No. _____

In the

Supreme Court of the United States

Jonathan Scott May,

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

1. Did the district court plainly err when applying an enhancement under U.S. Sentencing Guidelines Manual § 2G2.2(b)(5)?

PARTIES TO THE PROCEEDING

Petitioner is Jonathan Scott May, who was the Defendant-Petitioner 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. May*, No. 21-10308, 2022 U.S. App. LEXIS 1131, 2022 WL 152506, at *1 (5th Cir. Jan. 14, 2022)
- *United States v. May*, No. 5:20-cr-133-1 (N.D. Tex. Nov. 30, 2020)

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 Jonathan Scott May 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 reported at *United States v. May*, No. 21-10308, 2022 U.S. App. LEXIS 1131, 2022 WL 152506, at *1 (5th Cir. Jan. 14, 2022). The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit entered judgment on January 14, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES AND GUIDELINES PROVISIONS

This petition involves an enhancement under the U.S. Sentencing Guidelines:

> If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.

U.S. Sentencing Guidelines Manual § 2G2.2(b)(5) (2021).

STATEMENT OF THE CASE

On October 14, 2020, Jonathan Scott May, Petitioner, was charged in a one-count indictment with receipt and distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2). (ROA.30). On November 19, 2020, May entered a guilty plea to the one-count indictment pursuant to a written guilty plea and supported by a factual resume. *See* (ROA.48-65,156).

After the guilty plea, a presentence report (PSR) was prepared. (ROA.178). The PSR applied a base offense level of 22, pursuant to U.S.S.G. §2G2.2. (ROA.184). May received an additional two-point enhancement for the material involving a prepubescent minor under the age of 12, U.S.S.G. §2G2.2(b)(2); a two-level enhancement for distribution of the material, U.S.S.G. §2G2.2(b)(3)(F); a four-level enhancement for sadistic or masochistic conduct, U.S.S.G. §2G2.2(b)(4)(A); a five-level increase for engaging in a pattern of sexual abuse or exploitation of a minor, U.S.S.G. §2G1.1(b)(5); a two-level enhancement for use of a computer, U.S.S.G. §2G2.2(b)(6); and a two-level enhancement for possession of more than 600 images, U.S.S.G. §2G2.2(b)(7)(D). (ROA.184-185). Those enhancements resulted in an Adjusted Offense Level of 42. (ROA.185). After a three-level adjustment for acceptance of responsibility, May's total offense level was 39. (ROA.185). May had a criminal history score was 6, resulting in a criminal history category of III. (ROA.186-189). His advisory imprisonment range was 324-405 months, but because his statutory maximum was 20 years, he advisory range became 240 months. (ROA.196).

The factual basis, in part, of the five-level enhancement for engaging in a pattern of sexual exploitation of a minor was a sexual relationship that May had with a 15-year-old when he was 19, with whom he fathered a child. (*See* (ROA.183,185). Neither party filed objections to the PSR. At the sentencing hearing, May's attorney pointed out, and the sentencing judge acknowledged, that part of the sexual conduct relied upon to justify the five-level enhancement was between and 19-year-old and a 15-year-old and was a "boyfriend/girlfriend situation." (ROA.144,151). The only other incident that was relied upon was an incident where May touched the breast of a nine-year-old girl. It is not clear from the PSR whether that touching was over the clothes (ROA.184,185,144,151). Despite the clear and obvious error that May was receiving a five level enhancement under U.S.S.G. §2G2.2(b)(5), because at least one of the incidents relied upon did not qualify as "the sexual abuse or exploitation of a minor", the district court accepted the findings of the PSR and applied a total offense level of 39. *See* (ROA.143). The court imposed a sentence of 240 months imprisonment and a 10-year term of supervised release. (ROA.151-153). The Fifth Circuit affirmed. *United States v. May*, No. 21-10308, 2022 U.S. App. LEXIS 1131, 2022 WL 152506, at *1 (5th Cir. Jan. 14, 2022).

REASON FOR GRANTING THIS PETITION

I. The district court plainly erred when applying an enhancement under U.S. Sentencing Guidelines Manual § 2G2.2(b)(5).

Section 2G2.2 provides for a five-level enhancement to the base offense level "[i]f the defendant engaged in a pattern of activity involving the sexual abuse of exploitation of a minor." U.S.S.G. §2G2.2((b)(5). The commentary provides further:

> "***Pattern of activity involving the sexual abuse or exploitation of a minor***" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

U.S.S.G. §2G2.2, application note 1.

In *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), this Court held, "in the context of statutory rape offenses that criminalize sexual intercourse based solely on the ages of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16."

The Texas offense of statutory rape allows for the prosecution of consensual intercourse with a person younger than 17 years of age. *See* Texas Penal Code §§ 22.011(a)(2) and (c)(1). Moreover, the Texas statute allows for a conviction when there is only a three-year age differential, whereas the federal generic statute requires a four-year differential. Therefore, under the categorical approach, the Texas statute does not satisfy the generic definition of "sexual abuse of a minor." Moreover, the conduct described in the PSR in no way fits the elements of "sexual exploitation of a minor" set forth in 18 U.S.C. § 2251.

Because the relationship between a 19-year-old May and his 15-year-old-girlfriend does not qualify as "sexual abuse or sexual exploitation of a minor," and the single incident of sexual contact with a nine-year-old does not qualify as "Two or more instances of sexual abuse or sexual exploitation of a minor," the application of the five level enhancement was clear and obvious error.

Moreover, the substantial rights of May were affected because, absent the error, his advisory imprisonment range would have been reduced from 324-405 months to 188-235 months. This huge disparity in the advisory range, resulting from an error that went unnoticed by the district court, had to have an effect on the sentence imposed, regardless of the district court's routine attempt at inoculating the sentenced against any Guideline error. Fairness, integrity and the reputation of the proceedings require the sentence to be vacated and remanded for re-sentencing.

A. Standard of Review

Unpreserved error is reviewed under the plain error standard. *See* Fed. R. Crim. P. 52(b). Reversible plain error consists of 1) error, 2) that is plain or obvious, 3) that affects substantial rights, and 4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 732 (1993).

B. Discussion

1. The district court erred.

Section 2G2.2 provides for a five-level enhancement to the base offense level "[i]f the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." U.S.S.G. §2G2.2((b)(5). The commentary provides further:

> "***Pattern of activity involving the sexual abuse or exploitation of a minor***" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

U.S.S.G. §2G2.2, application note 1.

What is "necessary under the plain language of §2G2.2(b)(5) and its commentary are two or more separate instances of sexual abuse or exploitation of a minor." *United States v. Bacon*, 646 F.3d 218, 221 (5th Cir. 2011). "The government was required to prove the facts warranting the increase by a preponderance of the evidence." *United States v. Blanton*, 486 Fed. Appx. 358, 359 (5th Cir. 2012); *citing United States v. Juarez*, 626 F.3d 246, 251 (5th Cir. 2010).

The federal sexual exploitation of children statute involves conduct of employing, using, persuading, inducing, enticing or coercing minors to engage in certain conduct for producing images of sexual conduct and has no bearing on Mr. May's five-level enhancement. *See* 18 U.S.C. § 2251. However, 18 U.S.C. § 2243 sets forth the elements of sexual assault of a minor or ward:

> **(a) Of a Minor.—**Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who—
>
> **(1)** has attained the age of 12 years but has not attained the age of 16 years; and
>
> **(2)** is at least four years younger than the person so engaging;

> or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

18 U.S.C. § 2243(a).

In *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), this Court held, "in the context of statutory rape offenses that criminalize sexual intercourse based solely on the ages of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16." *Id.* at 1568.

The Texas offense of statutory rape (non-forcible sexual assault) allows for the prosecution of consensual intercourse with a person younger than 17 years of age. *See* Texas Penal Code §§ 22.011(a)(2) and (c)(1). The Texas statute also provides for an affirmative defense if the actor was no more than three years older than the victim and the victim was 14 years or older. *See* Texas Penal Code § 22.011(e). Therefore, under the categorical approach, the Texas statute does not satisfy the generic definition of "sexual abuse of a minor." Also, under the facts in the PSR, the age difference was likely to have been less than the four-year age gap required for a federal generic offense. And, again, the conduct described in the PSR in no way fits the elements of "sexual exploitation of a minor" set forth in 18 U.S.C. 2251.

In the context of determining whether a defendant had a qualifying prior sex offense conviction for the purposes of the enhanced Guideline under U.S.S.G. §4B1.5(a), courts have employed the categorical approach. *See United States v. Wikkerink*, 841 F.3d 327, 331-332 (5th Cir. 2016). That is, it examines the elements of the prior offense rather than the conduct. *See Wikkerink*, 841 F.3d at 331-332. If the prior statute may be realistically committed in a manner that falls outside the

definition of a "sex offense conviction," the statute is "overbroad" and cannot be used to trigger §4B1.5(a). *See id.*

Obviously, Mr. May was not convicted of any of the conduct used to apply the five level enhancement, and the Guideline and commentary do not require such a conviction. *See* U.S.S.G. §2G2.2(b)(5), application note 1. However, the Guideline does require "two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant". *Id.* A non-forcible consensual sexual relationship between and 19 year-old and a 15 year-old is conduct that clearly falls outside of the generic elements of either a "sexual abuse of a minor" or a "Sexual exploitation of a minor." [1]

Because the relationship between a 19-year-old May and his 15-year-old-girlfriend does not qualify as "sexual abuse or sexual exploitation of a minor," and the single incident of sexual contact with a nine-year-old does not qualify as "two or more instances of sexual abuse or sexual exploitation of a minor," the application of the five level enhancement was clear and obvious error.

2. The error was clear or obvious.

The language of U.S.S.G. §2G2.2(b)(5) and the commentary is plain and clear. In order to qualify for the five-level enhancement, there must be a "combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant." U.S.S.G. §2G2.2(b)(5), application note 1. This Court has made it clear in unambiguous language that regarding "offenses that criminalize sexual

[1] Moreover, the second incident used to establish a pattern also does not qualify as a sexual abuse of a minor. The facts in the PSR discussing that incident do not establish that the "sexual act" between May and a nine-year-old girl involved any touch not through the clothes A "sexual act" does not include a touching through the clothes. *See* 18 U.S.C. § 2246 (2).

intercourse based solely on the ages of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16." *Esquivel-Quintana*, at 1568. *Esquivel-Quintana* is dispositive of the issue. Moreover, the fact that the Texas statute has a more limited age differential than the federal offense of sexual abuse of a minor also takes the offense outside of the scope of the federal generic offense. *See Wikkerink*, 841 F.3d at 331-332. Moreover, courts have also found that this type of error is clear and obvious. *See Wikkerink*, 841 F.3d at 336.

3. The error affected substantial rights.

The PSR found that the total offense level was 39 with a criminal history category III, resulting in an advisory imprisonment range of 324-405 months. (ROA.196). Of course, the statutory maximum was 20 years, capping the imprisonment range at 240 months. Absent the error in this case, the Appellant's total offense level would have been 34, resulting in an imprisonment range of 188-235 months.

"When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez* v. *United States*, __U.S.__, 136 S.Ct. 1338, 1345 (2016). This is so even when the difference between the true and erroneous ranges is small. *See Molina-Martinez v. United States*, 136 S.Ct. at 1344 (seven months); *United States v. Marroquin*, 884 F.3d 298, 301- 302 (5th Cir. 2018) (six months).

Further, the sentence actually imposed also fell outside the true range, a fact that courts have emphasized in substantial rights inquiries. *See United States v. Jasso*, 587 F.3d 706, 713 n.10 (5th Cir. 2009) ("In cases where this Court has found plain error, the gap between the correct and erroneous sentences has been sufficient enough that there was an apparent, reasonable probability that the defendant would have received a lesser sentence but for the district court's error.")(collecting cases); *Marroquin*, 884 F.3d at 301 ("The prejudice is even stronger when the correct Guidelines range is below the defendant's sentence…"). The high end of the true range should have been no greater than 235 months, but the defendant here received 240 months.

The district court did say that it would impose the same sentence under different Guidelines. (*See* ROA.153). Sometimes, courts give such statements heavy weight in determining the prejudice associated with a Guideline error. *See United States v. Richardson*, 676 F.3d 491, 511 (5th Cir. 2012); *United States v. Redmond*, 965 F.3d 416, 420-421 (5th Cir. 2020); *United States v. Garcia*, 647 Fed. Appx. 408, 410 (5th Cir. 2016)(unpublished); *United States v. Thomas*, 793 Fed. Appx. 346, 347 (5th Cir. 2020)(unpublished); *United States. v. Rico*, 864 F.3d 381, 386-387 (5th Cir. 2017); *United States v. Reyna-Aragon*, 992 F.3d 381, 387-389 (5th Cir. 2021); *United States v. Castro-Alfonso*, 841 F.3d 292, 297–99 (5th Cir. 2016).

But sometimes, it ignores them. *See United States v. Martinez-Romero*, 817 F.3d 917 (5th Cir. 2016); *United States v. Rico-Mejia*, 859 F.3d 318, 323-325 (5th Cir. 2017), *overruled on other grounds by United States v. Reyes-Contreras*, 910 F.3d 169

(5th Cir. 2018)(en banc), *abrogated by Borden v. United States*, __U.S.__, 141 S.Ct. 1817 (2021); *United States v. Tanksley*, 848 F.3d 347, 353 (5th Cir. 2017); *United States v. Cardenas*, 598 Fed. Appx. 264, 269 (5th Cir. 2015)(unpublished); *United States v. Vasquez-Tovar*, 420 Fed. Appx. 383, 384 (5th Cir. 2011)(unpublished); *United States v. Leal-Rax*, 594 Fed. Appx. 844 (5th Cir. 2014)(unpublished), *overruled on other grounds by United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018)(en banc), *abrogated by Borden v. United States*, __U.S.__, 141 S.Ct. 1817 (2021); *United States v. Bazemore,* 608 Fed. Appx. 207 (5th Cir. 2015)(unpublished). And this case is clearly one in which the district court's Guideline disclaimer cannot overcome the expectation of prejudice attendant to a Guideline error.

In this particular case, it is clear from the record that none of the participants -- the Court, the probation officer, the prosecution nor defense -- recognized this significant and obvious error in the Guideline calculations. This despite the existence of a Supreme Court case directly addressing the problem in this case. As a result of the error, the district court was most certainly aware of and influenced by the mistaken believe that Mr. May's guideline range was 324-405 months, but was limited by the 20-year statutory maximum. Although the district court made the statement that he would have imposed the same sentence even if there was an error in the Guideline calculations, there is no possible way the court could have known that would be true if the Guideline error was so significant and resulted in such a drastic increase in the offense level and imprisonment range. There should be no question that Mr. May was prejudiced by this grave error in the Guideline calculation.

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

This Court has recognized that a Guideline miscalculation "will in the ordinary case, as here, seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief." *Rosales-Mireles v. United States*, __U.S.__, 138 S.Ct. 1897, 1903 (2018); *accord United States v. Perez-Mateo*, 926 F.3d 216, 218 (5th Cir. 2019). In most cases where prong three is satisfied, a court "must 'exercise o[ur] discretion' to remand." *United States v. Rodriguez-Pena*, 957 F.3d 514, 515 (5th Cir. 2020) (quoting *United States v. del Carpio Frescas*, 932 F.3d 324, 333 (5th Cir. 2019) (quoting *Rosales-Mireles*, 138 S.Ct. at 1909)).

This recognizes that the public legitimacy of the judiciary rests on its willingness to correct its own mistake, at least when significant terms of imprisonment are at stake. S*ee Rosales-Mireles*, 138 S.Ct. at 1908. Because Guideline errors affect sentencing rather than conviction, they require ***relatively*** few judicial resources to rectify – they call for a new sentencing hearing rather than a full-blown retrial. *See id.* at 1909. As such, the *Rosales-Mireles* court's holding that "[i]n the context of a plain Guidelines error that affects substantial rights, that diminished view of the proceedings ordinarily will satisfy *Olano* 's fourth prong," *id.* at 1908, does not imply that the fourth prong is without function. Rather, it merely identifies one class of errors for which the fourth prong imposes a lesser barrier -- trial error, or error in the conduct of a plea, may be more readily affirmed on plain error review.

The general expectation of remand for Guideline error also recognizes that the Guidelines "serve an important role" in the sentencing framework established by

Congress. *See id*. at 1903. They promote "certainty and fairness" in sentencing, and help to avoid sentencing disparity. *Id.* A Guideline error does not just affect the parties – it makes it more difficult to operate a national system of even-handed sentencing, in part because the Commission relies on data from each individual sentencing to gauge judicial response to the Guidelines and consider reforms. The *Rosales-Mireles* court explained:

> Ensuring the accuracy of Guidelines determinations also serves the purpose of "providing certainty and fairness in sentencing" on a greater scale. The Guidelines assist federal courts across the country in achieving uniformity and proportionality in sentencing. To realize those goals, it is important that sentencing proceedings actually reflect the nature of the offense and criminal history of the defendant, because the United States Sentencing Commission relies on data developed during sentencing proceedings, including information in the presentence investigation report, to determine whether revisions to the Guidelines are necessary. When sentences based on incorrect Guidelines ranges go uncorrected, the Commission's ability to make appropriate amendments is undermined.

Id. at 1908 (internal citations omitted)(quoting and citing 28 U.S.C. §§ 994(f), and 991(b)(1)(B), *United States v. Booker*, 543 U.S. 225 (2005), and *Rita v. United States*, 551 U.S. 338 (2007)).

The *Rosales-Mireles* court acknowledged that the Sentencing Guidelines are sometimes complex. But it also held that this complexity does not lessen the potential effect of Guideline error on the fairness of judicial proceeding. *Id*. at 1904 ("Given the complexity of the calculation, however, district courts sometimes make mistakes."). Plain Guideline errors should ordinarily be reversed, even if the party seeking plain error relief cannot show that the error represents a miscarriage of justice, nor that it

shocks the conscience, nor calls into question the court's competence or integrity. *See id.* at 1906.

Several case-specific factors support the expectation that Guideline error will merit remand here. First, the error in the case effected a substantial change in the defendant's advisory range. In *Rosales-Mireles*, the error involved a change in the Guidelines of just seven to nine months. *See id.* at 1905. And courts have repeatedly reversed plain errors involving even smaller numbers. *See United States v. Santacruz–Hernandez*, 648 F. App'x 456, 458 (5th Cir. 2016) (holding a sentence disparity of 2 months was reversible plain error); *United States v. Carrizales–Jaramillo*, 303 Fed.Appx. 215, 217 (5th Cir.2008) (finding plain error where the imposed sentence was one month above the correct Guidelines range); *United States v. Chan-Xool*, 716 Fed. Appx. 274, 279-280 (5th Cir. 2018)(unpublished)(three months); *United States v. Marroquin*, 884 F.3d 298, 301- 302 (5th Cir. 2018)(six months).

In the present case, Mr. May received a sentence that was five months higher than what his advisory imprisonment range should have been. It was a sentence at the top of the 20-year statutory maximum. It was a sentenced influenced by the mistaken believe that his advisory range, without the statutory maximum, was 324-405 months. The district court was under the mistaken belief that the bottom of May's range was 84 months (Seven years) above the statutory maximum. Fairness, integrity and the reputation of the judicial proceedings compel this Court to exercise its discretion to correct the error.

CONCLUSION

Petitioner respectfully prays that this Court grant this Petition.

Respectfully submitted,

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