the critical and exigent circumstances caused by the lower court's usurpation and abuse of discretion of the Plain Error standards announced in this U.S. Supreme Court and in their court (Fifth Circuit Court of Appeals).

2) Petitioner/Applicant Frye contends that Article VI Clause II of the United States Constitution and Congress-enacted Federal Rule of Criminal Procedure 52(b)—Plain Error, required the lower courts to apply the stare decisis doctrine to petitioner's case. Article VI Clause II states that the United States Constitution and the laws of the United States, which shall be made in pursuant thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and all judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

Petitioner asserts that the record of facts support his claim that the lower courts (Fifth Circuit Court of Appeals and the U.S. District Court for the Southern District of Mississippi) in Petitioner/Applicant Frye's case are contrary and inconsistent to Article VI Clause II, First Amendment, and Fifth Amendment. Article VI Clause II states: "The Supreme Law of the land, and all judges in every state, shall be bound thereby, the Constitution or laws enacted by Congress." Here, Petitioner/Applicant Frye asserts

that the record of facts reflects that the lower courts are bound by well-established law, to provide a plain error review in Petitioner/Applicant Frye's case.

#### Record of Facts

Petitioner/Applicant Frye diligently filed unsuccessfully requests for a plain error review:

On 4-1-2019, the U.S. Court of Appeals for the Fifth Circuit received and docketed Petitioner/Applicant Frye's Application for Leave to Proceed on Appeal Pursuant to F.R.Crim.P. 52(b)—Plain Error and was assigned Appeal No. 19-60185.

According to the standards of F.R.Crim.P. 52(b), the Court of Appeals failed to acknowledge the substantial rights of Petitioner/Applicant Frye that were clearly being deprived. Specifically:

The right to petition the Fifth Circuit Court of Appeals for a Plain Error analysis of the incorrect application of the United States Sentencing Guidelines based on this U.S. Supreme Court's decision in Rosales-Mireles v. U.S., 2018 BL 214344, U.S., No. 16-9493 (6-18-2018). In Petitioner/Applicant Frye's case, the incorrect application of the U.S.S.G. is clearly identical to Rosales-Mireles (cited above).

The Fifth Circuit Court's failure to apply a Plain Error review to Petitioner/Applicant Frye's case also deprived Frye of his Fifth Amendment procedural due process right, which required the Fifth Circuit Court to afford Frye an entire appellate proceeding, including a Plain Error analysis, due to the clear plain error of the incorrect application of the U.S.S.G.

- 1) The Fifth Circuit Court of Appeals failed to adjudicate the clear plain error in Applicant/Petitioner Frye's case, on the merits. Instead, the court dismissed Frye's entire appellate proceedings by way of improper and unreasonable use of appellate rules. The Fifth Circuit Court then stated, "Because Frye has not shown he will raise a non-frivolous issue on appeal, his Motion to Appeal In Forma Pauperis is denied and the appeal is dismissed. (See: Court Order dated 12-3-2019, Appendix B, pp. 2-3).

Petitioner/Applicant Frye maintains that based on this U.S. Supreme Court's holdings in Rosales-Mireles v. U.S., supra, the Fifth Circuit Court's order is clearly improper and unreasonable. This U.S. Supreme Court held that "a miscalculation of a Guideline sentencing range that has been determined to be plain and to affect a defendant's substantial rights calls for a Court of Appeals to exercise its discretion under F.R.Crim.P. 52(b) to vacate the sentence in the ordinary case."

The above facts are one of the many reasons that Petitioner/Applicant Frye is seeking this Court's clearly warranted injunctive relief.

B. Necessity of extraordinary writ.

Petitioner/Applicant Frye is aware that the extraordinary writ is one of the most potent weapons in the judicial arsenal, and three conditions must be satisfied before it may issue. See Kerr v. U.S. District Court for the Northern District of California, 96 S.Ct. 219 (1976).

The first condition is "that the party seeking issue of the writ must have no other adequate means to attain the relief he desires." This condition is designed to insure that the writ will not be used as a substitute for the regular appeal process.

Here, Petitioner/Applicant Frye relies on the facts cited

above to satisfy the first condition, whereas Petitioner/Applicant Frye requests that this United States Supreme Court enjoins the enforcement of duly-enacted laws, and Congress-enacted federal statutes is the extraordinary circumstances that is reserved for the rarest cases, such as this case. The Petitioner/Applicant is forced to reiterate the continual usurpation of powers and the abuse of discretion of the United States Court of Appeals for the Fifth Circuit panel's decision. (See: Appendix B, pp. 2-3. United States Court of Appeals for the Fifth Circuit panel's entire decision, which is a misapplication of Article VI, Clause II, of the United States Constitution, the First Amendment of the United States Constitution, the Fifth Amendment of the United States Constitution, and the intent of Congress-enacted Federal Rules of Criminal Procedure 52(b), which amounts to a miscarriage of justice warranting extraordinary relief from this U.S. Supreme Court.

Petitioner/Applicant Frye requests a grant of this United States Supreme Court's equitable power as a failsafe to be used in this case, only because of the critical exigent circumstances manifested by the United States Court of Appeals for the Fifth Circuit panel's decision in this matter.

The second condition that the petitioner/applicant will satisfy is "the burden of showing that petitioner's right to issuance of the writ is clear and indisputable." See: Kerr, 426 U.S. at 403.

Here, Petitioner/Applicant Frye contends that the rights provided by Article VI, Clause II, of the United States Constitution. petitioner/applicant's First Amendment right to petition the government for redress of grievance, and petitioner/applicant's

Fifth Amendment right to procedural due process of law (right to appeal an incorrect application of the U.S.S.G. pursuant to the Congress-enacted federal statute F.R.Crim.P. 52(b)).

Petitioner/Applicant Frye respectfully asserts that the provided supported facts provide clear example of the United States Court of Appeals for the Fifth Circuit panel's impediment of the petitioner/applicant's relied upon United States Constitutional rights warranting the issuance of the requested extraordinary relief by this United States Supreme Court.

Petitioner/Appellant Frye will satisfy the third condition by showing that the writ is appropriate under the circumstances. Petitioner/Applicant Frye is aware that the extraordinary writ against a lower court is codified at 28 U.S.C. § 1651(a) [28 U.S.C. § 1651(a)]: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." Ex Parte Fahey, 332 U.S. 258, 259-60, 91 L.Ed. 2041, 67 S.Ct. 1558 (1947). "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the lower court against which extraordinary writ is sought] to a [124 S.Ct. 2587] lawful exercise of its prescribed jurisdiction." Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26, 87 L.Ed. 1185, 63 S.Ct. 938 (1943). Although courts have not "confined themselves to an arbitrary and technical definition of jurisdiction," Will v. U.S., 389 U.S. 90, 95, 19 L.Ed.2d 305, 88 S.Ct. 269 (1967), "only exceptional

circumstances amounting to a judicial 'usurpation of power'," ibid., or a "clear abuse of discretion," Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383, 98 L.Ed. 106, 74 S.Ct. 145 (1953), "will justify the invocation of this extraordinary remedy." Will, 389 U.S. at 95, 19 L.Ed.2d 305, 88 S.Ct. 269.

Here, in this case, it is necessary for this United States Supreme Court to issue the extraordinary writ to restrain the lower court (United States Court of Appeals for the Fifth Circuit) from seriously affecting the fairness, integrity, and public reputation of judicial proceedings, by their improper and unreasonable denial of Petitioner/Applicant Frye's entire appellate proceedings pursuant to F.R.Crim.P. 52(b). Petitioner/Applicant Frye also relies on this United States Supreme Court's decision in Rosales-Mireles v. U.S., 2018 BL 214344, U.S., No. 16-9493, 6/18/2018.

This United States Supreme Court has repeatedly reversed judgments for plain error on the basis of inadvertant or unintentional errors of the court or the parties below (the United States Court of Appeals for the Fifth Circuit).

Petitioner/Applicant Frye relies upon and quotes Supreme Court Justice Neil M. Forsch: "What reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity, if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands."

Here, the United States Court of Appeals for the Fifth Circuit panel's refusal to correct obvious errors of their own devise does not threaten but forces the petitioner/applicant to linger in



federal prison longer than a correct application of the United States Sentencing Guidelines and the law demands.

## II. United States Court of Appeals for the Fifth Circuit's Judicial Usurpation of Power and Abuse of Discretion

### A. Supporting Laws to the Facts

In this matter, Petitioner Frye relies on the facts and laws that are clearly in conflict with the United States Court of Appeals for the Fifth Circuit panel's erroneous decision, which supports Petitioner/Applicant Frye's claim of the Fifth Circuit panel's "usurpation of power" and "abuse of discretion."

The following are the actual legal facts, which demonstrate the U.S. Court of Appeals for the Fifth Circuit's usurpation of power and abuse of discretion.

Article VI, Clause II, of the United States Constitution binds every court in the United States and judge thereof to the supreme law of the land. The laws of the land that Petitioner/Applicant Frye is relying on are:

- ° Rosales-Mireles v. U.S., 2018 BL 214344, U.S., No. 16-9493, 6/18/2018, which is in conflict with the U.S. Court of Appeals for the Fifth Circuit panel's decision for the reasons cited above.
- ° Stokes v. Southwest Airlines, 887 F.3d 199 (April 5, 2018), which states in pertinent part: "this circuit abides by the rule of orderliness, under which a panel of the court cannot overturn a prior panel decision absent an intervening change in the law, such as by a statutory amendment or the Supreme Court ..."
- ° United States v. Douglas, No. 17-30884, 5th Circuit (December

12, 2018). The United States Court of Appeals for the Fifth Circuit ordered that Douglas' sentence be vacated and remanded the case to the district court for resentencing, finding that the district court's miscalculation of Douglas' sentencing range constitutes plain error (420-months sentence was 93 months higher than the top of the guideline range).

Petitioner respectfully asserts that a proper plain error review of Petitioner/Applicant Frye's sentence would give example of unauthorized Career Offender status and enhancements and incorrect application of the Sentencing Guidelines, resulting in plain error that incorrectly and unlawfully sentences the petitioner/applicant to a error in sentence length much greater than that of the Douglas case. As United States v. Douglas is a very recent ruling and provided the type of relief that the petitioner/applicant is seeking, the United States Court of Appeals for the Fifth Circuit panel's decision in Douglas is in conflict with the panel's ruling in petitioner/applicant's appellate proceedings. This U.S. Supreme Court's granting of an extraordinary writ is necessary to prevent the abuse of discretion and usurpation of power that denies Petitioner/Applicant Frye access to the relief provided by Congress-enacted Federal rule of Criminal Procedure 52(b), Article VI Clause II, petitioner/applicant's First Amendment right to redress, and Fifth Amendment right to procedural due process.

In the Douglas case, it is clear that the Fifth Circuit Court of Appeals is capable of providing a plain error review/analysis and making a ruling consistent with the Congress-enacted Federal Rule of Criminal Procedure 52(b)—Plain Error.

Although the Fifth Circuit Court of Appeals did not make a ruling consistent with established precedent and this U.S. Supreme Court's holdings in Petitioner/Applicant Frye's case, the evidence of conflicting decisions is made clear in the following recent cases where the Fifth Circuit Court of Appeals has made rulings consistent with Federal Rule of Criminal Procedure 52(b). See:

United States v. Lovely, 776 F.ed Appx. 262 (Sept. 4, 2019);

United States v. Perez-Mateo, 926 F.3d 216 (June 10, 2019);

United States v. Frescas, 932 F.3d 324 (July 29, 2019);

United States v. Waldrip, 2019 U.S. Appx. LEXIS 23789

August 9, 2019);

United States v. Sedberry, 768 Fed. Appx. 199 (April 11, 2019);

United States v. Campos, 922 F.3d 686 (April 30, 2019);

United States v. Brown, 2019 U.S. Appx. LEXIS 16168 (May 22, 2019);

United States v. Reado, 776 Fed. Appx. 261 (Sept. 4, 2019);

Furthermore, to support Petitioner/Applicant Frye's claim of usurpation of power and abuse of discretion, the Fifth Circuit Court of Appeals stated in United States v. Tanksley, 848 F.3d 347, 350 (5th Cir.), emphasis added, quoting United States v. Kirk, 528 F.2d 1057, 1063 (5th Cir. 1976), as supplemented, 854 F.3d 284 (5th Cir. 2017): "When the Supreme Court 'expressly or implicitly' over-rules one of our precedents, we have the authority and obligation to declare and implement this change in the law ... Such a change occurs, for example, when the Supreme Court disavows the mode of analysis on which our precedent relied." See, e.g., id., at 350-52 (finding precedent abrogated where a recent Supreme Court

opinion "instructed courts on how to perform the relevant analysis in a way that unequivocally resolve[d] the case").

Here, Petitioner/Applicant Frye respectfully asserts that the U.S. Court of Appeals for the Fifth Circuit panel's decision pre-terms this U.S. Supreme Court's decision in Rosales-Mireles, which clearly disavows the mode of analysis used by the Fifth Circuit Court of Appeals when reviewing issues of plain error. The precedents established in United States v. Tanksley and United States v. Kirk, supra, give clear example of the U.S. Court of Appeals for the Fifth Circuit established precedents which instruct the Court of Appeals on how to perform the relevant change in analysis. The Fifth Circuit panel's decision is again in conflict with their own precedents and impedes the petitioner/applicant's attempt to receive correction of the plain errors that seriously affect the fairness, integrity, or public perception of judicial proceedings. Petitioner/Applicant Frye asserts that this is not only an abuse of discretion but evidence of usurpation of power by the U.S. Court of Appeals for the Fifth Circuit Court of Appeal panel.

Petitioner respectfully asserts that numerous additional precedents exist, such as United States v. Trujillo, 502 F.3d 353, 356 (5th Cir. 2007), where it states that the U.S. Court of Appeals for the Fifth Circuit reviews the district court's interpretation or application of the Sentencing Guidelines de novo and its factual findings for clear error; United States v. Boche-Perez, 755 F.3d 327, 334 (5th Cir. 2014), quoting Tech Automation Servs. Corp. v. Liberty Surplus Ins. Corp., 673 F.3d 399, 405 (5th Cir.

2012), asserting the Fifth Circuit Court of Appeals abides by the rules of orderliness, Hoskins v. Berkin Van Lines, 343 F.3d 769, 775-76 (5th Cir. 2003), giving the court instruction when the U.S. Supreme Court shifts the focus of analysis; United States v. Alcantar, 733 F.3d 143, 146 (5th Cir. 2013), requiring an intervening change in analysis must be unequivocal.

The U.S. Court of Appeals for the Fifth Circuit panel's conflicting decision is a clear example of not only an abuse of discretion but also evidence of usurpation of power, which has denied Petitioner/Applicant Frye his constitutional rights as well as Supreme Court doctrines and rights afforded by Congress-enacted federal statutes, amounting to extraordinary circumstances that require the relief only afforded by this U.S. Supreme Court's extraordinary writ.

Petitioner/Applicant Frye diligently attempted to invoke his First and Fifth Amendment rights in appellate proceedings on December 10, 2019, by filing a "Motion to Suspend Any Appellate Rules in Appeal Proceeding #19-60185 and to Expedite a Plain Error Decision for Good Cause and to Prevent a Manifest Injustice Pursuant to Federal Rules of Appellate Procedure 2—Suspension of Rules." The Fifth Circuit Court of Appeals again unjustly decided to take no action on this motion, resulting in a clear deprivation of Petitioner/Applicant Frye's procedural due process as to a complete appeal proceeding.

The diligent efforts of Petitioner/Applicant Frye to obtain a plain error review/decision are:

\* Petitioner/Applicant Frye filed an Application for Leave to

Proceed on Appeal Pursuant to F.R.Crim.P. 52(b) Plain Error dated 4-1-2019;

- \* Petitioner/Applicant Frye filed a Judicial Notice annexed to his Application for Leave to Proceed on Appeal Pursuant to F.R.Crim.P. 52(b) Plain Error dated 4-1-2019;
- \* Petitioner/Applicant filed a Motion to Show Cause why Untimely Appeal Based on Plain Error Should Be Timely Due to Excusable Neglect;
- \* Petitioner/Applicant Frye filed a Motion to Proceed In Forma Pauperis Based on Plain Error in U.S. District Court;
- \* Petitioner/Applicant Frye filed an Appeal of Denial of In Forma Pauperis Seeking Plain Error Review;
- \* Petitioner/Applicant Frye filed a Brief on Appeal Pursuant to F.R.Crim.P. 52(b) Plain Error.
- \* Petitioner/Applicant Frye filed a Notice of Appeal of U.S. District Court's Denial of In Forma Pauperis for Plain Error Review on Appeal;
- \* Petitioner/Applicant Frye filed a Supplement to Brief with Exhibits of Plain Error from Record of P.S.R. annexed thereto;
- \* Petitioner/Applicant Frye filed a Motion to Suspend Rules to Expedite a Plain Error Decision and Prevent Manifest Injustice Pursuant to Federal Rules of Appellate Procedure 2—Suspension of Rules;
- \* Petitioner/Applicant Frye filed the instant Extraordinary Writ Pursuant to 28 U.S.C. § 1651, after receiving Mandate of Dismissal of Appeal, where appellate court state that the decision to dismiss the appeal was based on the record and the briefs filed.

This showing of Petitioner/Applicant Frye's diligent attempts to receive a plain error review and decision is in conflict with the lower court's decisions, in light of the record of facts, and the briefs filed. The record clearly demonstrates that Petitioner/Applicant Frye was given a Career Offender status and enhancements without having the two prior convictions required by the U.S.S.G. and Congress, which resulted in plain error that resulted in an incorrect application of the U.S.S.G. Sentencing Table, specifi-

cally an incorrect Criminal History category as well as an incorrect Offense Level.

The lower court, in its mandate (see: Appendix #A) also stated that the decision to dismiss was based on the briefs filed. This statement is also in conflict with the facts and has deprived Petitioner/Applicant Frye of his substantial right to procedural due process. All of the briefs filed in this appellate proceeding (#19-60185) have been filed by Petitioner/Applicant Frye and are provided in this petition's appendix. Every brief/motion filed by Petitioner/Applicant Frye has requested a Plain Error review and decision and has given clear indication of the clear plain error. The lower court's admission of their decision dismissing the appeal being based on the record and briefs filed is an assertion that a Plain Error review was made by the court. If this is to be taken as fact, at the very least, the Plain Error described in the briefs have been made aware to the court. The decision to dismiss Petitioner/Applicant Frye's appeal is in conflict with this Court's holdings in Rosales-Mireles v. U.S., supra, and numerous Fifth Circuit holdings where decisions correcting plain errors that affect appellants' rights have been made or remanded back to the district court for resentencing. To dismiss Petitioner/Applicant Frye's appeal seeking Plain Error review when admitting to reviewing the briefs and record is allowing a plain error that affects Petitioner/appellant's substantial rights to go uncorrected, which is what this U.S. Supreme Court considers abuse of discretion.

The Fifth Circuit Court of Appeals denied Petitioner/Applicant Frye's substantial right to redress the government for grievance

and declined to have the Government/Appellee respond to petitioner/applicant's brief. Because the error is plain and clearly established on the record, Petitioner/Applicant Frye asserts that any response by Appellee would have been conceding that the plain error did exist, as there is no legal position ethically available to support a defense that allows a plain error causing this great a loss of liberty to remain uncorrected.

Petitioner/Applicant Frye asserts that the lower courts acted outside of their role as mediator and assumed the position of adversary and, in doing so, abused their discretion in numerous ways:

- \* The lower courts' actions denied Petitioner/Applicant Frye's procedural due process;
- \* The lower courts' actions denied Petitioner/Applicant Frye's right to redress the government for the clearly asserted plain error grievance;
- \* The lower courts' actions denied Petitioner/Applicant Frye the right to due process by not allowing the Government/Appellee to respond to the assertion of plain error that affected Frye's substantial rights;
- \* The lower courts' actions, specifically the decision to take no action on the motion to supplement which provided the court with the portion of the record (the presentencing recommendation which was adopted by the sentencing court, showing the incorrect and unwarranted application of the Career Offender status and enhancements), which gave clear indication of where the plain error is located in the record and how it was incorrectly applied,



deprived Petitioner/Applicant Frye of his substantial rights;

\* The lower courts' actions, specifically the decision to take no action on the "Motion to Suspend All Rules to Expedite a Plain Error Decision to Prevent a Manifest Injustice from Occurring Pursuant to Federal Rules of Appellate Procedure 2 Suspension of Rules" deprived Petitioner/Applicant Frye of his substantial rights and allowed the manifest injustice to remain uncorrected, this decision was an abuse of discretion;

\* The lower court abused its discretion by using conflicting applications of well-established legal precedents after having evidence of clear plain error which affected Petitioner/Applicant Frye's substantial rights, but took no action to correct that clear plain error and allowing a deprivation of substantial rights and the manifest injustice to remain uncorrected;

\* The lower courts' decision to take no action to correct the clear plain error, and consider Petitioner/Applicant Frye's attempt to redress as frivolous and threaten to place sanctions on Petitioner/Applicant Frye for seeking a Plain Error decision, and to take no action on the Motion to Suspend the Rules to Prevent a Manifest Injustice from Occurring give example of their lack of fairness and questions the integrity and public reputation of these judicial proceedings;

\* The Fifth Circuit Court of Appeals' actions and decisions do not just affect Petitioner/Applicant Frye's substantial rights; they give example of the lower courts' usurpation of power and a lack of fairness and judicial integrity, which results in a negative public perception of judicial proceedings.

The above-listed facts support Petitioner/Applicant Frye's assertion that relief in any other form and from any other court is unavailable and this U.S. Supreme Court's injunctive relief is warranted. This is not an appeal of the lower courts' decision or a Petition for Writ of Certiorari, as Petitioner/Applicant Frye respectfully asserts that this Court based Petitioner/Applicant Frye's request for injunctive relief on the irreparable consequences/damages that will occur without the aid of this Court's power pursuant to U.S. Supreme Court Rule 20.

The lower courts' refusal to make a plain error decision, even while stating that dismissal of the appeal was based on the record and briefs filed, is an abuse of discretion.

The briefs filed (see: Appendix) all clearly asserted that a miscalculation of the U.S.S.G. has occurred that clearly affect Petitioner/Applicant Frye's substantial rights. The Supplement (on which the court took no action) clearly provides as an exhibit the P.S.R. sentencing calculation showing the flawed Government recommendation used at sentencing to give Petitioner/Applicant Frye the unauthorized Career Offender status and unwarranted enhancement of the Criminal History category and Offense Level.

This confirmation by the Court that the Briefs and Record were used to determine the dismissal of appeal decision confirms clearly the Fifth Circuit Court's abuse of discretion, the Fifth Circuit Court's conflicting use of well-established law, the usurpation of the U.S. Supreme Court's power and authority as well as the usurpation of Congress-enacted U.S.S.G. authority by allowing Appellee's unauthorized recommendations to Appellant's sentencing

remain uncorrected and a manifest injustice to occur and continue.

The unavailability and unsuitability of any other form of relief from any other court make this instant Petition for Extraordinary Writs Injunctive Relief warranted, required, and necessary here and now.

Here, Petitioner/Applicant Frye contends that the critical and exigent circumstances described above demonstrates, according to the standards announced in Ohio Citizens for Responsible Cities, Inc. v. NIC, 479 U.S. 1312, and Brown v. Gilmore, 533 U.S. 1301 (2001), that this instant petition warrants this Court's injunctive relief.

Petitioner/Applicant Frye is aware that this U.S. Supreme Court's injunctive power is to be used sparingly and used only in the most critical and exigent circumstances. To further support Petitioner/Applicant Frye's request for injunctive relief, Petitioner/Applicant Frye provides this U.S. Supreme Court with these further facts. In this instant petition, Petitioner/Applicant Frye asserts that the critical and exigent circumstances, which warrant this Court's injunctive relief, include that the statute F.R.Crim.P. 52(b) is clearly constitutional. However, the lower court has consistently disregarded the constitutionality of F.R. Crim.P. 52(b).

Petitioner/Applicant Frye respectfully maintains that the exigent circumstances in his case are that the Fifth Circuit Court of Appeals and the U.S. District Court are again incorrectly interpreting F.R.Crim.P. 52(b) and trying to set an unduly burdensome standard of plain error on the Petitioner/Applicant.

## Discrimination

Discrimination is the effect of a law or established practice (plain error) that confers privileges on a certain class (federal inmate) because of race, age, sex, nationality, religion, or handicap.

Petitioner/Applicant Frye asserts that the discrimination in the instant case exists because the Fifth Circuit Court has repeatedly conducted a plain error review and decision in the following recently decided cases, during the same time period as Petitioner/Applicant's filings. See: United States v. Lovely, 776 Fed. Appx. 262 (Sept. 4, 2019); United States v. Perez-Mateo, 926 F.3d 216 (June 10, 2019); United States v. Frescas, 932 F.3d 324 (July 29, 2019); United States v. Waldrip, 2019 U.S. Appx. LEXIS 23789 (Aug. 9, 2019); United States v. Sedberry, 768 Fed. Appx. 199 (April 11, 2019); United States v. Campos, 922 F.3d 686 (April 30, 2019); United States v. Brown, 2019 U.S. Appx. LEXIS 15168 (May 22, 2019); and United States v. Reado, 776 Fed. Appx. 261 (Sept. 4, 2019). These cases adjudicated by the Fifth Circuit Court of Appeals clearly give example of the Fifth Circuit's discriminatory practices when viewed in respect to the Fifth Circuit Court's decision as to Petitioner/Applicant Frye which clearly affect Petitioner/Applicant Frye's substantial rights, the fairness, integrity, and public reputation of judicial proceedings.

The Fifth Circuit Court of Appeals' order of dismissal based on a finding that Petitioner/Applicant Frye's appeal was frivolous is another form of discrimination and abuse of discretion, because of the Fifth Circuit Court of Appeals' failure to exercise sound

reasonable and legal decision making, the Fifth Circuit Court's adjudication failed to show that a plain error review and decision was without merit, by stating that Petitioner/Applicant Frye's request for a plain error review was not serious or had no chance of winning. This is contrary to all established holdings by this U.S. Supreme Court, the Fifth Circuit Court of Appeals, and a majority of other Circuits.

In Gomillion v. Lightfoot, 364 U.S. 399 (1960), the U.S. Supreme Court held that "One must be ever aware that the Constitution forbids sophisticated as well as simple modes of discrimination ..."

Petitioner/Applicant maintains that the Fifth Circuit Court of Appeals has totally and repeatedly, in their discriminatory decisions, disregarded and violated the Ninth Amendment of the United States Constitution, as well as Article Six Clause Two of the United States Constitution. A review of Rosales-Mireles v. U.S., supra, and Buck v. Davis, 580 U.S. \_\_\_, \_\_\_, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017), shows that the Fifth Circuit Court of Appeals has disparaged the retained constitutional rights of Petitioner/Applicant Frye, and failed to acknowledge that they are bound by anything in the Constitution or laws of the Supreme Law of the Land.

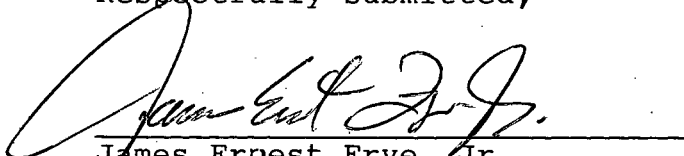
This United States Supreme Court's injunctive relief is required because this Court held that "Federal Rule of Criminal Procedure 52(b) strikes a careful balance between judicial efficiency and the redress of injustice." Rosales-Mireles v. U.S., supra, at 397.

## CONCLUSION

For the reasons stated above, Petitioner/Applicant Frye prays that this Honorable U.S. Supreme Court grant this extraordinary writ seeking mandamus and injunctive relief, to prevent the United States Court of Appeals for the Fifth Circuit's continuous usurpation of power and abuse of discretion, thereby ending a manifest injustice. In this case, Petitioner-Applicant Frye respectfully requests that the decision of the Fifth Circuit Court of Appeals, dismissing Petitioner-Applicant Frye's appeal, be vacated, remanded, and instruction be given for plain error review and resentencing.

Done this 13th day of February, 2020.

Respectfully submitted,



James Ernest Frye, Jr.  
Register No. 98362-024  
FCC Coleman/USP-2  
P.O. Box 1034  
Coleman, FL 33521-1034