

No. 23-7819

ORIGINAL

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IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

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LASHONDA O'NEILL, PETITIONER

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Pro Se Petitioner for record

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LaShonda O'Neil asks that a writ of certiorari issue to review the opinion and
judgement entered by the United States Court of Appeals for the Fifth Circuit on November
06, 2023

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

QUESTIONS PRESENTED FOR REVIEW

1). Whether the Fifth Circuit Court of Appeals erred when it failed to employ the Plain error analysis to review, de novo, the District Court's abuse of discretion for Judicial fact-finding when it adopted the PSR that contained increased drug quantities that were not found by the jury beyond a reasonable doubt which is counter to the Constitution's Fifth and Sixth Amendments, in light of *Alleyne v. United States*.

2). Whether the Fifth Circuit Court of appeals erred by failing to employ the Harmless Error analysis to review de novo the District Court's abuse of Discretion when it overruled the objection to the obstruction of justice guideline enhancement that was based upon the introduction of an affidavit introduced After trial in violation of the Constitution's Fifth and Sixth Amendment's in light of *Crawford v. Washington* and *Alleyne v. United States*.

RELATED PROCEEDINGS

United States v. O'Neil, U.S. District Court for the Western District of Texas,
Number 5:18-CR-00068-OLG-2, Judgment entered November 2, 2022.

United States v. O'Neil, U.S. Court of Appeals for the Fifth Circuit, Number
22-50996, Judgement entered November 6, 2023.

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OPINION BELOW

The opinion of the Court of Appeals is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF
THE UNITED STATES

The opinion and judgement of the Court of Appeals was entered on November 06, 2023. This Petition was filed within 90-days after the entry of the judgement. See Supreme Court Rule 13.1. The Court returned the original petition that was filed on or about January 29, 2024 with instructions to cure and correct the deficiencies within 60-days of the date of the decision that was entered on or about March 15, 2024. The petitioner has cured and corrected the deficiencies and has filed this petition prior to the expiration of the 60-days allotted. The Court has jurisdiction to grant certiorari order under 28 U.S.C. ~ 1254(1).

UNITED STATES CONSTITUTION AMENDMENTS INVOLVED

The pertinent part of the United State's Constitutional Amendments provides:

The Due-Process Clause of the Fifth Amendment prohibits the Federal government from depriving any person of "Life, Liberty or property, without due-process of Law", Ensuring fairness in legal process and protection of individual Rights. U.S. Const. Amend. V.

.....

Defendants have the Right to be informed of the Nature and Cause of the accusations: Defendants must understand what they are being charged with and the details of the allegations against them. U.S. Const. Amend. VI.

.....

The Confrontation Clause of the Sixth Amendment states, "In all criminal prosecutions, The accused shall enjoy the right...to be confronted with witnesses against him". U.S. Const. Amend. VI.

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

Federal Rule of Criminal Procedure 52(a) states that Objections that preserve arguments for appellate review will be reviewed de novo for Harmless error.

Federal Rule of Criminal Procedure 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the Courts attention."

STATEMENT OF THE CASE

On or about February 8, 2018 Petitioner LaShonda O'Neill was charged with one count of conspiring to possess five kilograms or more of cocaine with intent to distribute it, one count of Money Laundering and one count of possessing five kilograms or more of cocaine with the intent to distribute it. 18 U.S.C. 1956(a)(1)(A)(a)(i-ii), (h); 21 U.S.C. 841(a)(1), (b)(1)(B) and (846(A)(ii). O'Neill was released on an pre-trial bond after spending six (6) days in custody. O'Neill had zero criminal background and the government had determined that she posed no risk of flight or any danger to the public. As a condition of her pre-trial bond O'Neill was instructed not to have any contact with her co-defendants. One of the co-defendants is O'Neill's husband, Darwin Powell, whom she had been residing with for a significant number of years along with three (3) minor children in the home. Because of the minor children in the home and the government's expected cooperation of O'Neill, the government moved to allow O'Neill and Powell to have contact. The government communicated the permitted contact with both defendant's attorneys. Jesse Rivera was the attorney of record for O'Neill and James Rodriguez was the attorney for Powell at the time of the contact being permitted. On or about May of 2018, attorneys for both O'Neill and Powell notified them of the permitted contact by the government. This contact was not formally entered by the District Court but instead at the government's discretion. The permitted contact included phone calls from the holding facility that Powell was being held in, video visits, letters and non-contact in person visitation. The contact between O'Neill and Powell went on for over 40 months while she was on pre-trial bond.

Throughout O'Neill's release on pre-trial bond she had very tumultuous attorney-client relationships with various court appointed attorneys as a result of conflicting views about her innocence which resulted in several attorneys requesting to withdraw from her case. APPENDIX E. In each instance, the attorneys sought to pressure O'Neill into cooperating with the government of which she maintained her innocence and refused to do.

After about 40 months of consistent contact with Powell, it was brought to the attention of O'Neill that her husband, Powell wanted to withdraw a guilty plea that he had entered. Because O'Neill and Powell were arrested together and transported in the same vehicle, O'Neill was a Direct Witness to the chain of events

that transpired at the time of arrest and the period of time thereafter, which pertained to the actions of the arresting agents. As a result of this, O'Neill provided an affidavit to Powell's attorney detailing what transpired on the day of arrest. The affidavit was presented to the Court by Powell's attorney in support of Powell's motion to withdraw his plea of guilt. Ultimately, the affidavit was not accepted by the Court because it failed to include that it was provided 'under the penalties of perjury'. In response to O'Neill providing the affidavit, in support of Powell's Motion to withdraw his guilty plea, the government soon after moved to terminate/revoke her pre-trial bond for violating the no-contact order condition of her bond. Although the government had verbally modified the condition permitting O'Neill to have contact with Powell and communicated such to both defendant's attorneys, the government did not make the Court aware of the modification. Therefore the revocation of O'Neill's pre-trial bond was at the sole mercy of the government. Due to the manner of which the contact order was modified by the government; and communicated through prior attorneys, the government declined to present such facts to the court at the revocation hearing for O'Neill. The attorney representing O'Neill at the revocation hearing was unaware of the permitted contact by the government or the manner of which it was instituted, therefore did not contest the revocation of O'Neill's pre-trial bond on the merits. Ultimately the Court revoked O'Neill's pre-trial bond at the request of the government on or about September 8, 2021.

Shortly thereafter attorney for O'Neill requested to withdraw from her case and the Court appointed Leslie Sachanowitz. During Sachanowitz's representation he communicated to O'Neill that there were over 2,200 entries associated with her case and there was no way he had time to go through all of the information and suggested to O'Neill that cooperating with the government was in her best interest. Because O'Neill insisted that she was innocent and refused to do so, attorney Sachanowitz positioned to the court that he was unable to afford her proper representation and requested to withdraw from the case. APPENDIX E.

The Court then appointed attorney Jeb Lock to represent her about three or four months prior to trial. While O'Neill isn't entitled to an attorney of her choice, it is O'Neill's position that in consideration of the chronicity of her case at the time and time period prior to trial, attorney Jeb Lock was not able to familiarize himself with the facts of her case before proceeding to trial. There was over 2,200 entries associated with her case that Lock presumably failed to review and did not discuss a defense with her in preparation for trial. Mr. Lock was ill-prepared and demonstrated his lack of trial experience during the course of O'Neill's trial. Although attorney representation is a 2255 issue, Lock failed to position the trial Court to present a specific drug quantity attributed to O'Neill's role in the conspiracy to the jury. The failures of O'Neill's attorney resulted

in O'Neill being found guilty on all three counts without any findings of a specific amount of drugs attributed to her. The jury did not deliberate or enter the findings of a quantity of drugs in the Verdict form. Appendix B. O'Neill's sentencing hearing was held on November 2, 2022 at which time O'Neill's trial attorney Jeb Lock filed various objections to the PSR. Mr. Lock objected to Guideline enhancements for 'obstruction of justice' and for possession of a dangerous weapon. APENDIX C. However, as consistent with the filing of her writ of certiorari O'Neill brings the attention of the court to the fact that the Guideline enhancement for obstruction of justice involved a affidavit that was presented to the court and entered into the record After her trial had concluded. Both of the enhancements were elements of the offense and were not presented to the jury. The post-trial introduction of the affidavit also prevented O'Neill from cross-examining the affiant. Although Mr. Lock objected to the guidelines enhancement he failed to raise the objection on the grounds of a 'Confrontation clause' violation. cf. CRAWFORD v. WASHINGTON. Mr. Lock also failed to object to the drug quantities alleged in the PSR and accepted by the Court that increased her Base offense level. The District Court's fact-finding of the drug quantities alleged in O'Neill's PSR were not presented to the jury nor identified on the Verdict Form. APPENDIX D. cf. ALLEYNE v. UNITED STATES. The District Court overruled O'Neill's objections and adopted the PSR and sentenced O'Neill to 270 months on count-1, 270 months on count-2 and 240 months on count-3 all to run concurrently. The failures of trial attorney Lock are in fact 2255 issues which did not preserve such challenges for Direct appeal, nevertheless, O'Neill's appellate counsel, Kimberly Keller failed to raise the challenges pursuant to Fed. Rule of Crim. P. 52 (b) and the Fifth Circuit Court of Appeals failed to apply the standard to review the District Court's abuse of discretion de novo and AFFIRMED her conviction. APPENDIX A.

~~REASONS FOR GRANTING THE WRIT~~

THE COURT SHOULD GRANT CERTIORARI TO ADDRESS THE CIRCUIT SPLIT ON THE APPLICATION OF THE PLAIN ERROR STANDARD AND TO ENSURE UNIFORMITY IN UPHOLDING SUPREME COURT PRECEDENTS .

The Fifth and Sixth Amendments of the United States Constitution guarantees a defendant accused of a crime some very distinct, but valuable protections, that can only be referred to as a guarantee if the Courts are uniform in upholding the Rule of law as prescribed by the Oath of office. When District Courts abuse their discretion and Circuit Courts err by failing to employ the applicable standard to correct manifest injustices, the Constitutional guarantees become eroded. The United States Constitution has provided a system of government with checks and balances designed to preserve the Constitution and its guarantees. Because Rule 52(b) is a 'discretionary Rule', there is a split amongst the Circuit Courts as to its application. The Fifth Circuit has had a longstanding issue in failing to employ the Plain error standard and this Certiorari would be the perfect opportunity for the United States Supreme Court to set the standard on when the Circuit Courts should employ the rule. Congress has provided the American people the ability to Petition the United States Supreme Court via writ of certiorari for review of splits amongst Circuit Courts to ensure that the United States Constitution and its precedents are upheld.

A. THE FIFTH CIRCUIT COURT OF APPEALS ERRED WHEN IT FAILED TO EMPLOY THE PLAIN ERROR STANDARD IN ITS REVIEW OF THE DISTRICT COURT FOR ABUSE OF DISCRETION WHEN IT COMITTED JUDICIAL FACT-FINDING BY HOLDING O'NEILL RESPONSIBLE FOR DRUG QUANTITIES THAT WERE NOT FOUND BY THE JURY BEYOND A REASONABLE DOUBT.

The Fifth Amendment encompasses the Due Process Clause which prohibits the Federal Government from depriving any person of "Life, Liberty, or Property, without due process of law", Ensuring fairness in legal process and protection of individual Rights. U.S. Const. Amend. V. The Sixth Amendment encompasses that defendants has the Right to be informed of the nature and cause of the accusations: Defendants must understand what they are being charged with and the details of the allegations against them. U.S. Const. Amend. VI . Pursuant to these Constitutional Guarantees the United States Supreme Court set the standard in *Alleyne v. United States*, 133 S. Ct. 2151, 2158, 186 L. Ed. 2d 314 (2013). In *Alleyne*, the Supreme Court

held that "The sentence imposed on the defendant for using or carrying a firearm in relation to a crime of violence under 18 U.S.C. 924 (c)(1)(A) violated his Sixth Amendment Rights because the sentence was based on a finding that defendant had brandished the firearm, and this FACT was found by the judge, rather than the jury beyond a reasonable doubt." The Supreme Court held that Factual determinations that increases maximum or minimum sentences, other than a prior conviction, Must be found by a jury beyond a reasonable doubt (or admitted by the defendant). see also *APPENDI v. NEW JERSEY*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed 2d 435 (2000). As the circuit courts expounded upon this precedent the Fifth Circuit decided in *UNITED STATES v. HAINES*, 803 F. 3d 713; 2015 U.S. App LEXIS that because the jury did Not make any findings about the 42 quantities attributable to Haines or Porter, their sentences were vacated and remanded for re-sentencing. In O'Neill's case the Pre Sentence Report held her responsible for 724 kilograms of cocaine which placed her Base offense level at 38. see PSR. The District Court adopted the order and found O'Neill responsible for the drug quantities that were Not reflected or identified on the Verdict form to had been deliberated or found by the jury beyond a reasonable doubt. SEE APPENDIX D (verdict form). In *Alleyne v. United States*, the Court held that 'brandishing' was an 'element' of the offense that must be presented to the jury and found beyond a reasonable doubt. The drug quantities are an element of the offense that O'Neill was charged with and such a determination made by the Judge, rather than the jury, violates the Fifth Amendment's Due-Process Clause, the Sixth Amendment's jury trial Right as well as the Supreme Court precedents set out in *ALLEYNE v. UNITED STATES*, 133 S. Ct. 2151, 2158, 186 L. Ed. 314 (2013) and *APPENDI v. NEW JERSEY*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

It is O'Neill's position that the District Court erred in its adoption order of the PSR absent the drug quantities being included on the verdict form and was therefore guilty of judicial fact-finding. This error upon the District Courts was an abuse of discretion that was Plain, obvious and affected the substantial Rights of O'Neill. Fed. Rule of Crim. P. 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

Although trial counsel was ineffective for failing to preserve the challenge for review by objection and appellate counsel was also ineffective for failing to raise the challenge for review under the Plain error standard, the Fifth Circuit had the discretion to employ the standard pursuant to Fed. Rule of Crim. P. 52(b). "Where a defendant did not object to the errors before the district court, the court reviews for plain error" *UNITED STATES v. VONN*, 535 U.S. 55,59 (2002). A plain error is an error or defect not intentionally

abandoned by the defendant that is "clear or obvious, rather than subject to reasonable dispute." *PUCKETT v. UNITED STATES*, 556 U.S. 129, 135 (2009). If in addition, the error affects the defendant's substantial rights, then the court may exercise its discretion to correct the error if it "seriously affect(s) the fairness, integrity or public reputation of judicial proceedings." *ROSALES-MIRELES v. UNITED STATES*, 138 S. Ct. 1897, 1903 (2018). In *ROSALES-MIRELES*, the Supreme Court reversed a decision by the Fifth Circuit, holding that a clear sentencing error made by the trial court should be corrected in most situations, even when the defendant did not object to the mistake. In so holding, the Court rejected the Fifth Circuit's interpretation of the plain error Rule. Because the jury did not indicate a specific drug quantity attributed directly to O'Neill's role in the conspiracy, but instead found her guilty of the Statutory charge, O'Neill should only be held responsible for the Statutory amount associated with 21 U.S.C. 841(b)(1)(c) and not the amount found by the judge. Under the applicable standard, the Fifth Circuit should have reviewed the court's decision for abuse of discretion *de novo* but failed. O'Neill hereby petitions the Court on Certiorari for review of the Circuit court's failures to employ the Fed. Rule to review the District Court's abuse of discretion by judicial fact-finding.

B. THE FIFTH CIRCUIT ERRED WHEN IT FAILED TO EMPLOY THE HARMLESS ERROR STANDARD TO REVIEW THE DISTRICT COURT FOR ABUSE OF DISCRETION WHEN IT OVERRULED O'NEILL'S OBJECTION TO OUT-OF-COURT STATEMENTS THAT VIOLATED THE CONFRONTATION CLAUSE AND RIGHT TO TRIAL BY JURY.

The Confrontation Clause of the Sixth Amendment states. "In all criminal prosecutions, the accused shall enjoy the right....to be confronted with witnesses against him." U.S. Const. Amend. VI. The Supreme Court set the landmark precedent *CRAWFORD v. WASHINGTON*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) which held, "A defendant's Confrontation Right is violated when the prosecution introduces "testimonial statements of witness who did not appear at trial", unless that witness is unavailable to testify, and the defendant had a prior opportunity for cross-examination." The Fifth Circuit held that Police officers cannot, through their trial testimony, refer to the substance of statements given to them during the course of their investigation, when those statements inculpates the defendant". "When the statement from an out-of-court witness is offered for its truth, Constitutional error can arise". *TAYLOR v. CAIN*, 545 F. 3d 327, 335 (5th cir. 2008).

During O'Neill's sentencing hearing Jeb Lock objected to the 'obstruction of justice' guidelines enhancement that was premised on out-of-court statements from a non-testifying witness which were introduced by the government [after trial]. The government also failed to give notice to the defense in violation of Fed.

Rule 32 and the Constitution's right to present a defense. see Document 386 pg. 3 at 7-18; pg. 4 at 1-11.

Because the statements were introduced by the government [after trial], the witness did not appear in trial or at O'Neill's sentencing hearing and O'Neill did not have the opportunity to cross-examine the witness.

DAVIS v. ALASKA, 415 U.S. at 316 (1974) Held, Cross-examination constitutes "the principal means by which the believability of a witness and the truth of his testimony are tested."; see also DELAWARE v. VAN ARSDALL, 475 U.S. 673, 678-79 (1986) (cross-examination allows defendant to probe motivation of witnesses). Cross-examination allows the finder of fact to hear the defense theory of the witness's credibility and to "make an informed judgement as to the weight to place on" testimony that is crucial to the prosecutor's case. DAVIS, 415 U.S. at 317. In this instance, the 'finder of fact' did not hear the defense theory in order to make an 'informed judgement' in O'Neill's case because the out-of-court testimony was introduced in a manner that did not allow the defense the opportunity to cross-examine the witness which is a structural defect. As a result of the structural defect, the District Court relied solely on the government's evidence in its ruling. This structural defect affected O'Neill's substantial rights and increased her guideline range. Structural defects are per se prejudicial and mandates reversal, ARIZONA v. FULMINANTE, 499 U.S. 279 (1991).

Although trial counsel did not specifically state the claim of a Confrontation Clause violation, the obstruction of justice guideline enhancement was premised on out-of-court statements and O'Neill's objection placed the court on Notice that the defense intended to contest the merits of the enhancement. The purpose of objection is to facilitate a de novo determination by the District Court of the issues". THOMAS v. ARN, 474, U.S. 140, 149-52 (1985), ACUNA v. BROWN & ROOT. Inc. 200 F. 3D 335, 340 (5th cir 2000), and to facilitate specific review of error(s) on appeal. DOUGLASS v. UNITED AUTO SERV. ASS'N, 79 F 3D 1415, 1428-29 (5th cir 1996)(en banc)(objection required to avoid plain error review on appeal).

While O'Neill's right to challenge the Sixth Amendment Confrontation Clause violation was preserved by objection, appellate counsel Kimberly Keller failed to properly assert the claim in the brief that she filed. APPENDIX B. Appellate counsel Keller challenged the obstruction of justice enhancement but failed to present the Confrontation Clause violation that premised the enhancement as a result of the government introducing violative out-of-court testimony. Despite the deficiencies in appellate counsel Keller's brief, the challenge was preserved by objection and was meritorious. Furthermore, it is O'Neill's position that obstruction of justice is/was an element of the offense which should have been presented to the jury. As the government states on the record. During the testimony of the trial there was significant testimony

about vehicles that Mr. Powell and Ms O'Neill were driving during the course of this conspiracy" APPENDIX C. pg 3 at 21-23..the agents followed up with that car dealer because we believe that other assets are still out there are being concealed" APPENDIX C pg. 4 at 2-4. The government conceded to the fact that they believed that assets were out there and being concealed which is an element of the offence. The government also conceded to being [aware] of the information alleged during the trial and therefore should have followed up on the information during the trial proceedings so as to present the information to the jury if it intended on pursuing the enhancement in connection to the offense.

The Circuit court was aware of the preserved challenge and had access to the complete record, therefore should have exercised its discretion to review the violation under the Harmless error standard. In UNITED STATES v. BELL, 367 F. 3d 452 465 (5th cir. 2004) the court held, "This court review[s] the alleged violation of the Confrontation Clause de novo, subject to harmless error analysis" id. A properly raised Confrontation Clause objection preserves the claim of error" UNITED STATES v. POLIDORE, 690 F. 3d 705 (5th cir. 2012). "Police officers cannot, through their trial testimony, refer to the substance of statements given to them by nontestifying witnesses in the course of their investigation, when the statements inculcate the defendant. "When the statement from an out-of-court witness is offered for its truth, Constitutional error can arise." TAYLOR v. CAIN, 545 F. 3d 327, 335 (5th Cir. 2008).

Its very clear from the record that the information presented to the court by the government was derived from statements given to officers in the course of their investigation which inculpated O'Neill for obstruction of justice in connection with the charges she was found guilty of. It is also clear that the out-of-court statements were testimonial in nature and offered for its truth which violates the United States Constitution, the United States Supreme Court precedents as well as the Fifth Circuits own precedents In accordance with Fed. Rule of Crim. P. 52(a) the Fifth Circuit Court of Appeals should have reviewed the violation for harmless error as it was preserved by objection and cognizable on appellate review. The Circuit Court erred in its judgement.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this honorable Court Grants a writ of certiorari and review the judgment of the court of appeals.

Is/ 
LaShonda O'Neill-pro se petitioner

DATED: May 12, 2024