

No. _____

In the

Supreme Court of the United States

Brent Anderson,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Did the district court plainly err when it applied a 2-level enhancement for “reckless endangerment during flight” after already applying a 4-level “in connection with another felony” enhancement for the same conduct?
- II. Did the district court plainly err when it found that Mr. Anderson used or possessed a firearm “in connection with” vehicular flight even though he threw the firearm out of the window of the vehicle mid-flight?

PARTIES TO THE PROCEEDING

Petitioner is Brent Anderson, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *United States v. Anderson*, 841 F. App'x 729 (5th Cir. 2021)
- *United States v. Anderson*, 795 F. App'x 267 (5th Cir. 2020), *vacated by Anderson v. United States*, 141 S. Ct. 845 (2020)
- *United States v. Anderson*, No. 4:18-CR-247-1 (N.D. Tex. Oct. 3, 2018)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinions of the Court of Appeals are reported at *United States v. Anderson*, 841 F. App'x 729 (5th Cir. 2021) and *United States v. Anderson*, 795 F. App'x 267 (5th Cir. 2020). The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit entered judgment on March 31, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES AND GUIDELINES PROVISIONS

U.S. Sentencing Guidelines Manual § 3C1.2 (2018) provides: “Do not apply this enhancement where the offense guideline in Chapter Two, or another adjustment in Chapter Three, results in an equivalent or greater increase in offense level solely on the basis of the same conduct”

U.S. Sentencing Guidelines Manual § 2K2.1(b)(6)(B) (2018) provides: “If the defendant ... used or possessed any firearm or ammunition in connection with another felony offense ... increase [the base offense level] by 4 levels.”

STATEMENT OF THE CASE

On June 4, 2018, an Arlington Police Department officer saw Mr. Anderson leaving a motel and recognized him as someone with an outstanding arrest warrant. (ROA.134). When the officer sought to initiate a traffic stop to execute the warrant, Mr. Anderson fled in his vehicle, causing a chase, during which Mr. Anderson threw a firearm out of the window of his moving vehicle. (ROA.134). Eventually, Mr. Anderson pulled over and surrendered. (ROA.134).

Mr. Anderson waived indictment (ROA.22) and the government charged him, by information, with one count of Felon in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (ROA.17-18). On October 3, 2018, Mr. Anderson pleaded guilty to the one-count information. (ROA.95).

In the Presentence Investigation Report (PSR), the Probation Officer, based on the chase, concluded that Mr. Anderson had committed another felony offense: evading arrest with a motor vehicle. (ROA.136). Because Mr. Anderson had possessed a firearm for a portion of the chase, the Probation officer recommended a 4-level enhancement for use or possession of a firearm “in connection with” another felony offense under U.S. Sentencing Guidelines Manual (USSG) § 2K2.1(b)(6)(B). The Probation Officer also recommended a 2-level enhancement for reckless endangerment during flight under USSG § 3C1.2 because “[t]he defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer.” (ROA.136). These enhancements,

combined with a criminal history category of IV, resulted in an advisory sentencing range of 70 to 87 months. (ROA.151).

On January 31, 2019, the district court held the sentencing hearing. (ROA.108-129). Although defense counsel argued that the PSR overstated the seriousness of the offense (ROA.111-15), counsel did not specifically object to the 2-level or 4-level enhancements described above. Ultimately, the district court adopted the PSR and sentenced Mr. Anderson to 74 months imprisonment, followed by three years of supervised release. (ROA.126-27).

The Fifth Circuit affirmed. *United States v. Anderson*, 795 F. App'x 267 (5th Cir. 2020). After this Court granted, vacated, and remanded the circuit opinion, the Fifth Circuit affirmed again. *United States v. Anderson*, 841 F. App'x 729 (5th Cir. 2021). This appeal follows to challenge the enhancement for reckless endangerment during flight and, alternatively, the enhancement for use or possession of a firearm “in connection with” another felony offense.

REASON FOR GRANTING THIS PETITION

- I. The district court plainly erred when it applied a 2-level Guidelines enhancement for “reckless endangerment during flight” because it also applied a 4-level Guidelines enhancement in Chapter 2 based on the same conduct.**

Standard of Review: Plain Error

Because Mr. Anderson did not object to the 2-level Guidelines enhancement of “reckless endangerment during flight” at sentencing, review is for plain error. In order to establish plain error, Mr. Anderson must show (1) error (2) that is plain and (3) that affects his substantial rights. If he can do so, this Court may exercise its discretion to reverse if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Cotton*, 535 U.S. 625, 631 (5th Cir. 2002).

- A. The district court’s error was plain based on the commentary to U.S. Sentencing Guidelines Manual § 3C1.2 (2018).**

A plain error is one that is “clear or obvious.” *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016). Here, the district court’s error was clear or obvious based on express Sentencing Commission guidance. *United States v. Alcantar*, 733 F.3d 143, 147 (5th Cir. 2013) (explaining that the Guidelines’ application notes are generally authoritative).

At sentencing, the district court applied a 4-level enhancement to Mr. Anderson’s base offense level under U.S. Sentencing Guidelines Manual (USSG) § 2K2.1 because he possessed the firearm “while evading law enforcement with a

vehicle,” a felony under Texas law. Paragraph 20 of the Presentence Investigation Report (PSR) explains:

USSG §2K2.1(b)(6)(B) provides a 4-level increase to the base offense level if the defendant 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. On June 4, 2018, while in possession of a firearm, the defendant also evaded law enforcement with a vehicle, a felony offense pursuant to Title 10, Section 38.04 of the Texas Penal Code. Therefore a 4-level increase is applied.

(ROA.136) (emphasis added). The district court then applied a 2-level enhancement to Mr. Anderson’s base offense level under USSG § 3C1.2 for “reckless endangerment during flight.” Paragraph 23 of the PSR explains:

The defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer as outlined in paragraphs 7, 8, and 14; therefore, 2 levels are added. USSG §3C1.2.

(ROA.136). The three other paragraphs (7, 8, 14) cited in paragraph 23 make clear that there was only one incident of evading with a motor vehicle and that the 2-level Chapter Three enhancement was based on the same conduct as the 4-level Chapter Two enhancement:

¶ 7: On June 4, 2018, an Arlington, Texas, Police Department (APD) officer observed Anderson while leaving a Budget Suites motel. The officer knew Anderson had an outstanding warrant for Aggravated Assault With a Deadly Weapon out of APD. Anderson began driving his vehicle southbound on Regency Drive when the officer initiated a traffic stop.

¶ 8: Upon approaching the vehicle, Anderson failed to comply with the officer's commands to place his arms outside of the window. Anderson then fled in his vehicle and drove northbound on Highway 360. The officer activated the patrol vehicle's siren and pursued Anderson's vehicle. During the pursuit, Anderson dropped a pistol with an extended magazine out the driver's side window. Crime Scene Investigators responded to the scene where Anderson disposed the weapon and recovered a Masterpiece Arms, 9-millimeter pistol with Serial No. F19646. The pistol had an extended magazine that held approximately 19 rounds of ammunition.

¶15¹: The defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer. The defendant fled from an officer during day time hours at speeds exceeding 65 miles per hour on the highway and 40 miles per hour on city streets. Additionally, the defendant was observed swerving in and out of traffic, he failed to use his turn signal, and failed to stop at four separate stop lights driving into oncoming traffic. The defendant endangered himself, other drivers, and the officer due to his reckless conduct. Therefore, an enhancement will be applied pursuant to USSG §3C1.2.

(ROA.134-35). This sort of double-counting based on the same conduct is discouraged in many Guidelines provisions, and is done so expressly by § 3C1.2 application note one:

Do not apply this enhancement where the offense guideline in Chapter Two, or another adjustment in Chapter Three, results in an equivalent or greater increase in offense level solely on the basis of the same conduct.

¹ Based on context, it seems clear that the PSR meant to refer to ¶ 15 rather than ¶ 14. Paragraph 14 simply states: "This is a Title 18 offense and there is no identifiable victim other than society at large." (ROA.135).

USSG § 3C1.2 cmt. n.1 (2018). Because the 4-level enhancement under Chapter Two was solely on the basis of the same conduct (one instance of evading law enforcement with a vehicle), the district court erred by applying the 2-level enhancement under § 3C1.2. This error was made clear and obvious by § 3C1.2 application note 1. *United States v. Alcantar*, 733 F.3d 143, 147 (5th Cir. 2013) (“The Guidelines’s application notes are authoritative unless they violate the Constitution or a federal statute, or are inconsistent with, or a plainly erroneous reading of, that Guideline.” (cleaned up)).

B. The district court’s error affected Mr. Anderson’s substantial rights because there is a reasonable probability he would have received a lesser sentence under the correct sentencing range.

A district court’s 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.” *United States v. John*, 597 F.3d 263, 284-85 (5th Cir. 2010) (quoting *United States v. Price*, 516 F.3d 285, 289 (5th Cir. 2008)). The district court’s error here increased Mr. Anderson’s total offense level by 2-levels, from 21 to 23. (See ROA.136). This, in turn, increased his advisory sentencing range, under the Guidelines, from 57-71 months to 70-87 months. (See ROA.151). Further, there is no indication in the record that the district court would have issued the same sentence of imprisonment had the Guidelines been properly calculated. (See ROA.119,126-27). In fact, the district court’s decision to impose a sentence of 74 months, near the bottom of the advisory range, suggests that it would have imposed a significantly lower sentence under the correct range. See

Price, 516 F.3d at 289 (determining that a sentencing error affected the defendant's substantial rights even though the Guidelines sentencing range calculated by the district court and the correct sentencing range overlapped because the low end of the correct sentencing range, 92 months of imprisonment, was substantially (18 months) lower than the defendant's actual sentence of 110 months of imprisonment).

C. The district court's error seriously affected the fairness, integrity, or public reputation of the proceedings.

The district court's clear and obvious error not only affected Mr. Anderson's substantial rights, it also seriously affected the fairness, integrity, and public reputation of the proceedings. If the district court were to re-impose, on remand, a sentence four months above the bottom of the *correct* Guidelines range, Mr. Anderson's actual sentence of imprisonment would decrease by 13 months. That should be enough to persuade this Court to exercise its discretion to correct the sentencing error below.

In *United States v. John*, the Fifth Circuit reversed on plain error after noting two considerations that "marred" "the perception of fairness in sentencing." 597 F.3d 263, 286 (5th Cir. 2010). First, the Court noted that the actual sentence imposed would have been an upward variance had the advisory sentencing range been correctly calculated. *Id.* "Absent remand," the Court explained, "the defendant's sentence will be imposed without the district court's consideration of a lower Guidelines range, even though the this Court has said that district courts should consider the properly calculated Guidelines range as 'the starting point and the initial benchmark.'" *Id.* (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)). Second, the

Court noted that affirming an inadvertent above-Guidelines sentence would excuse the district court from “consider[ing] the extent of the deviation and ensur[ing] that the justification is sufficiently compelling to support the degree of the variance.” *Id.* (quoting *Gall*, 552 U.S. at 50). Thus, the Court concluded that remand was necessary “to promote the perception of fair sentencing.” *See id.*

Both considerations in *John* are also present here. The district court’s 74-month sentence of imprisonment would be an upward variance if the advisory sentencing range were properly calculated at 57-71 months. Yet the district court said nothing to justify an upward variance and, by all accounts, believed that a sentence near the bottom of the range was warranted. If this Court is to honor the processes described in *Gall*, remand is necessary to safeguard the fairness, integrity, and public reputation of these proceedings.

Despite the guidance of *John* and *Gall*, the government may argue that the likely disparity between the actual sentence and a sentence on remand is too small to justify fourth-prong discretion. But Mr. Anderson’s request is not outside the bounds of what courts have done before. In *United States v. Blanton*, a recent unpublished opinion, the Fifth Circuit exercised its discretion under the fourth prong of plain error review when the erroneous sentence exceeded the lower end of the properly calculated Guidelines range by only four months. 684 F. App’x 397, 400 (5th Cir. 2017) (unpub.). Here, the sentence of 74 months was 17 months above the low-end (57 months) of the proper range. The Fifth Circuit similarly remanded in *United States v. Segura-Sanchez* when the likely sentence under the correct range was nine

months lower than that under the incorrect range. 452 F. App'x 471, 474 (5th Cir. 2011) (unpub.) (comparing “bottom end” to “bottom end”). This Court should do the same here.

II. Alternatively, the district court plainly erred when it applied the 4-level Guidelines enhancement under USSG § 2K2.1(b)(6)(B) because possession of the firearm was clearly not “in connection with” his vehicular flight. [foreclosed]

Standard of Review: Plain Error

Because Mr. Anderson did not object to the 4-level Guidelines enhancement under USSG § 2K2.1(b)(6)(B) at sentencing, review is for plain error. In order to establish plain error, Mr. Anderson must show (1) error (2) that is plain and (3) that affects his substantial rights. If he can do so, this Court may exercise its discretion to reverse if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Cotton*, 535 U.S. 625, 631 (5th Cir. 2002).

A. The district court’s error was plain based on the undisputed fact that Mr. Anderson threw the firearm out of the window of the vehicle.

A plain error is one that is “clear or obvious.” *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016). The Guidelines commentary and precedent are clear that mere possession of a firearm during the commission of another felony is insufficient to establish that the firearm was used or possessed “in connection with” that felony.² The Guidelines application notes explain: “Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition *facilitated, or had the potential of*

² Burglary and drug trafficking felonies are treated more strictly; however, neither are at issue here. See USSG § 2K2.1 cmt. n.14(B).

facilitating, another felony offense or another offense, respectively.” USSG § 2K2.1 cmt. n.14(A) (emphasis added). The Fifth Circuit similarly explained in *United States v. Jeffries*:

[F]or all other felony offenses that are *not* drug trafficking offenses (or burglary, which is separately addressed), the enhancement only applies “if the firearm ... facilitated, or had the potential of facilitating,” that offense; no presumption is made.

...

The record here is devoid of evidence that would support any finding that Mr. Jeffries’s possession of the firearm “facilitated” his possession of cocaine. At best, the Government has shown only that Mr. Jeffries possessed cocaine and a firearm at the same time. Such a showing would be sufficient to satisfy the “in connection with” requirement were the other offense cited a drug trafficking offense, but it is not sufficient to satisfy the higher “facilitation” standard required since 2006 for drug possession offenses.

587 F.3d 690, 693 (5th Cir. 2009). The Court has observed this heightened “facilitation” standard in more recent unpublished opinions as well. *E.g.*, *United States v. Pimpton*, 589 F. App’x 692, 693 (5th Cir. 2013) (unpub.) (holding that a firearm’s proximity to body armor in the trunk of a vehicle did not support an enhancement under USSG § 2K2.1(b)(6)(B)); *United States v. Ledesma*, 750 F. App’x 344, 347-48 (5th Cir. 2019) (holding that possession of a firearm did not “facilitate” possession of a user-quantity of methamphetamine).

In response, the government may try to argue that the presence of a firearm facilitated the vehicular flight because it somehow “emboldened” Mr. Anderson to flee. *See United States v. Jenkins*, 566 F.3d 160, 164 (4th Cir. 2009) (mention of emboldening); *see also United States v. Smith*, 535 F.3d 883, 886 (8th Cir. 2008)

(same). Perhaps that could seem possible but for the fact that Mr. Anderson threw out the firearm during his flight. (ROA.134), which divorced any relationship between the firearm and flight. Consider, by negative implication, *United States v. Rowland-Smith*, before the Northern District of Indiana, in which the 4-level enhancement *was* applied to flight:

It cannot be disputed that, during this flight, the weapon was within easy reach and loaded. As soon as the vehicle crashed, the Defendant was able to escape and to take the gun with him. It was found—still loaded—at his girlfriend's house where he admitted hiding it. Further, it is reasonable to conclude that the loaded firearm gave the Defendant and the driver a sense of security, which emboldened them to attempt to evade arrest, whether that arrest was for stealing a vehicle or possessing a firearm. The acts occurred together, not by mere accident or coincidence, through the deliberate choice to continue illegal conduct, rather than to stop in response to the officers' show of authority. A loaded firearm in the hands of the passenger of a fleeing vehicle serves the purpose of making an attempted escape more likely to succeed. The Defendant did not dispose of the firearm during the pursuit by, for example, tossing it out the window or placing it in an inaccessible place within the car, but held onto it throughout every stage of the pursuit. He thus controlled the gun in way that was intentionally related to the flight, not merely coincidental to it. The Defendant provides no explanation for the purpose behind his possession of a loaded firearm and recently purchased ammunition. Whatever the purposes behind the firearm possession, at least one of those purposes became to embolden the Defendant and to facilitate flight.

No. 1:14-CR-53, 2015 U.S. Dist. LEXIS 169826, at *11-12 (N.D. Ind. Dec. 21, 2015) (unpub.). Here, there was no attempt to control the firearm during the flight. Quite the opposite. According to the PSR, Mr. Anderson discarded the pistol and then

continued his flight for “several miles.” (ROA.134). This is not facilitation within the meaning of the Guidelines, the Guidelines commentary, or *Jeffries*.

B. The district court’s error affected Mr. Anderson’s substantial rights because there is a reasonable probability he would have received a lesser sentence under the correct sentencing range.

A district court’s 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.” *United States v. John*, 597 F.3d 263, 284-85 (5th Cir. 2010) (quoting *United States v. Price*, 516 F.3d 285, 289 (5th Cir. 2008). The district court’s error here increased Mr. Anderson’s total offense level by 4-levels, from 19 to 23. (See ROA.136). This, in turn, increased his advisory sentencing range, under the Guidelines, from 46-57 months to 70-87 months. (See ROA.151). Further, there is no indication in the record that the district court would have issued the same sentence of imprisonment had the Guidelines been properly calculated. (See ROA.119,126-27). In fact, the district court’s decision to impose a sentence of 74 months, near the bottom of the advisory range, suggests that it would have imposed a significantly lower sentence under the correct range. See *Price*, 516 F.3d at 289 (determining that a sentencing error affected the defendant’s substantial rights even though the Guidelines sentencing range calculated by the district court and the correct sentencing range overlapped because the low end of the correct sentencing range, 92 months of imprisonment, was substantially (18 months) lower than the defendant’s actual sentence of 110 months of imprisonment).

C. The district court's error seriously affected the fairness, integrity, or public reputation of the proceedings.

The district court's clear and obvious error not only affected Mr. Anderson's substantial rights, it also seriously affected the fairness, integrity, and public reputation of the proceedings. This is for the same reasons articulated *supra* in Part I.C. The only difference here is the presence of a more extreme disparity between the correct advisory sentencing range and the range under which Mr. Anderson was sentenced because USSG § 2K2.1(b)(6)(B) imposes a 4-level increase to the offense level rather than the 2-level increase for reckless endangerment during flight.

CONCLUSION

Mr. Anderson respectfully requests that this Court reverse and remand for resentencing without the 2-level enhancement for “reckless endangerment during flight” or, alternatively, without the 4-level enhancement for “in connection with” another felony.

Respectfully submitted,

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