No. _____

In the

Supreme Court of the United States

_____

D'Arde Lee Williams,

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. **Whether the court of appeals failed to properly apply the plain error analysis to the question of whether the sentencing court erred by failing to grant a four-level reduction of escaping from the non-secure custody of a halfway house or similar facility pursuant to U.S.S.G. §2P1.1(b)(3)?**

PARTIES TO THE PROCEEDING

Petitioner is D'Arde Lee Williams, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

Petitioner D'Arde Lee Williams seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. D'Arde Lee Williams*, 850 Fed. Appx. 313 (5th Cir. June 18, 2021) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on June 18, 2021. The 90-day deadline for filing a petition for writ of certiorari provided for in Supreme Court Rule 13 has been extended to 150 days from the date of the lower court judgment by order of this Court on June 18, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS

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 offence 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;

U.S.S.G. §2P1.1 provides the following:

> (a) Base Offense Level:
>
> > (1) **13**, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense;
> >
> > (2) **8**, otherwise.
>
> (b) Specific Offense Characteristics
>
> > (1) If the use or the threat of force against any person was involved, increase by **5** levels.
> >
> > (2) If the defendant escaped from non-secure custody and returned voluntarily within ninety-six hours, decrease the offense level under §2P1.1(a)(1) by **7** levels or the offense level under §2P1.1(a)(2) by **4** levels. *Provided*, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more.
> >
> > (3) If the defendant escaped from the non-secure custody of a community corrections center, community treatment center, "halfway house," or similar facility, and subsection (b)(2) is not applicable, decrease the offense level under subsection (a)(1) by **4** levels or the offense level under subsection (a)(2) by **2** levels. *Provided*, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more.
> >
> > (4) If the defendant was a law enforcement or correctional officer or employee, or an employee of the Department of Justice, at the time of the offense, increase by **2** levels.

LIST OF PROCEEDINGS BELOW

1. *United States v. D'Arde Lee Williams*, 5:20-CR-00018-1, United States District Court for the Northern District of Texas, Lubbock Division. Judgment and sentence entered on July 30, 2020. (Appendix B).

2. *United States v. D'Arde Lee Williams,* 850 Fed. Appx. 313 (5th Cir. June 18, 2021), CA No. 20-10803, Court of Appeals for the Fifth Circuit. Judgment affirmed on June 18, 2021. (Appendix A)

STATEMENT OF THE CASE

In District Court

This is an appeal of the sentence imposed after the defendant, D'Arde Williams (Williams), pleaded guilty to escape from federal custody, in violation of 18 U.S.C. § 751(a). (ROA.26). In February, 2019, Williams had been convicted of a federal firearm offense and ordered to serve 27 months in prison. (ROA.146); *see United States v. Williams*, No. 5:18-CR-84 (N.D. Tex. Feb. 8, 2019).

As he neared the end of that sentence, the Bureau of Prisons (BOP) approved his transfer from Florence FCI in Colorado to a Residential Reentry Center (a.k.a., a halfway house) in Houston, Texas. (ROA.134–135). The plan was for Williams to travel unescorted by Greyhound bus from Colorado to Houston. (ROA.134–135). But on the way to the halfway house, the bus stopped in Williams' hometown of Lubbock, Texas. (ROA.134–135). Williams walked off the bus and never continued to Houston. Authorities caught up with him a week later.

On March 11, 2020, D'Arde Williams (Williams) was charged in a one-count indictment with escape from federal custody, in violation of 18 U.S.C. § 751(a). (ROA.26). The indictment specifically alleged the following:

> On or about January 13, 2020, in the Lubbock Division of the Northern District of Texas, and elsewhere, **D'Arde Lee Williams,** defendant, did knowingly escape, attempt to escape, and depart without permission from federal custody at or near 801 Broadway Street, Lubbock, Texas, *while en route to Leidel Residential Reentry Center, 1819 Commerce Street, Houston, Texas, an institution and facility in which he was lawfully confined at the direction of the Attorney General* by virtue of a judgment and commitment of the United States District Court for the Northern District of Texas upon conviction for the

commission of the felony offense of Convicted Felon in Possession of a Firearm and Ammunition, in violation of Title 18, United States Code, Sections 922(g)(l), 924(a)(2), defendant knowing that he did not have permission to leave federal custody.

(ROA.26) (*emphasis added*)

On April 22, 2020, Williams pled guilty to the one count indictment pursuant to a written plea agreement. (ROA.57,85-107,126-132). As a part of the guilty plea, Williams signed the following stipulation of facts:

1. D'Arde Lee Williams, defendant, admits and agrees that on or about January 13, 2020, in the Lubbock Division of the Northern District of Texas, and elsewhere, he did knowingly escape, attempt to escape, and depart without permission from federal custody at or near 801 Broadway Street, Lubbock, Texas, while en route to Leidel Residential Reentry Center, 1819 Commerce Street, Houston, Texas, an institution and facility in which he was lawfully confined at the direction of the Attorney General by virtue of a judgment and commitment of the United States District Court for the Northern District of Texas upon conviction for the commission of the felony offense of Convicted Felon in Possession of a Firearm and Ammunition, in violation of Title 18, United States Code, Sections 922(g)(l), 924(a)(2), defendant knowing that he did not have permission to leave federal custody, in violation of Title 18, United States Code, Section 75 l(a).

2. At all times material to this factual resume, D'Arde Lee Williams was in federal custody at the Florence Federal Correctional Institution, Florence, Colorado, an institutional facility in which he was lawfully confined at the direction of the Attorney General by virtue of a judgment and commitment of the United States District Court for the Northern District of Texas upon conviction for the commission of the felony offense of Convicted Felon in Possession of a Firearm and Ammunition, No. 5:18-CR-084-C.

3. As Williams was close to completing his federal sentence, he was assigned to the Leidel Residential Reentry Center, 1819 Commerce Street, Houston, Texas. Williams was placed on a bus in Colorado and directed to report to the Leidel Residential Reentry Center.

4. On January 13, 2020, Williams's bus stopped at the Lubbock bus station at 801 Broadway Street, Lubbock, Texas. Williams left the bus and did not return. When Williams failed to report to Leidel Residential Reentry Center, he was placed on escape status and the United States Marshals Service (USMS) began looking for him.

> 5. On January 20, 2020, USMS investigators received information that Williams was at 1701 46th Street, Lubbock, Texas. When USMS investigators arrived at that location they encountered Williams and Williams fled on foot. USMS investigators called Lubbock Police Department (LPD) officers and set up a perimeter around the area where Williams had fled. A USMS deputy marshal searching the area where Williams had fled looked in the bed of an abandoned pickup truck and found Williams hiding. The deputy arrested Williams without incident.
>
> 6. Williams admitted to the deputy that he was supposed to report to the Leidel Residential Reentry Center and failed to do so. Williams explained that he thought he needed to "stay on the run" because he was already in trouble for not reporting.
>
> 7. The defendant agrees that the defendant committed all the essential elements of the offense. This factual resume is not intended to be a complete accounting of all the facts and events related to the offense charged in this case. The limited purpose of this statement of facts is to demonstrate that a factual basis exists to support the defendant' s guilty plea to Count One of the Indictment.

(ROA. 134-135).

After Williams pled guilty, a presentence report (PSR) was prepared. The probation officer assessed a base offense level of 13 because Williams was in custody for a conviction. U.S.S.G. §2P1.1. (ROA.144). The probation officer decided not to apply U.S.S.G. §2P1.2(b)(3), which provides for a four-level reduction if the defendant escaped from a non-secure halfway house or similar facility, despite the fact that the indictment alleged and the factual resume established that when the defendant left the bus he was assigned to (and on his way to) the Leidel Residential Reentry Center. (ROA.144). After a two-level reduction for acceptance, Williams' total offense level was 11. At a criminal history category V, his advisory imprisonment range was 24-30 months. (ROA.155).

The government filed a statement adopting the PSR. (ROA.157). Williams filed a notice of no objections to the PSR, but specifically reserved his right to appellate

review of objections not made. (ROA.158). At the sentencing hearing, Williams' attorney discussed the fact that Williams had not received a four-level reduction for escaping from a halfway house or similar facility. (ROA.118). However, it appears that the defense attorney, the probation officer, and the Court all assumed that Williams pled guilty to escaping from FCI Florence, rather than from a bus station while en route to a halfway house. *See* (ROA.118). What appeared to go unnoticed by all was the fact that the grand jury correctly found that Williams was in the custody of the halfway house when he escaped, and that was confirmed by his plea of guilty. *See* (ROA.26,134).

On Appeal

On appeal, Williams argued that under the allegations in the indictment and the stipulation of facts, Williams should have received a four-level reduction, and the Court's failure to do so was plain error. The Fifth Circuit found that Williams' argument failed to satisfy the second prong of plain error because his error was subject to reasonable dispute. *See United States v. Williams*850 Fed App. 313, 314 (5th Cir. 2021). The court also found that the error was harmless because the district court made the statement that it would have imposed the same sentence if there was any error in calculating the guideline sentence. *See id*.

REASONS FOR GRANTING THIS PETITION

I. This Court should grant review to determine whether the court of appeals misapplied the plain error standard of review.

Petitioner did not raise the Guidelines issue in the trial court, and therefore, the Fifth Circuit purported to apply the plain error standard of review. *See United States v. Williams*, 850 Fed. Appx. at 313. Plain error review requires the court of appeals to determine whether (1) the district court erred, (2) its error was plain, and (3) the error affected Cavazos's substantial rights. *See United States v. Mares*, 402 F.3d 511, 520 (5th Cir. 2005) (citing *United States v. Cotton*, 535 U.S. 625, 631 (2002)). If these conditions are met, then the court of appeals has the discretion to reverse the conviction and sentence if it also finds that the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (quoting *Cotton*, 535 U.S. at 631).

As is set forth below, the Petitioner's case met the four prongs of plain error review. However, the court of appeals rejected Williams' argument by simply stating that the issue was subject to reasonable dispute. This Court should grant review and remand this case for the Fifth Circuit to properly apply the plain error standard.

(1) The district court erred by failing to apply the four-level enhancement.

The Chapter 2 sentencing guideline for escape offenses is simple, but it is not a one-size-fits-all. *See* U.S.S.G. §2P1.1. The guideline first provides for a base offense

level of 13 "if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense." U.S.S.G. §2P1.1(a)(1). But the Commission sought to differentiate between various acts of escape based on their true culpability. The offense level goes up if the defendant used or threatened violence; the offense level goes down if the defendant merely walked away from a non-secure facility like a halfway house:

> (a) Base Offense Level:
>
> > (1) **13**, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense;
> >
> > (2) **8**, otherwise.
>
> (b) Specific Offense Characteristics
>
> > (1) If the use or the threat of force against any person was involved, increase by **5** levels.
> >
> > (2) If the defendant escaped from non-secure custody and returned voluntarily within ninety-six hours, decrease the offense level under §2P1.1(a)(1) by **7** levels or the offense level under §2P1.1(a)(2) by **4** levels. *Provided*, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more.
> >
> > (3) If the defendant escaped from the non-secure custody of a community corrections center, community treatment center, "halfway house," or similar facility, and subsection (b)(2) is not applicable, decrease the offense level under subsection (a)(1) by **4** levels or the offense level under subsection (a)(2) by **2** levels. *Provided*, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more.
> >
> > (4) If the defendant was a law enforcement or correctional officer or employee, or an employee of the Department of Justice, at the time of the offense, increase by **2** levels.

U.S.S.G. §2P1.1

The commentary to the guideline contains the following definition for "non-secure" custody:

> 1. "***Non-secure custody***" means custody with no significant physical restraint (*e.g.*, where a defendant walked away from a work detail outside the security perimeter of an institution; where a defendant failed to return to any institution from a pass or unescorted furlough; or where a defendant escaped from an institution with no physical perimeter barrier).

U.S.S.G. §2P1.1, application note 1.

When the Government successfully sought an indictment against Williams, it presented enough evidence for the grand jury to determine that Williams was both "en route to" *and* "lawfully confined" by "Leidel Residential Reentry Center" in Houston. (ROA.26). That is the charge Williams pleaded guilty to.

The written stipulation of facts took a belt-and-suspenders approach to the question of custody. The first paragraph, consistent with the indictment, admitted that the Houston halfway house was "an institution and facility in which he was lawfully confined at the direction of the Attorney General." (ROA.134).

But the second paragraph of the factual resume asserted that he was *also* "in federal custody at the Florence Federal Correctional Institution, Florence, Colorado, an institutional facility in which he was lawfully confined at the direction of the Attorney General." (ROA.134). The third paragraph then returned to the original recognition that, on the date he committed the offense, he was already "assigned to the Leidel Residential Reentry Center." (ROA.134-135). The fourth paragraph then revealed the actual "facility" he physically escaped from was a Greyhound bus or bus

station in Lubbock, Texas: Williams' bus stopped at the Lubbock bus station at 801 Broadway Street, Lubbock, Texas. Williams left the bus and did not return. When Williams failed to report to Leidel Residential Reentry Center, he was placed on escape status and the United States Marshals Service (USMS) began looking for him. (ROA.135).

The plain straightforward language of Section 2P1.1 provides that Mr. Williams was entitled to a four level reduction if he escaped from the non-secure custody of a community corrections center, community treatment center, "halfway house", or similar facility. *See* U.S.S.G. §2P1.1(b)(3). *See United States v. Shaw*, 979 F.2d 45 ("[T]he plain language of U.S.S.G. §2P1.1(b) . . . dictates that two circumstances must be present before an escapee receives the four-level reduction: first, the escape must be from non-secure custody, and, second, the non-secure custody must be provided by a particular type of facility, i.e., a community corrections center, community treatment center, halfway house or similar facility."); and *United States v. Brownlee*, 970 F.2d 764, 765 (5th Cir. 1992) (Holding the same).

There is absolutely no question that Mr. Williams was in non-secure custody, according to the definition in application note 1. In fact, his case aligns squarely with one of the examples given in the application note – failing to return to an institution from a pass or unescorted furlough. *See id*. application note 1. Williams was traveling, unescorted and unrestrained, on a commercial passenger bus from Florence, Colorado to his assigned halfway house in Houston, Texas when he left the bus.

The only remaining question is whether Williams was in custody of a community corrections center, community treatment center, "halfway house," or similar facility. Everything in the record points to an affirmative answer: the indictment (ROA.26) (the RRC was "an institution and facility *in which he was lawfully confined*") (*emphasis added*); the factual resume (same language) (ROA.134); and even the PSR ("had nearly completed his time in federal custody and was due to report to the Leidel Residential Reentry Center (RRC) in Houston, Texas, to finish his sentence.") (ROA.142).

The Leidel RRC was a halfway house. The Bureau of prisons describes residential re-entry centers as follows:

> The BOP contracts with residential reentry centers (RRCs), also known as halfway houses, to provide assistance to inmates who are nearing release. RRCs provide a safe, structured, supervised environment, as well as employment counseling, job placement, financial management assistance, and other programs and services. RRCs help inmates gradually rebuild their ties to the community and facilitate supervising ex-offenders' activities during this readjustment phase.

Federal Bureau of Prisons Website, viewable at

https://www.bop.gov/about/facilities/residential_reentry_management_centers.jsp

The record establishes that when Mr. Williams left his Greyhound bus, He had been assigned to and was in the custody of a halfway house. He should have received a four-level reduction under U.S.S.G. §2P1.1(b)(3). The district court's failure to apply the four-level reduction was error.

2) Error that is plain and obvious

The error in this case was a plain and obvious failure of the district court, and the PSR, to correctly apply the provisions of §2P1.1(b)(3) to the facts of this case. *See United States v. Martinez-Cruz*, 593 Fed. Appx. 560, 564 (5th Cir. 2013) (Finding the district court's error involving a straightforward misapplication of the plain language of the Guidelines was particularly obvious), *quoting United States v. Hernandez*, 690 F.3d 613, 622 (5th Cir. 2012); *see also United States v. Villegas*, 404 F.3d 355, 364 (5th Cir. 2005) (holding that a district court committed plain error by committing an obvious error that caused it to impose a sentence that resulted from its incorrect application of the Guidelines). Of course, the argument that a factual issue that is precluded from plain error analysis is no longer an appropriate response. *See Davis v. United States*, 140 S. Ct. 1060, 1061-1062 (2020).

The plain language of the indictment, the factual resume, the escape guidelines and the application notes make it clear that the four level adjustment should have applied. For whatever reason, the district court, the probation officer, Williams' attorney and the prosecutor were all unaware of the fact that Williams was charged with and pleaded guilty to leaving the custody of a halfway house. If he was not in the custody of a halfway house, he was not guilty of the offense charged. Williams had to be in custody of the "halfway house" at the time he walked away from Greyhound Bus. Of course the factual resume contains the stipulation that Williams was lawfully confined in the halfway house when he walked away from the bus. (ROA.134). Once the district court accepted the stipulation in the factual resume as

true (ROA.104-105,106), this four-level enhancement should have applied to Williams.

3) The error affected Williams' substantial rights

In Mr. Williams' case, as a result of the error in applying the escape guideline, the total offense level was 11, with a criminal history category V and an advisory imprisonment range of 24 to 30 months. (ROA.155). Without this error, Mr. Williams' total offense level would have been 8 and his advisory imprisonment range would have been 12 to 18 months.

"In most cases a defendant who has shown that the district court deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome. And, again in most cases, that will suffice for relief if the other requirements of Rule 52(b) are met." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016).

Williams recognizes that his case, the district court stated:

> Although I find that the guideline calculations announced today were correct, to the extent that were incorrectly calculated, I would have imposed the same sentence without regard to the applicable guideline range, and I would have done so for the same reasons, in light of the 3553(a) factors.

(ROA.122).

Williams also recognizes that the Supreme Court in *Molina-Martinez* stated that "There may be instances when, despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist." *Molina-Martinez v. United States*, 136 S. Ct. at 1346. "The record in a case may show, for example, that

the district court thought the sentence it chose was appropriate irrespective of the Guidelines range." *Id.*

However, that is not what happened in this case. The sentencing judge had no awareness that the Guideline imprisonment range had been incorrectly calculated. His statement that this is the sentence he would have imposed even if there were some unrecognized error cannot possibly serve to satisfy the Supreme Court's example in *Molina-Martinez*. What the record reflects in this case is that the district court had no idea that he was imposing a sentence based upon an incorrectly calculated imprisonment range. It does not reflect that the district court thought the sentence it chose was appropriate irrespective of the Guideline range. This is a far different situation from where a district judge considers an objection to the Guidelines, overrules the objection, but finds he would have imposed the same sentence and states the reasons why he would have imposed a non-Guideline sentence. That simply did not happen in this case. Mr. Williams was prejudiced because the district court never considered the correct advisory imprisonment range before imposing a sentence that would be an upward variance or departure from that sentence and was actually unaware that he was basing his sentence on an incorrectly calculated guideline range.

In the present case, the district court imposed a within guideline sentence of 30 months. There simply is nothing in the record to reflect that the court considered the correct advisory range of 12 to 18 months, which of course is a sentencing factor that must be considered. *See* 18 U.S.C. § 3553(a)(4). In order for the government to

show that Williams was not prejudiced by this error, it must show that the district court considered both the correct and incorrect applicable guideline range. *See United States v. Guzman-Rendon*, 864 F.3d 409, 411 (5th Cir. 2017); *accord United States v. Richardson*, 676 F.3d 491, 511 (5th Cir. 2012)(citing *United States v. Duhon*, 541 F.3d 391, 396 (5th Cir.2008).

Accordingly, the error in this case affected Mr. Williams' substantial rights and satisfied the third prong of plain error.

4) The error affected the fairness, integrity and public reputation of the proceedings.

This Court should exercise its discretion to reverse the plain error in this case because the error seriously affected the fairness, integrity and public reputation of the proceeding.

"[A]ny exercise of discretion at the fourth prong of *Olano* inherently requires 'a case-specific and fact intensive' inquiry." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1909 (2018) *quoting Puckett v. United States*, 556 U.S. 129, 142 (2009).

"[W]hat 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?" *Rosales-Mireles v. United States*, 138 S. Ct. at 1908 (2018) *quoting United States v. Sabillon-Umana*, 772 F. 3d 1328, 1333-1334 (10th Cir. 2014) (Gorsuch, J.).

In this case, the district court sentenced Mr. Williams using an advisory imprisonment range of 24 to 30 months when it should have used an imprisonment range of 12 to 18 months. The district court imposed a sentence of 30 months. This Court should exercise its discretion to correct this error.

The court of appeals should have exercised its discretion to reverse the plain error in this case because the error seriously affected the fairness, integrity and public reputation of the proceeding. The court of appeals' analysis and the basis for its opinion is a complete failure to apply a rational plain error analysis to the argument in this case. Most obviously, the court of appeals completely ignored the undisputed fact that Williams was charged with and plead guilty to escaping from the halfway house, and the factual resume established that fact. The court never addressed the fact that, although there may have been a reasonable dispute whether Williams was still considered to be in custody of the BOP, that did not change the undisputed fact that he was also, according to the indictment, the guilty plea and the factual resume in custody of the halfway house. This qualified him for the reduction under the plain language of the statute. Simply dismissing the argument as being subject to a reasonable dispute was a misapplication of the plain error standard.

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 15th day of November, 2021.

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