No. _____

In the

Supreme Court of the United States

_____

Saul Hernandez-Serrano,

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

Whether the presumption of prejudice recognized in *Molina-Martinez v. United States* extends to Federal Sentencing Guideline errors that do not affect the numerical range of imprisonment set forth in the sentencing table?

PARTIES TO THE PROCEEDING

Petitioner is Saul Hernandez-Serrano, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Saul Hernandez-Serrano seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported at *United States v. Hernandez-Serrano*, 858 Fed. Appx. 695, 697 (5th Cir. May 28, 2021)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on May 28, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT FEDERAL STATUTES, RULES AND SENTENCING GUIDELINES

Sections 3553(a)(4) and (5) of Title 18 provide:

> (a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> ***
>
> (4) the kinds of sentence and the sentencing range established for—
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
(5) any pertinent policy statement—
(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

Federal Rule of Criminal Procedure 52(b) provides:

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

United States Sentencing Guideline 5G1.3 provides:

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:
(1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

(c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

(d) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

STATEMENT OF THE CASE

A. Background and offense

The parents of Petitioner Saul Hernandez-Serrano brought him to the United States when he was a ten years old child, hoping to free him from the poverty and hunger he had experienced in Mexico. (Record in the Court of Appeals 152). Like many Americans, he developed an alcohol problem during his late adolescence or early adulthood. (Record in the Court of Appeals 152). Unfortunately, this led to a string of DWI convictions, culminating in his only removal on January 5, 2016, at the age of 31. (Record in the Court of Appeals 145).

On November 29, 2018, Fort Worth Police arrested him for DWI. (Record in the Court of Appeals 145). On the same day, federal immigration officials found him and determined that he was illegally present in the country. (Record in the Court of Appeals 145). But it was not until April 29, 2019 that Petitioner pleaded guilty to that state DWI charge, the same day he received a four-year term of imprisonment. (Record in the Court of Appeals 151). After serving a portion of this sentence, he appeared in federal court to answer an indictment for illegally re-entering the country, the instant offense. (Record in the Court of Appeals 154).

B. Pre-sentence proceedings in the instant case

Petitioner pleaded guilty to illegal re-entry, (Record in the Court of Appeals 110), and Probation prepared a Presentence Report (PSR), (Record in the Court of Appeals 142, et seq.). It found that his criminal history score was 11, and that his

criminal history category was V, which produced a Guideline range of 70-87 months imprisonment. (Record in the Court of Appeals 154).

As the court and Probation ultimately recognized, this calculation was incorrect. (Record in the Court of Appeals 161-162). Three of the eleven criminal history points assessed by the PSR flowed from a two-year sentence for possessing cocaine in 2006. (Record in the Court of Appeals 149). As the Addendum ultimately noted, however, the person who sustained this conviction was in prison on the date that Petitioner suffered a DWI arrest. (Record in the Court of Appeals 161-162). The defense caught the error and showed Probation that the conviction had actually been sustained by a different person with similar identifiers "after combing the TDC documents." (Record in the Court of Appeals 163). Correcting the error reduced the criminal history score to eight, the criminal history category to IV, and the Guideline range to 57-71 months. (Record in the Court of Appeals 163).[1]

The PSR also stated without objection that the Guidelines required a consecutive sentence. It said:

> On April 29, 2019, the defendant sustained a conviction for Driving While Intoxicated Felony Repetition, under Case No. 1572280, in the Tarrant County Criminal Court No.1. He was sentenced to four years

[1] Among the eight remaining criminal history points, one stemmed from a 20-day DWI sentence imposed on March 27, 2008. *See* (Record in the Court of Appeals 149). This conviction was Petitioner's, but he received it more than ten years prior to November 29, 2018. *See* (Record in the Court of Appeals 149). The PSR expressly named November 29, 2018 as the commencement date for the instant re-entry offense, for want of any evidence of an earlier entry. *See* (Record in the Court of Appeals 145)("The date and location of Hernandez-Serrano's return to the United States following his deportation on January 11, 2016, is unknown, therefore, in calculating the criminal history, the defendant's earliest offense date, including relevant conduct is November 29, 2018."). The PSR assessed a criminal history point anyway, notwithstanding the Guideline exclusion of convictions imposed more than ten-years prior to the commencement of the instant offense. *See* USSG §4A1.2(e).

> imprisonment and was in the custody of the Texas Department of Corrections-Institutional Division prior to being placed in federal custody on December 2, 2019, pursuant to a writ of habeas corpus ad prosequendum. His projected sentence expiration date in this case is November 29, 2022. **Therefore, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment. USSG §5G1.3(d).**

(Record in the Court of Appeals 154)(PSR, ¶59)(emphasis added).

C. The sentencing hearing

Sentencing occurred in-person in May 2020, during the stress of the pandemic, and with all participants in masks. (Record in the Court of Appeals 124, *et seq*.). The court adopted the factual findings and Guideline calculations of the PSR. (Record in the Court of Appeals 128-129).

In mitigation, defense counsel referenced the defendant's letters of support, noted the defendant's marketable HVAC skills, and argued that his family arrangements could help him remain in Mexico. (Record in the Court of Appeals 129-131). The government noted its concerns about the defendant's DWI record, which the court echoed. (Record in the Court of Appeals 129-132). The court then imposed a 60-month sentence. (Record in the Court of Appeals 133). It ordered the sentence served consecutively to the undischarged four-year DWI term of imprisonment. (Record in the Court of Appeals 133).

D. Appeal

Petitioner appealed, contending that the district court had plainly erred in its application of USSG §5G1.3. He argued that the PSR, which the court adopted, either misunderstood USSG §5G1.3(d) – believing that it recommended a consecutive sentence, when it in fact offered no recommendation on the point – or mistakenly believed that USSG §5G1.3(a) applied to the case. *See* Initial Brief in *United States v. Hernandez-Serrano*, No. 20-10485, 2020 WL 5751727, at *9-14 (5th Cir. Filed September 17, 2020)("Initial Brief"). Further, he argued that the district court – in adopting the PSR – had wrongly stated that the Guidelines were mandatory. *See* Initial Brief, at *14. As respects the error's prejudicial effect, he offered a range of out-of-circuit authority granting relief on plain error for misapplications of USSG §5G1.3. *See id.* at *15-16 (citing *United States v. Ward*, 796 Fed. Appx 591, 597-99 (11th Cir. 2019) (unpublished), *United States v. Brown*, 892 F.3d 385, 400 (D.C. Cir. 2018), and *United States v. Bowman*, 634 F.3d 357, 362 (6th Cir. 2011)). And he cited *Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338 (2016), for the proposition that Guideline error will ordinarily support a finding of prejudice.[2] *Id*. at *15.

The court of appeals affirmed. [Appx. A]; *United States v.* 695 (5th Cir. May 28, 2021)(unpublished). It found no plain error, apparently believing that the court intended to apply USSG §5G1.3(d), which makes no recommendation as to a

[2] The court below said that "[t]he presumption of an effect on a defendant's substantial rights in *Molina-Martinez v. United States*, —— U.S. ——, 136 S. Ct. 1338, 1345, 194 L.Ed.2d 444 (2016), upon which Hernandez-Serrano relies *in his reply brief*, is inapplicable here." [Appx. A]; *United States v. Hernandez-Serrano*, 858 Fed. Appx. 695, 697 (5th Cir. May 28, 2021)(unpublished)(emphasis added). If the court meant to say that Petitioner only cited *Molina-Martinez* to support his claim of prejudice in the reply brief, its statement was false. *See* Initial Brief at *15 ("But the Supreme Court cautioned in *Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338 (2016), that a misapplication of the Guidelines will ordinarily be sufficient to show an effect on the defendant's substantial rights, absent unusual circumstances.").

concurrent or consecutive sentence, rather than USSG §5G1.3(a), which calls for a consecutive sentence. [Appx. A]; *Hernandez-Serrano*, 858 Fed. Appx. at 696 ("Beyond adopting the PSR in general terms, the district court gave no indication at sentencing that the decision to impose the sentence consecutively to the undischarged sentence was based on § 5G1.3(a)."). Yet it did not explain why the PSR cited USSG §5G1.3(d) for the proposition that "the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment." *See id.* Nor did it explain why the district court would have adopted this document if it did not think the Guidelines to call for a consecutive sentence. *See id.*

The court below further found that *Molina-Martinez* did not create a presumption of prejudice attendant to the error alleged in this case; it said:

> Moreover, Hernandez-Serrano fails to show that the alleged error affected his substantial rights. The presumption of an effect on a defendant's substantial rights in *Molina-Martinez v. United States*, —— U.S. ——, 136 S. Ct. 1338, 1345, 194 L.Ed.2d 444 (2016), upon which Hernandez-Serrano relies in his reply brief, is inapplicable here. *Molina-Martinez* held that, absent additional evidence, courts will presume that an error in calculating the guidelines range affected a defendant's substantial rights. Hernandez-Serrano has shown no error in the calculation of his guidelines range.

Id. at 697 (citing *Puckett v. United States*, 556 U.S. 129,135 (2009))(internal citations omitted). Lacking any presumption of prejudice, the court then canvassed the record and found no reasonable probability of a different result if the court had correctly applied the Guidelines. *Id*. at 697-698.

REASONS FOR GRANTING THE PETITION

The courts of appeals have divided on the question of whether the expectation of prejudice recognized in *Molina-Martinez v. United States* extends to Federal Sentencing Guideline errors that do not affect the numerical range of imprisonment set forth in the sentencing table.

Section 3553(a) of Title 18 requires that district courts begin each federal sentencing by correctly determining the recommendations of the Federal Sentencing Commission, both its Guidelines and its Policy Statements. 18 U.S.C. §3553(a)(4),(5). Although they do not bind the district court's selection of sentence, *United States v. Booker*, 543 U.S. 220 (2005), this Court has recognized that the Guidelines function as a "starting point and ... initial benchmark." *Gall v. United State*s, 552 U.S. 38, 49 (2007). This is reflected in a number of holdings from this Court that recognize the centrality of the Guidelines. Thus, a district court that errs in determining the Guidelines' recommended sentence can be reversed. *Gall*, 552 U.S. at 50. Further, defendants enjoy *ex post facto* rights in the version of the Guidelines applicable at the time of the offense, even though the court can disagree with their recommendations. *See Peugh v. United States*, 569 U.S. 530, 533 (2013). And Guideline sentences may be presumed reasonable on appeal. *See Rita v. United States*, 551 U.S. 338, 347 (2007). Finally, relevant here, a court that makes a clear or obvious Guideline error will ordinarily be reversed even if the parties fail to object.

This last proposition is established by *Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338 (2016), and *Rosales-Mireles v. United States*, __U.S.__, 138 S.Ct. 1897 (2018). *Molina-Martinez* recognized the centrality of the Guidelines to the federal sentencing both as a doctrinal and empirical matter. *Molina-Martinez*, 136

S.Ct. at 1346 ("The Commission's statistics demonstrate the real and pervasive effect the Guidelines have on sentencing.") For its part, *Rosales-Mireles* held that fairness and the public reputation of judicial proceedings require that clear Guideline errors be corrected rather than ignored. *Rosales-Mireles*, 138 S.Ct. at 1907. Yet the court below, in common with the Second Circuit, has held that the expectation of prejudice established by *Molina-Martinez* does not extend to errors in the application of USSG §5G1.3, the Guideline provision governing the selection of a concurrent or consecutive sentence. The Eleventh and D.C. Circuits, by contrast, have found *Molina-Martinez* applicable to errors arising from this provision.

The court below held flatly that "[t]he presumption of an effect on a defendant's substantial rights in *Molina-Martinez v. United States* … which Hernandez-Serrano relies in his reply brief, is inapplicable here." [Appx. A]; *United States v. Hernandez-Serrano*, 858 Fed. Appx. 695, 697 (5th Cir. May 28, 2021)(unpublished). It reasoned that *Molina-Martinez* did not apply because "Hernandez-Serrano has shown no error in the calculation of his guidelines *range*." [Appx. A]; *Hernandez-Serrano*, 858 Fed. Appx. at 697 (emphasis added). The court below thus limits *Molina-Martinez* to errors that affect the numerical *range* of imprisonment found on the sentencing table, *see* USSG Ch. 5A, excluding the Sentencing Commission's qualitative recommendations such as the choice of a concurrent or consecutive sentence.

The Second Circuit has held likewise. Confronted with a claim of plain error in the application of USSG §5G1.3, that court reasoned similarly to the court below. *See United States v. Johnson*, 681 Fed. Appx. 52, 54 n.1 (2d Cir. 2017)(unpublished). It

concluded that "there is no asserted error in the Guidelines *range*, but rather in the application of a guideline whose mandatory consecutive sentence was rendered advisory by *United States v. Booker*…." *Johnson*, 681 Fed. Appx. at 54, n.1 (emphasis added). So in the Second Circuit, as below, *Molina-Martinez* requires an effect on the Guideline *range*.

The Eleventh Circuit has taken the opposite position. In *United States v. Ward*, 796 Fed. Appx 591 (11th Cir. 2019)(unpublished), the Eleventh Circuit vacated the sentence imposed on a defendant who pleaded guilty to unlawful possession of a firearm. *Ward*, 796 Fed. Appx at 601. The district court ran the sentence consecutively to pending attempted murder and burglary charges arising from the same incident. *Id.* at 595, 597-599. In doing so, it failed to recognize that §5G1.3(c) called for a concurrent sentence in that circumstance. *Id.* at 595, 597-599. The Eleventh Circuit found that the district court's failure to recognize the recommendation of §5G1.3(c) – that the sentence be concurrent – amounted to plain and reversible error. *Id.* at 598-599. Notably, it agreed with the government that §5G1.3 did not bind the district court. *Id*. at 598 ("Of course, as the government points out, because the guidelines are advisory, a district court is not required to impose a concurrent sentence, even if § 5G1.3(c) applies."). Yet it cited *Molina-Martinez* for the proposition that "where 'the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights,'" and provided relief to the defendant. *Id.* at 599 (quoting *Molina-*

Martinez, 136 S. Ct. at 1347). As can be seen, then, the Eleventh Circuit views Molina-Martinez as fully applicable to USSG §5G1.3.

In *United States v. Brown*, 892 F.3d 385 (D.C. Cir. 2018), the D.C. Circuit agreed with the Eleventh Circuit regarding the scope of *Molina-Martinez*. In that case, the district court sentenced a drug conspiracy defendant consecutively to a local sentence for using violence earlier in the same conspiracy. *Brown*, 892 F.3d at 398. "Because the district court did not acknowledge that the Guidelines recommended a concurrent sentence," the court found, "it improperly applied the Guidelines." *Id.* at 399-400.

Like the Eleventh Circuit, the D.C. Circuit acknowledged that §5G1.3 was advisory only. *Id.* at 399. But it offered relief, citing *Molina-Martinez* for the proposition "'in the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder,'" and that "'[a]bsent unusual circumstances, he will not be required to show more.'" *Id.* at 400 (quoting *Molina-Martinez*, 136 S.Ct. at 1347). Accordingly, the D.C. Circuit regards *Molina-Martinez* as applicable to §5G1.3, in addition to errors that affect the numerical ranges found in the sentencing table.

The division of authority merits the court's attention. The decision to run a sentence concurrently or consecutively can be one of the most consequential to a criminal defendant, often more important than the ranges found in the sentencing table. While the ranges in the table may vary by no more than 6 months or 25% from

top to bottom, 28 U.S.C. §994(b), a consecutive sentence may double the effective time in prison.

Many defendants, moreover, will arrive at federal sentencing with pending or undischarged sentences. A Westlaw search revealed that the federal courts of appeals have cited USSG §5G1.3 on 41 occasions in the past year alone. Further, the issue that divides the court of appeals – whether *Molina-Martinez* is limited to cases involving an errant range of imprisonment – may affect any number of other consequential Guideline issues. These include Guideline recommendations as to the imposition of probation or other alternatives to imprisonment, *see* USSG Ch. 5B, the choice to revoke or continue a term of supervised release, *see* USSG §7B1.3, and the choice to depart from the applicable range, *see* USSG Ch. 5B. None of these involve the numerical ranges set forth on the sentencing table. All of them matter a great deal to the affected parties.

The present case is an excellent vehicle to address the issue. The district court plainly botched USSG §5G1.3. The Presentence Report said "the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment. USSG §5G1.3(d)." (Record in the Court of Appeals, 154)(PSR, ¶59).

This reflects one of two errors, either of them plain. First, this language – adopted by the district court -- may reflect a belief that USSG §5G1.3(d) calls for a consecutive sentence. But it doesn't. Rather, that provision provides a non-exhaustive list of factors and commits the issue to the district court without recommendation.

Alternatively, it may reflect a typo: the substitution of USSG §5G1.3(d) for USSG §5G1.3(d). Subsection (a) of 5G1.3 does call for a consecutive sentence, but it was plainly inapplicable to Petitioner. Before stating that the Guidelines called for a consecutive sentence, the PSR stated:

> On April 29, 2019, the defendant sustained a conviction for Driving While Intoxicated Felony Repetition, under Case No. 1572280, in the Tarrant County Criminal Court No.1. He was sentenced to four years imprisonment and was in the custody of the Texas Department of Corrections-Institutional Division prior to being placed in federal custody on December 2, 2019, pursuant to a writ of habeas corpus ad prosequendum. His projected sentence expiration date in this case is November 29, 2022.

(Record in the Court of Appeals, 154)(PSR, ¶59).

Subsection (a) of Guideline 5G1.3 says:

> [i]f the instant offense was committed while the defendant **was serving** a term of imprisonment (including work release, furlough, or escape status) or **after sentencing** for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

USSG §5G1.3(a)(emphasis added).

Here, the defendant concluded his illegal re-entry offense on November 29, 2018, the "day[] immigration officials made contact with Hernandez-Serrano and determined he was a citizen of Mexico, unlawfully present in the United States." (Record in the Court of Appeals 145). In the court below, at least, illegal re-entry offenses terminate on the date an alien is found by immigration authorities. *See United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996)("a previously deported alien is 'found in' the United States when his physical presence is discovered and noted by the immigration authorities, and the knowledge of the illegality of his

presence, through the exercise of diligence typical of law enforcement authorities, can reasonably be attributed to the immigration authorities."); *accord United States v. Gunera*, 479 F.3d 373, 376 (5th Cir. 2007); *United States v. Compian-Torres*, 712 F.3d 203, 207 (5th Cir. 2013); *see also United States v. Corro–Balbuena*, 187 F.3d 483, 485 (5th Cir.1999)("A § 1326 offense "begins at the time the defendant illegally re-enters the country and does not become complete unless or until the defendant is found by the [ICE] in the United States.").

It follows that on November 29, 2018, Petitioner was not "serving" a state sentence for DWI, as required by §5G1.3(a). Nor was this a date "after sentencing," as contemplated by §5G1.3(a). Rather, his instant offense terminated prior to the commencement of any DWI sentence. Accordingly, Subsection 5G1.3(a) plainly did not call for a consecutive sentence. It appears that the PSR, adopted by the district court, may have confused the date of transfer to federal custody with the termination date of the §1326 offense. *See* (Record in the Court of Appeals, 154)(PSR, ¶59)(observing that Petitioner "was sentenced to four years imprisonment and was in the custody of the Texas Department of Corrections-Institutional Division prior to being placed in federal custody on December 2, 2019, pursuant to a writ of habeas corpus ad prosequendum…" and that "[t]herefore, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment."). In any case, it was wrong.

In addressing the prejudice question, the court below passed explicitly on the scope of *Molina-Martinez*, finding it inapplicable. [Appx. A]; *Hernandez-Serrano*, 858

Fed. Appx. at 696-697. Application of *Molina-Martinez*, moreover, could have produced a reasonable probability of a different result. The district court imposed sentence near the low end of the numerical Guideline range, (Record in the Court of Appeals 132-133), and did not say that it would have imposed a consecutive sentence even if the Guidelines did not affirmatively call for one.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 25th day of October, 2021.

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