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Uncorrected Injustice: Plain Error Review of Misapplied Sentencing Law

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NOTE

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State v. Perry, 548 S.W.3d 292 (Mo. 2018) (en banc)

*Alec D. Guy**

I. INTRODUCTION

Criminal convictions often result in a restriction on the defendant's freedom and a deprivation of the defendant's liberty. Given the gravity of these consequences, there are multiple procedures the court must follow not only in determining guilt but also in imposing a sentence. Sentencing ranges are an essential component of criminal law. In Missouri, sentencing ranges are found in statutes,[1] and these statutes help trial judges determine what sentence to impose. Unfortunately, these guidelines can be incorrectly applied. If these errors are not addressed at the trial level, the appellate process can provide relief. However, interesting questions arise when the error is not preserved and courts are required to apply plain error review instead of the abuse of discretion standard.

In *State v. Perry*,[2] the Supreme Court of Missouri conducted plain error review of the application of an incorrect sentencing range. The court held that, in order to prevail under plain error review, the defendant must prove the sentence was based on a mistaken belief about the sentencing range.[3] The court affirmed Perry's sentence,[4] even though the sentencing judge, the prosecutor, and Perry's own counsel agreed upon the incorrect sentencing range.[5] This Note analyzes the Supreme Court of Missouri's reasoning in *Perry* and considers the limited ability of defendants to obtain relief, both on direct appeal and in seeking postconviction relief, when the incorrect sentencing range is used but the error is not preserved for appellate review. This Note argues the Supreme Court of Missouri should have created a rebuttable presumption of prejudice when an incorrect sentencing range is applied. Finally, this Note posits

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1. *See* MO. REV. STAT. § 558.011 (2018); *id.* § 558.016.
2. 548 S.W.3d 292, 300–01 (Mo. 2018) (en banc).
3. *Id.* at 301.
4. *Id.*
5. *Id.* at 297.

that judicial integrity, as well as public confidence in the judiciary, is undermined due to the result and implications of *Perry*.

II. FACTS AND HOLDING

Joseph Perry was charged with possession of a controlled substance with the intent to distribute.[6] This charge was based on Perry's conversation with, and attempted escape from, a police officer.[7] The officer noticed Perry backing out of his driveway and started following him.[8] The police officer believed Perry's license was suspended, but she was unable to verify this information as she followed him.[9] Perry then reached his fiancé's house and pulled into the driveway.[10] The officer stopped, approached Perry, and asked to speak with him.[11] Perry obliged, and the officer asked to see his license.[12] After obtaining Perry's license, the officer attempted to verify it was valid but could not do so because her radio was not functioning properly.[13] During this time period, Perry began acting suspiciously.[14] He reached into his pocket and took out what appeared to be a plastic bag.[15] The officer asked Perry to come over to her.[16] Instead, Perry took a bike out of the back of his truck and walked to the front of the vehicle, all while keeping the bag clenched in his fist.[17] The officer followed Perry to the front of the vehicle, where he quickly threw down the bike and began running.[18] Perry briefly hesitated when he came to a fence but then climbed over.[19] Eventually, he surrendered, and a plastic bag of methamphetamine was found in the fence Perry scaled.[20]

The prosecutor charged Perry with one count of possession of a controlled substance with intent to distribute.[21] Perry filed a motion to suppress the methamphetamine, arguing it was unlawfully seized because the police officer requested his driver's license without a reasonable suspicion Perry was engaged in criminal activity, but his motion was denied.[22] A jury found Perry guilty of

6. *Id.* at 296–97.
7. *Id.* at 295.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 295–96.
12. *Id.* at 296.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 296–97.
22. *Id.* at 297.

the lesser included offense of possession of a controlled substance.[23] During sentencing, the prosecutor stated the sentencing range was five to fifteen years' imprisonment in the Department of Corrections and recommended an eight-year sentence.[24] The prosecutor noted Perry was not convicted of the charged crime but instead possession of a controlled substance,[25] which is a class C felony carrying a sentencing range of one year in the county jail to seven years in the Department of Corrections.[26] However, Perry was subject to enhanced penalties because he was deemed a persistent offender.[27] The prosecutor argued the applicable range was still five to fifteen years, due to the enhanced penalties.[28] Perry's counsel did not object at the sentencing hearing[29] but instead agreed five to fifteen years was accurate.[30] Yet, the correct range of punishment was one year in the county jail to fifteen years in the Department of Corrections because "[a]t the time of sentencing, only the *maximum* sentence increased for a persistent offender, while the minimum sentence was unaffected."[31] Perry was then sentenced to eight years' imprisonment.[32]

Perry first appealed to the Missouri Court of Appeals for the Western District, but the case was transferred to the Supreme Court of Missouri after the Western District issued an opinion.[33] There, Perry raised two arguments.[34] He argued the trial court erred in sentencing him to eight years' imprisonment because the court operated "under a materially false belief" regarding the sentencing range.[35] Further, he contended the trial court erred in overruling his motion to suppress the methamphetamine because he was unlawfully seized during his interaction with the police officer.[36] The majority held the trial court did not err in sentencing Perry to eight years' imprisonment[37] or denying Perry's motion to suppress.[38] Consequently, the judgment of the trial court was

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 300.

27. *Id.* A persistent offender is someone "who has been found guilty of two or more felonies committed at different times." MO. REV. STAT. § 558.016.7 (2018).

28. *Perry*, 548 S.W.3d at 297.

29. *Id.* at 300.

30. *Id.* at 297.

31. *Id.* at 300 (alteration in original).

32. *Id.* at 297.

33. State v. Perry, No. WD 78653, 2016 WL 6081854 (Mo. Ct. App. Oct. 18, 2016), *aff'd*, 548 S.W.3d 292 (Mo. 2018) (en banc).

34. *Perry*, 548 S.W.3d at 295.

35. *Id.* at 300.

36. *Id.* at 297.

37. *Id.* at 301.

38. *Id.* at 300. Perry argued he had been unlawfully seized because the police officer requested his license without a reasonable suspicion that he had participated in criminal activity. *Id.* at 297. Based on the surrounding circumstances, the court held Perry was never seized and, as a result, his Fourth Amendment rights were not violated. *Id.* at 300. Additionally, Judge Breckenridge, in her partial concurrence and partial

affirmed.[39] The dissent agreed the trial court did not err in dismissing Perry's motion to suppress but argued Perry established plain error regarding his sentencing claim.[40]

III. LEGAL BACKGROUND

Sentencing law has become complex, and mistakes in applying sentencing law are common. First, this Part briefly introduces Missouri sentencing law and explains the error committed in *Perry*. Next, this Part details multiple Missouri cases that have addressed misapplications of sentencing law. Finally, this Part examines how the federal appellate courts have applied plain error review to incorrect application of the Federal Sentencing Guidelines ("Guidelines").

A. Missouri Sentencing Law

In Missouri, the sentencing scheme is codified in the Revised Statutes of Missouri.[41] These statutes provide the sentencing ranges for both misdemeanors and felonies,[42] and the Supreme Court of Missouri has determined judges must impose a sentence within the specified range.[43] Chapter 558 provides further guidance concerning other aspects of sentencing.[44] For example, this chapter details the general rules for imposing multiple sentences and explains how the sentencing ranges are altered when the defendant is a prior or persistent offender.[45] Additionally, Missouri has established an eleven-member Sentencing Advisory Commission (the "Commission") that is responsible for various duties.[46] For example, the Commission studies the sentencing practices of Missouri trial courts, determines if there are sentencing disparities based on social and economic statuses, and investigates alternative sentences as well as alternative programs.[47] The Commission occasionally publishes a user guide.[48] Previously, the guide included a system of recommended sentences, but in

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dissent, agreed with the majority's ruling that the trial court did not err in dismissing Perry's motion to suppress. *Id.* at 301 (Breckenridge, J., concurring in part and dissenting in part). This point will not be discussed further in this Note.

39. *Id.* at 301 (majority opinion).

40. *Id.* at 302 (Breckenridge, J., concurring in part and dissenting in part).

41. *See* MO. REV. STAT. ch. 558 (2018).

42. *Id.* § 558.011.

43. State v. Hart, 404 S.W.3d 232, 234 n.2 (Mo. 2013) (en banc).

44. *See* MO. REV. STAT. § 558.026; *id.* § 558.016.

45. *Id.* § 558.026; *id.* § 558.016.

46. *Id.* § 558.019.6(1).

47. *Id.* § 558.019.6(2).

48. *See* MO. SENTENCING ADVISORY COMM'N, USER GUIDE 2015–2016 1 (2016), https://www.mosac.mo.gov/file.jsp?id=102733.

2012, section 558.019 was amended to remove this requirement of the Commission.[49]

Missouri sentencing law imposes an increased range of punishment for defendants found to be persistent offenders – that is, individuals "who [have] been found guilty of two or more felonies committed at different times."[50] At the time of Perry's sentencing, the statute only increased the maximum term of imprisonment to the next felony level.[51] Unfortunately, trial courts, much like the trial court in *Perry*, were increasing both the minimum and maximum sentence, which led to the application of an erroneous sentencing range.[52] The applicable statute has since been amended. Missouri's sentencing scheme now provides that persistent offenders who are sentenced to a class B, C, D, or E felony must be sentenced at the "authorized term of imprisonment for the offense that is one class higher than the offense for which the person is found guilty."[53] Consequently, both the maximum and minimum punishment will increase for persistent offenders.

B. Missouri Case Law

One of the leading Missouri cases addressing an incorrect application of sentencing law is *Wraggs v. State*.[54] There, the defendant was sentenced to thirteen years' imprisonment for a conviction of assault with intent to maim with malice.[55] Wraggs was convicted under the Habitual Criminal Act, and the judge explicitly referenced Wraggs' prior convictions at sentencing.[56] Wraggs had previously been convicted of two robberies.[57] Those convictions were later vacated, and Wraggs pleaded guilty to one count of robbery instead of two.[58] Based on this change, Wraggs filed a motion to set aside the sentence in the assault case, arguing the thirteen-year sentence was founded on an illegal and

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49. *Id. Compare id.* § 558.019.6 (2012), *with id.* § 558.019.6 (2011).
50. *Id.* § 558.016.3.
51. *Id.* § 558.016.7 (2013). The statute stated that

> [t]he total authorized maximum terms of imprisonment for a persistent offender or a dangerous offender are: (1) For a class A felony, any sentence authorized for a class A felony; (2) For a class B felony, any sentence authorized for a class A felony; (3) For a class C felony, any sentence authorized for a class B felony; (4) For a class D felony, any sentence authorized for a class C felony.

Id.

52. *See* State v. Perry, 548 S.W.3d 292, 300 (Mo. 2018) (en banc).
53. MO. REV. STAT. § 558.016.7 (2018).
54. 549 S.W.2d 881 (Mo. 1977) (en banc).
55. *Id.* at 882.
56. *Id.* at 882–83.
57. *Id.* at 883.
58. *Id.*

invalidated conviction.[59] The trial court denied the motion because the conviction was based on a prior burglary conviction, not the robbery convictions.[60]

The Supreme Court of Missouri determined the sentence had to be set aside because it depended on "assumptions concerning [Wraggs'] criminal record which were materially untrue."[61] The court explained the trial judge believed Wraggs had been convicted of five felonies when he had only been legally convicted of three felonies.[62] The rationale was that the sentence "might have been different if the sentencing judge had known that at least two of (appellant's) previous convictions had been (illegally) obtained."[63] The court determined that on the record before it, "the conclusion [wa]s inescapable that the sentencing judge . . . took into consideration 'the totality' of appellant's prior convictions, including the two 10-year robbery sentences later invalidated."[64] Ultimately, the thirteen-year sentence was vacated, and the case was remanded for resentencing.[65]

Since *Wraggs*, the Missouri appellate courts have decided various cases where the trial court has misstated or misapplied sentencing law, and the courts often reach different results – sometimes plain error is found and sometimes it is not. When a mistake is not preserved, the appellate court can only review for plain error.[66] Relief will be granted under this standard only if "the alleged error so substantially affects the rights of the accused that a manifest injustice or miscarriage of justice inexorably results if left uncorrected."[67] Further, "[m]anifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice."[68]

In *State v. Elam*, the defendant was convicted of first-degree statutory rape and first-degree statutory sodomy.[69] Elam was sentenced to fifteen and ten years, respectively, and the sentences were to run consecutively.[70] On appeal, Elam argued the court committed plain error in imposing consecutive sentences because the State contended consecutive sentences were mandatory when, in fact, they were not.[71] The Missouri Court of Appeals for the Southern District explained that if "the trial court imposed consecutive sentences instead of concurrent sentences based on a misunderstanding of the law, such conduct

59. *Id.*
60. *Id.*
61. *Id.* (quoting Townsend v. Burke, 334 U.S. 736, 741 (1948)).
62. *Id.*
63. *Id.* (quoting United States v. Tucker, 404 U.S. 443, 448 (1972)).
64. *Id.* at 884.
65. *Id.* at 886.
66. State v. Severe, 307 S.W.3d 640, 642 (Mo. 2010) (en banc).
67. State v. Hadley, 815 S.W.2d 422, 423 (Mo. 1991) (en banc) (citing State v. Sidebottom, 753 S.W.2d 915, 920 (Mo. 1988) (en banc)).
68. State v. Baxter, 204 S.W.3d 650, 652 (Mo. 2006) (en banc) (citing State v. Mayes, 63 S.W.3d 615, 624 (Mo. 2001) (en banc)).
69. 493 S.W.3d 38, 40 (Mo. Ct. App. 2016).
70. *Id.* at 40.
71. *Id.* at 42.

is plain error and the defendant is entitled to re-sentencing," but if the sentence was imposed based on other valid considerations, resentencing is not required.[72] Here, the trial court considered that Elam's crimes were serious and ongoing and that he had a fairly clean criminal record when the sentence was imposed.[73] Because the court believed the sentences were based on these considerations and not a mistake regarding the law, the court held Elam did not establish plain error.[74]

The same result was reached in *State v. Scott*.[75] There, the defendant argued the trial court plainly erred in imposing consecutive sentences because the judge incorrectly believed consecutive sentences were required.[76] The court stated no error would be found if the consecutive sentences were imposed based on valid considerations, like severity of the crimes.[77] The court determined the trial court ordered the sentences to run consecutively because of proper considerations.[78] Specifically, after the prosecutor stated the consecutive sentences appeared to be required, the judge asked for the defense's position, and the defense argued the court had discretion in sentencing.[79] Then, the judge "commended the courage shown by the victims and commented that he believed the jury appropriately recommended life sentences."[80] All of this showed the judge exercised independent discretion when he imposed the consecutive sentences; the judge did not simply rely on the prosecutor's misinterpretation of the statute.[81]

In other instances, appellate courts have found plain error when the trial judge has misstated or misapplied sentencing law. In *State v. Olney*, Olney was convicted of first-degree assault and armed criminal action.[82] The trial court sentenced him as a persistent offender and imposed consecutive ten-year sentences.[83] Olney argued the trial court committed plain error in imposing consecutive sentences because the judge believed consecutive sentences were

72. *Id.* at 43.

73. *Id.* at 44.

74. *Id.* Further, the Missouri Court of Appeals Western District has found plain error where the minimum sentence was improperly calculated and the defendant was given the minimum sentence. State v. Troya, 407 S.W.3d 695, 700–01 (Mo. Ct. App. 2013) (finding defendant's "sentence was passed on a mistaken belief that he was subject to a minimum term of ten years' imprisonment" and remanding under plain error review).

75. 348 S.W.3d 788 (Mo. Ct. App. 2011), *abrogated on other grounds by* State v. Sisco, 458 S.W.3d 304 (Mo. 2018) (en banc).

76. *Id.* at 799.

77. *Id.* at 800.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. 954 S.W.2d 698, 699 (Mo. Ct. App. 1997), *abrogated by* State v. Pierce, 548 S.W.3d 900 (Mo. 2018) (en banc).

83. *Id.*

mandatory.[84] Yet, the armed criminal action statute did not require consecutive sentences.[85] The State argued prejudice was not shown because the trial court would have imposed the same sentence even in the absence of a mistaken belief.[86] The State reinforced that during sentencing, the judge noted the "horrendous" nature of Olney's past crimes and advised Olney's counsel not to seek the minimum sentence because that "was not a reasonable argument here."[87] The Missouri Court of Appeals for the Western District acknowledged the State made a strong argument but determined remand for resentencing was appropriate because sentencing is the trial court's responsibility and the Western District did not want to interfere with the lower court's authority.[88]

A similar result was reached in *State v. Cowan*.[89] In that case, the defendant was found guilty of burglary and stealing.[90] Similar to Perry, Cowan was found to be a prior and persistent offender, which impacted his possible punishment.[91] Due to this designation, the trial court determined Cowan would be subject to the Class A sentencing range of ten to thirty years.[92] The minimum sentence, however, remained at the Class B level, regardless of the enhancement, and should have been five years.[93] The court remanded the case for resentencing, noting the trial court never addressed the mistake or showed Cowan's sentence was based on the correct range.[94]

As the cases discussed above illustrate, the Missouri appellate courts have taken different approaches in conducting plain error review of misapplied sentencing law. An analysis of these Missouri cases shows the appellate court's plain error review can result in one of three outcomes: (1) refusal to remand under plain error review because the sentencing judge listed other valid considerations that served as a basis for the sentence, (2) remand under plain error review because the sentence was based on a mistaken belief, or (3) remand

84. *Id.* at 699–700.

85. *Id.* at 700.

86. *Id.*

87. *Id.*

88. *Id.* at 701. Missouri appellate courts have remanded for plain error in similar situations. *See, e.g.*, State v. Summers, 456 S.W.3d 441, 446–47 (Mo. Ct. App. 2014) (finding plain error where the trial court thought an armed criminal action sentence must run consecutive and remanding for resentencing on the same basis as *Olney*), *abrogated by* State v. Pierce, 548 S.W.3d 900 (Mo. 2018) (en banc); State v. Powell, 380 S.W.3d 632, 635 (Mo. Ct. App. 2012) (finding plain error where the record implied the trial court believed consecutive sentences were mandatory), *abrogated by Pierce*, 548 S.W.3d 900.

89. 247 S.W.3d 617, 619 (Mo. Ct. App. 2008), *abrogated by Pierce*, 548 S.W.3d 900.

90. *Id.* at 618.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 619.

under plain error review even if there were other valid reasons given by the trial court.

State v. Pierce,[95] the companion case to *State v. Perry*, involved a conviction for one count of possession of child pornography and a sentence of fifteen years' imprisonment. Pierce claimed his sentence was based on a "materially false understanding of the possible range of punishment," as the court stated the incorrect range of ten to thirty years at sentencing.[96] Possession of child pornography is a class B felony with a range of punishment of five to fifteen years.[97] Pierce was found to be a persistent offender, which increased the maximum punishment to that of a class A felony or thirty years.[98] However, at the time Pierce was convicted, the minimum punishment did not increase to the class A minimum of ten years but instead remained at five years.[99] As a result, the permissible range of punishment for Pierce was five to thirty years instead of ten to thirty years.[100]

Pierce failed to object to this error during sentencing, and consequently, he asked for plain error review.[101] The Supreme Court of Missouri explained that "[a] sentence passed on the basis of a materially false foundation lacks due process of law and entitles the defendant to a reconsideration of the question of punishment in the light of the true facts, regardless of the eventual outcome."[102] However, the court in *Pierce* determined the trial court's mistaken belief regarding the applicable sentencing range did not alone entitle a defendant to relief under plain error review.[103] To prevail, the defendant must show the trial court sentenced him *based* on the mistaken belief.[104] In support of this holding, the court noted the invalidated convictions in *Wraggs* "played a significant part" in the sentencing judge's decision.[105] Further, the majority explained Missouri courts of appeal do not remand cases for resentencing if the sentences imposed by the trial court were unaffected by the mistaken sentencing range and were based on other valid considerations.[106]

Unlike *Wraggs*, where the court found the defendant showed his sentence "might have been different" if not for the judge's mistaken belief regarding his prior convictions,[107] the court ultimately determined Pierce did not show the sentence was founded on the trial court's mistake regarding the permissible

95. 548 S.W.3d 900, 902 (Mo. 2018) (en banc).
96. *Id.* at 903.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 903–04.
101. *Id.* at 904.
102. *Id.*
103. *Id.*
104. *Id.* at 905.
105. *Id.* (quoting Wraggs v. State, 549 S.W.2d 881, 886 (Mo. 1977) (en banc)).
106. *Id.*
107. *Wraggs*, 549 S.W.2d at 883 (quoting United States v. Tucker, 404 U.S. 443, 448 (1972)).

sentencing range.[108] In fact, the trial court mentioned several factors before pronouncing the sentence and acknowledged these factors were the foundation for the sentence.[109] As a result, Pierce was unable to show the manifest injustice required to establish plain error.[110]

In her partial concurrence and partial dissent, Judge Patricia Breckenridge argued the majority in *Pierce* ignored the manifest injustice that results when a judge sentences a defendant while misunderstanding the range of punishment.[111] In addition, Missouri courts have consistently found plain error when the judge misstates the sentencing range on the record or where the judge incorrectly believed the law required consecutive sentences – even if the court is reviewing for plain error.[112] Judge Breckenridge contended the cases the majority cited were distinguishable from *Pierce* because those cases involved the prosecutor misstating the law and the record did not show the trial court relied on those errors.[113] Judge Breckenridge further argued *Wraggs* created a different standard than the one articulated by the majority.[114] In *Wraggs*, the court determined "[t]he pertinent question is whether the sentence was predicated on misinformation; whether the sentence might have been different if the sentencing judge had known that at least two of appellant's previous convictions had been illegally obtained."[115] As a result, Judge Breckenridge argued, the test should be "whether the sentence might have been different had the [trial] court's sentence not been predicated on the mistaken sentencing range."[116]

In addition, the sentencing court must abide by the statutorily approved range of punishment.[117] Judge Breckenridge noted that, because of this, the sentencing range inherently affects the sentence and a different sentence might have resulted if the trial court knew of the correct sentencing range.[118] Finally, Judge Breckenridge argued the standard the majority created is nearly impossible for defendants to meet, as relief will only be afforded if the sentencing judge states the incorrect sentencing range is the basis for the sentence.[119] For these reasons, Judge Breckenridge would have vacated the sentence and remanded the case for resentencing.[120]

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108. *Pierce*, 548 S.W.3d at 906.
109. *Id.*
110. *Id.*
111. *Id.* at 907 (Breckenridge, J., concurring in part and dissenting in part).
112. *Id.*
113. *Id.* at 907–08.
114. *Id.* at 908.
115. *Id.* (quoting Wraggs v. State, 549 S.W.2d 881, 884 (Mo. 1977) (en banc)).
116. *Id.* at 908–09.
117. *Id.* at 909.
118. *Id.*
119. *Id.*
120. *Id.*

C. Federal Case Law

The federal circuit courts have taken different approaches in cases where the Guidelines have been incorrectly applied. The United States Sentencing Commission (the "U.S. Commission") first submitted guidelines to Congress on April 13, 1987, and the Guidelines took effect later that year.[121] The U.S. Commission can submit amendments to Congress every year, and these changes take effect after 180 days, unless Congress enacts a contrary law.[122] The U.S. Commission must "prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories."[123] Sentencing courts are required to select a sentence within the appropriate range, but a court can depart from the recommended range if the case presents atypical features.[124] The court must specify the reasons for a departure from the Guidelines.[125] When reviewing a sentence within the recommended range, an appellate court determines whether the Guidelines were applied correctly.[126] If the lower court did not issue a sentence within the specified range, the appellate court decides whether a departure from the appropriate range was reasonable.[127] However, a different standard of review is used when the alleged error is not preserved at the trial level.

The U.S. Court of Appeals for the Fifth Circuit will find plain error when the error is "clear or obvious" and has impacted "substantial rights."[128] To show substantial rights were affected in the sentencing context, defendants must show there is a reasonable probability they would have received a lower sentence if the correct range had been used.[129] Even if this is shown, the appellate court still has discretion in providing relief, which will be exercised "only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"[130]

In *United States v. Davis*,[131] the defendant was five months into a supervised release term when he violated the terms of his release. The district court used a sentencing range of fifteen to twenty-one months, but the correct range was six to twelve months.[132] At sentencing, the district court mentioned,

121. U.S. SENTENCING COMM'N, GUIDELINES MANUAL 2018 2 (2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. United States v. Davis, 602 F.3d 643, 647 (5th Cir. 2010).

129. *Id.*

130. *Id.* (alteration in original) (quoting Puckett v. United States, 556 U.S. 129, 135 (2009)).

131. *Id.* at 645.

132. *Id.* at 645–46.

among other circumstances, that Davis had only completed five months of the five year supervised release term, that Davis had a firearm, and that some of his possessions showed he intended to resume the conduct that led to his original conviction.[133] The Fifth Circuit noted the district judge imposed a sentence higher than even the incorrect maximum (twenty-four months) and determined the district court had "ample independent bases for imposing the sentence that it did . . . ."[134] As a result, Davis did not meet the reasonable probability standard.[135] Further, given the circumstances of the supervised release violation, the court held the imposition of the twenty-four-month sentence did not have a serious effect on the "fairness, integrity or public reputation of judicial proceedings."[136]

Before 2016, the Fifth Circuit imposed an additional burden on the defendant in certain circumstances. If the correct and incorrect sentencing ranges overlapped and the defendant's sentence fell within the common ground of the ranges, the defendant had to provide additional evidence to show substantial rights had been affected.[137] When a sentence fell within both the correct and incorrect sentencing range, the Fifth Circuit showed "'considerable reluctance in finding a reasonable probability that the district court would have settled on a lower sentence.'"[138] Further, in the Fifth Circuit, casual statements by the sentencing judge were deemed insufficient to show a reasonable probability of a different result.[139] The court determined the additional evidence rule was sensible, as the imposed sentence was within the correct range.[140] However, in *Molina-Martinez v. United States*,[141] the United States Supreme Court rejected the additional evidence rule. The Court explained the Guidelines are "the sentencing court's 'starting point and . . . initial benchmark.'"[142] Given their central role in the sentencing process, Guidelines errors can be serious, and the district court commits a serious procedural error when the Guidelines are miscalculated.[143]

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133. *Id.* at 648.

134. *Id.* at 649.

135. *Id.* at 650.

136. *Id.* at 651 (quoting Puckett v. United States, 556 U.S. 129, 135 (2009)).

137. United States v. Mudekunye, 646 F.3d 281, 290 (5th Cir. 2011). A defendant could meet the reasonable probability standard, without additional evidence, if "(1) the district court mistakenly calculates the wrong Guideline range, (2) the incorrect range is significantly higher than the true Guideline range, and (3) the defendant is sentenced within the incorrect range." *Id.* at 289.

138. United States v. Blocker, 612 F.3d 413, 416 (5th Cir. 2010) (quoting United States v. Campo-Ramirez, 379 Fed. App'x 405, 409 (5th Cir. 2010), *abrogated by* United States v. Sustaita-Mata, 728 Fed. App'x 402 (5th Cir. 2018)).

139. *Id.* at 416–17.

140. *Mudekunye*, 646 F.3d at 290.

141. *See* 136 S. Ct. 1338, 1345 (2016).

142. *Id.* (alteration in original) (quoting Gall v. United States, 552 U.S. 38, 49 (2007)).

143. *Id.* at 1345–46 (quoting *Gall*, 552 U.S. at 51).

Referencing various statistics that illustrated how courts use the Guidelines, the Court, in *Molina-Martinez*, explained, "[T]he Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar."[144] Thus, if the defendant shows the court used an incorrect, higher sentencing range, reasonable probability of a different outcome has likely been shown.[145] However, in some circumstances, even in the presence of an incorrect, higher sentencing range, a reasonable probability of prejudice might not be apparent.[146] For example, the record might include an explanation that shows the judge imposed the sentence due to other independent factors.[147] Absent such circumstances, prejudice is shown if the defendant can establish an incorrect, higher sentencing range was applied.[148] The Court further noted defendants will often not be able to show additional evidence because judges rarely articulate how the Guidelines have impacted the sentence.[149] Therefore, the cases where the Guideline range had an impact are the least likely to have additional evidence.[150] Ultimately, because the Guideline range will affect a sentence in most cases, the Court held defendants are allowed to rely on this fact when trying to show a reasonable probability that a different sentence would have been imposed under the correct Guidelines, which "is needed to establish an effect on substantial rights for purposes of obtaining relief under [plain error]."[151]

Other circuits, however, have been more lenient in their plain error review. The U.S. Court of Appeals for the Tenth Circuit explains plain error requires "a defendant [to] show that (1) the district court erred; (2) the error was plain; (3) the error affects the defendant's substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings."[152] If there is an "obvious misapplication of the sentencing guidelines," the third and fourth elements of plain error are normally satisfied.[153] The court noted that "the Guidelines are intended to, and do, affect sentencing."[154] In fact, the court explained the entire purpose of the Guidelines is to

144. *Id.* at 1346.

145. *Id.*

146. *Id.*

147. *Id.* at 1347.

148. *Id.*

149. *Id.* In fact, the United States Supreme Court has specifically "told judges that they need not provide extensive explanations for within-Guidelines sentences because '[c]ircumstances may well make clear that the judge rests his decision upon the Commission's own reasoning.'" *Id.* (alteration in original) (quoting Rita v. United States, 551 U.S. 338, 356–57 (2007)). Additionally, appellate courts can presume a sentence is reasonable, if it falls within the correctly calculated Guideline range. *Id.*

150. *Id.*

151. *Id.* at 1349.

152. United States v. Sabillon-Umana, 772 F.3d 1328, 1333 (10th Cir. 2014).

153. *Id.*

154. *Id.* (quoting United States v. Knight, 266 F.3d 203, 207 (3d Cir. 2001)).

impact substantial rights by assisting the district court in determining how much liberty the defendant must relinquish to the government.[155]

Additionally, the Guidelines operate as a starting point, and if the starting point is incorrect, there is a reasonable probability the final result is incorrect.[156] Regarding the fourth prong of the Tenth Circuit's test, a reasonable citizen's view of judicial integrity would likely be diminished when a court does not fix an error of its own creation that could lead to a longer prison sentence.[157] This is particularly true in circumstances where the correction would not be difficult, as the "district court [only needs] to exercise its authority to impose a legally permissible sentence."[158] Due to the above considerations, the Tenth Circuit determined "[a] presumption that the third and fourth prongs are met by obvious [G]uidelines errors is . . . sensible . . . ."[159] However, this presumption can be overcome if the sentencing judge makes a "fortuitous comment" that shows the Guidelines error did not negatively impact the final sentence.[160]

The U.S. Court of Appeals for the Third Circuit has created a presumption of prejudice in these cases as well.[161] The United States Supreme Court has explained that in some cases, where specific prejudice cannot be shown, a presumption of prejudicial error is warranted.[162] The Third Circuit articulated two reasons for creating a presumption in this scenario.[163] First, "the Guidelines are intended to, and do, affect sentencing."[164] Second, determining the effect of an incorrect Guideline range without a "fortuitous comment" from the sentencing judge will be difficult.[165] The practical impact of this presumption is that "a sentence based upon a plainly erroneous Guideline range will ordinarily be remanded so that the [d]istrict [c]ourt may exercise its discretion to choose an appropriate sentence based upon the correct range, unless the record shows that the sentence was unaffected by the error."[166]

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155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 1334.
159. *Id.*
160. *Id.*
161. United States v. Knight, 266 F.3d 203, 207 (3d Cir. 2001).
162. *Id.* (quoting United States v. Adams, 252 F.3d 276, 285 (3d Cir. 2001)).
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 208. Other courts have reached similar results and remanded for resentencing when the district court erred in calculating the Guideline range. *See* United States v. Vargem, 747 F.3d 724, 729 (9th Cir. 2014) ("We have held that when a sentencing judge incorrectly calculates the Guideline[] range, potentially resulting in the imposition of a greater sentence, the error affects the defendant's substantial rights and 'the fairness of the judicial proceedings.'"); United States v. Wallace, 32 F.3d 1171 (7th Cir. 1994) (holding that remand is appropriate where an incorrect Guideline range

IV. INSTANT DECISION

On appeal to the Supreme Court of Missouri, Perry contended he was sentenced "under a materially false belief" regarding the permissible sentencing range.[167] Under *Wraggs*, "[a] sentence passed on the basis of a materially false foundation lacks due process of law and entitles the defendant to a reconsideration of the question of punishment in the light of the true facts, regardless of the eventual outcome."[168] The court explained that, under plain error review, Perry must show the trial court's sentence was *based* on the mistaken belief regarding the sentencing range.[169] Thus, the trial court holding a mistaken belief about the sentencing range is not enough.[170] Here, the majority found Perry did not show the sentence was based on the judge's mistaken belief.[171] The Supreme Court of Missouri emphasized that the trial court did not sentence Perry to the minimum sentence but instead followed the prosecutor's recommendation of eight years.[172] In making the recommendation, the prosecutor discussed Perry was not a candidate for probation and emphasized his prior felony convictions.[173] Perry was unable to meet his burden, and as a result, the majority affirmed the trial court's judgement.[174]

In her partial concurrence and partial dissent, Judge Breckenridge disagreed with the holding that the trial court did not err in sentencing Perry.[175] Judge Breckenridge explained Missouri courts have consistently found plain error when the trial court misstated the sentencing range on the record.[176] Here, the trial court misstated the range, incorrectly asserting it was five to fifteen years in the Department of Corrections. The correct range was between one year in the county jail and up to fifteen years in the Department of Corrections.[177]

Judge Breckenridge argued the fact Perry was not sentenced to the minimum punishment is immaterial.[178] The true question is "whether the sentence might have been different."[179] Judge Breckenridge contended that knowledge of the correct range is a prerequisite to imposing a sentence and an incorrect

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was used, "unless [there is] reason to believe that the error did not affect the district court's selection of a particular sentence").

167. State v. Perry, 548 S.W.3d 292, 300 (Mo. 2018) (en banc).

168. *Id.* at 301 (quoting Wraggs v. State, 549 S.W.2d 881, 884 (Mo. 1977) (en banc)).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 301 (Breckenridge, J., concurring in part and dissenting in part).

176. *Id.* at 302.

177. *Id.*

178. *Id.*

179. *Id.* (quoting Wraggs v. State, 549 S.W.2d 881, 884 (Mo. 1977) (en banc)).

range could impact the sentence.[180] Due process does not allow a court to impose a sentence predicated on a materially false premise, like application of an incorrect sentencing range, and entitles the defendant to "reconsideration of the question of punishment in light of the true facts, regardless of the eventual outcome."[181] Judge Breckenridge argued the majority ignored these due process considerations and created an almost impossible burden by requiring one to show the sentence was based only on a mistaken belief as to the applicable sentencing range.[182] Finally, Judge Breckenridge asserted that "[i]mposing [a] sentence upon a mistaken belief as to the range of punishment is manifestly unjust and results in plain error."[183] Therefore, according to Judge Breckenridge, Perry's sentence should have been vacated and the case should have been remanded for resentencing.[184]

V. COMMENT

The Supreme Court of Missouri's decision in *Perry* greatly hinders a defendant's chances of obtaining relief under plain error review when the trial court uses an incorrect sentencing range. The specific sentencing error in *Perry* is no longer possible because the statute was amended in 2018 to provide that persistent offenders are sentenced using the range of "the offense that is one class higher than the offense for which the person is found guilty" rather than just increasing the maximum sentence.[185] However, sentencing judges can still make a mistake regarding the applicable sentencing range. Further, there are many nuances in Missouri's sentencing scheme, and the holding of *Perry* can apply to other misapplications of sentencing law. For example, many of the Missouri appellate court cases discussed above address alleged errors regarding the imposition of consecutive sentences. First, this Part analyzes the reasoning of the Supreme Court of Missouri in *Perry* and argues the court's rationale is flawed. Second, this Part discusses the heavy burden created by *Perry* as well as the difficulty of meeting this burden. Third, this Part considers the possibility of defendants seeking postconviction relief when mistakes in sentencing are made but determines most defendants will be unsuccessful in obtaining this sort of relief. Ultimately, this Part concludes that relief of any kind is improbable, and due to this, judicial integrity, as well as public confidence in the judicial system, is undermined by the plain error standard set forth in *Perry*.

180. *Id.*
181. *Id.* (quoting *Wraggs*, 549 S.W.2d at 884).
182. *Id.*
183. *Id.*
184. *Id.*
185. MO. REV. STAT. § 558.016.7 (2018).

A. Reasoning of the Supreme Court of Missouri

The Supreme Court of Missouri determined Perry did not establish his sentence was based on the mistaken belief held by the trial court.[186] In justifying this conclusion, the court noted that the trial judge did not enter the minimum possible sentence and the trial judge was following the prosecutor's recommendation.[187] At sentencing, the prosecutor indicated the range of punishment was five to fifteen years and argued that, due to Perry's actions and criminal history, he was not eligible for probation.[188] The prosecutor then recommended an eight-year sentence.[189]

First, the court's reliance on the fact the trial judge followed the prosecutor's recommended sentence is misplaced. As stated above, the prosecutor erroneously believed the range of punishment was five to fifteen years.[190] The correct range of punishment was one year in the county jail to fifteen years in the Department of Corrections.[191] Thus, even the prosecutor was operating under a mistaken belief regarding the applicable sentencing range. The prosecutor did mention some considerations aside from the sentencing range, such as Perry's actions and criminal history, but these were referenced to reject the possibility of probation.[192] Additionally, the prosecutor explicitly referenced the range when recommending the sentence.[193] As a result, the prosecutor's recommendation could have been skewed, which would, in turn, impact Perry's sentence because the court followed this recommendation.

The Supreme Court of Missouri further determined the defendant's sentence must be based on the mistaken belief to establish manifest injustice,[194] but, given the importance of the range of punishment, a miscalculation could have an adverse impact on the sentence even if there are other reasons for the sentence. The range of punishment plays a large role in the determination of a sentence, and Missouri should follow in the footsteps of the federal courts. The United States Supreme Court has explained the "Guidelines [are the] starting point and initial benchmark . . ." of sentencing.[195] Additionally, the central purpose of the Guidelines is to impact sentencing.[196] As a result, federal courts

186. *Perry*, 548 S.W.3d at 301 (majority opinion).
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* The prosecutor stated, "I believe that Mr. Perry's actions indicate that he's not a candidate for probation. His history indicates the same." *Id.*
193. *Id.*
194. *Id.*; *see also* State v. Pierce, 548 S.W.3d 900, 906 (Mo. 2018) (en banc).
195. Gall v. United States, 552 U.S. 38, 39 (2007).
196. United States v. Knight, 266 F.3d 203, 207 (3d Cir. 2001).

have determined an error in calculating the Guideline range can negatively impact the sentence.[197] In fact, miscalculation of the Guideline range is a "significant procedural error."[198] The federal courts have reached this conclusion even though the Guidelines are not the only consideration in imposing a sentence and district judges can impose sentences outside of the applicable range.[199]

In Missouri, the statutory sentencing range arguably has an even larger impact than in the federal court system. As Judge Breckenridge's partial concurrence and partial dissent in *Pierce* noted, "a defendant must be sentenced within the statutorily approved range of punishments."[200] Unlike sentencing at the federal level, Missouri judges are bound to follow the statutory range of punishment. As a result, trial court judges carefully consult the permissible range when imposing a sentence even if there are other considerations. Those further considerations simply explain where a specific sentence falls within the range.[201] As Judge Breckenridge noted, "[t]he correct range of punishment, therefore, is an essential predicate to imposing any sentence, and sentencing a defendant when mistaken as to that applicable range inherently affects the sentencing process and might lead to a different sentence."[202] Thus, if the trial court only holds a mistaken belief regarding the sentencing range, rather than basing the sentence on the mistaken belief, the error can "so substantially affect[] the rights of the accused that a manifest injustice or miscarriage of justice inexorably results if left uncorrected,"[203] which successfully establishes a claim for plain error. Additionally, the fact Perry's sentence fell within the correct range of punishment is immaterial. Given the importance of Missouri's sentencing guidelines, the sentence could still be impacted by the erroneous range. As the Third Circuit has explained, an individual "has a right to a sentence that

197. *See* United States v. Story, 503 F.3d 436, 440 (6th Cir. 2007) ("To the extent that this starting point was incorrect (a lower-end sentence of 346 months as opposed to 324 months), it is certainly possible that the overall sentence was incorrect as well.").

198. *See Gall*, 552 U.S. at 51.

199. *Id.* at 49–50.

200. State v. Pierce, 548 S.W.3d 900, 909 (Mo. 2018) (en banc) (Breckenridge, J., concurring in part and dissenting in part) (citing State v. Hart, 404 S.W.3d 232, 234 n.2 (Mo. 2013) (en banc)).

201. *Hart*, 404 S.W.3d at 234 n.2 ("Under section 557.036.3, the responsibility for 'assessing and declaring' a defendant's punishment in Missouri rests with the jury, unless the defendant waives this procedure or the state proves beyond a reasonable doubt that the defendant is a repeat offender in one of the categories excluded by section 557.036.4(2). After the jury makes this determination (and in all cases when jury sentencing is not applicable or the jury is unable to agree), the trial court imposes a sentence (within the statutorily approved range of punishments) that is appropriate under all the circumstances. In doing so, however, the trial court may not impose a greater sentence than the punishment assessed and declared by the jury (provided it was within the authorized range) and, if the jury assesses and declares a punishment below the lawful range, the trial court must impose the minimum lawful sentence.").

202. *Pierce*, 548 S.W.3d at 909.

203. State v. Perry, 548 S.W.3d 292, 300–01 (Mo. 2018) (en banc).

not only falls within a legally permissible range, but that was imposed pursuant to correctly applied law."[204] Even though Perry's sentence is within the legally prescribed range, there is doubt as to whether the law was correctly applied. Consequently, Perry should have another sentencing hearing, which will at least ensure the law is truly understood and applied accurately.

The Supreme Court of Missouri explained Perry was not sentenced to the misstated minimum sentence but instead to a longer eight-year sentence.[205] Yet, considering the importance of the sentencing range and the lack of evidence as to why the court imposed this sentence, this should not be determinative. The Supreme Court of Missouri does not list any reasons provided by the trial court that show the same sentence would have been imposed if the correct range was used.[206] The trial court or the prosecutor could have arrived at their sentences by seeking the middle of the range, which would render the final result erroneous because an incorrect range used. The fact that the trial court did not impose the minimum sentence does not necessarily show the sentence was not based on the incorrect range. Sentencing, at least to some degree, must be a function of the permissible range because judges are required impose a sentence within the statutory guidelines.[207] Without additional explanation, it is difficult to determine with any certainty that the sentence would not have been altered if the correct range was used.

B. Difficulty of Burden

The test the Supreme Court of Missouri established creates a burden nearly impossible for defendants to meet, and consequently, many defendants will be denied the relief they deserve. To avoid this injustice, the Supreme Court of Missouri should instead adopt the rebuttable presumption test used in the federal appellate courts. The United States Supreme Court has posited sentencing judges rarely explain how the Guidelines impact their decisions.[208] Further, the Third Circuit has determined it is difficult to ascertain the impact of an erroneous Guideline range in the absence of a "fortuitous comment" from the sentencing judge.[209] Thus, the Third Circuit adopted a rebuttable presumption of prejudice, unless the record contains evidence demonstrating the error did not impact the sentence.[210] The United States Supreme Court has determined that, in most cases, if the defendant can show the trial court used an incorrect, higher Guideline range, the defendant has established a reasonable

204. United States v. Knight, 266 F.3d 203, 210 (3d Cir. 2001).

205. *Perry*, 548 S.W.3d at 301.

206. *See id.*

207. State v. Hart, 404 S.W.3d 232, 234 n.2 (Mo. 2013) (en banc).

208. Molina-Martinez v. United States, 136 S. Ct. 1338, 1347 (2016). This fact played an important role in the Court's decision to invalidate the Fifth Circuit's "additional evidence" test, as that test failed to account for "the dynamics of federal sentencing." *Id.*

209. *Knight*, 266 F.3d at 207.

210. *Id.* at 208.

probability of a different outcome, which satisfies the federal standard for prejudice.[211] Yet, in some circumstances, a reasonable probability of prejudice might not exist.[212] For example, the record could show the trial court thought the sentence was appropriate, regardless of the sentencing range.[213]

In Missouri, however, a defendant must show the trial court imposed a sentence based on the mistaken belief in order to obtain relief under plain error review.[214] Judge Breckenridge argues this burden can really only be met when the defendant shows "he or she was sentenced solely on a mistaken belief as to the applicable sentencing range," which will be nearly impossible.[215] Given the realities of sentencing, the approaches used by the United States Supreme Court and the Third Circuit are more appropriate. Often, a defendant will not be able to meet the test the Supreme Court of Missouri established because the sentencing judge might not explain why he or she is imposing a sentence. *Perry* demonstrates this problem, as there is no explanation regarding the sentence.[216] The trial court simply followed the prosecutor's recommendation without detailing the reasons for the sentence.[217] Given this difficulty, a rebuttable presumption is more just. Under such a presumption, the defendant would need to show the wrong sentencing range was used; then, the prosecutor could turn to the record to establish there was truly no prejudice.[218]

Judicial economy is often cited as justification for creating a high burden.[219] The fear is that a remand for resentencing will consume precious judicial resources.[220] However, resentencing is not nearly as costly as retrial.[221] As a result, fewer judicial resources will be consumed if these cases are remanded. Additionally, the U.S. Court of Appeals for the Seventh Circuit has used limited remand in these cases,[222] which can save some judicial resources. For this procedure, the appellate court simply asks the district court to go on the record and state whether a different sentence would have been imposed had the judge known of the correct sentencing range.[223] The method used by the

211. *Molina-Martinez*, 136 S. Ct. at 1346.

212. *Id.*

213. *Id.* at 1346–47.

214. State v. Perry, 548 S.W.3d 292, 301 (Mo. 2018) (en banc).

215. *Id.* at 302 (Mo. 2018) (en banc) (Breckenridge, J., concurring in part and dissenting in part).

216. *Id.* at 301 (majority opinion).

217. *Id.*

218. United States v. Knight, 266 F.3d 203, 208 (3d Cir. 2001).

219. *See* Molina-Martinez v. United States, 136 S. Ct. 1338, 1348 (2016).

220. *Id.*

221. United States v. Wernick, 691 F.3d 108, 117–18 (2d Cir. 2012) ("[R]emand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial . . . ."); *see also* United States v. Sabillon-Umana, 772 F.3d 1328, 1334 (10th Cir. 2014) (determining the cost of correction is small because the defendant need not be released or retried).

222. United States v. Currie, 739 F.3d 960, 967 (7th Cir. 2014).

223. *Id.*

Seventh Circuit can provide relief to the defendant and establish finality regarding the sentence, all at a limited cost. While judicial economy is an important concern for courts, the limited cost of resentencing and potential alternatives for this process provide a cost-efficient method for addressing this injustice; not to mention the cost of resentencing is a small price to pay to ensure an individual is not unjustly deprived of his or her personal liberty by being required to serve a longer sentence than is otherwise necessary.

C. Lack of Relief

As discussed above, a heavy burden is placed on a defendant, and this burden will often be difficult to meet on plain error review. If direct appeal fails, a defendant can then seek postconviction relief.[224] The Missouri Supreme Court Rules allow a convicted felon to challenge the ruling by "claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel . . . ."[225] *Perry* was analyzed under plain error review because Perry did not object at the sentencing hearing.[226] Perry can likely bring an ineffective assistance of counsel claim based on the failure to object as well as his counsel's statement the sentencing range was correct.[227] To prevail on an ineffective assistance claim, the defendant must comply with the test set forth in *Strickland v. Washington*.[228] He or she "must demonstrate that: (1) defense counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would in a similar situation[] and (2) he or she was prejudiced by that failure."[229] The defendant must establish these criteria by a preponderance of the evidence.[230]

There is a strong presumption that the conduct of the counsel was effective and reasonable.[231] To satisfy the first prong of the *Strickland* test and defeat this presumption, the movant must "identify 'specific acts or omissions of counsel that, in light of all the circumstances, fell outside the wide range of professional competent assistance.'"[232] Perry can likely meet this heavy burden, as failure to object to, and ratification of, an incorrect sentencing range likely does not constitute professional competent assistance. Regarding the second prong, "Prejudice occurs when 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

224. MO. SUP. CT. R. 29.15(a).

225. *Id.*

226. State v. Perry, 548 S.W.3d 292, 300 (Mo. 2018) (en banc).

227. *Id.* at 297.

228. 446 U.S. 668, 687 (1984).

229. McIntosh v. State, 413 S.W.3d 320, 324 (Mo. 2013) (en banc) (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)).

230. *Id.*

231. *Id.*

232. *Id.* (quoting Zink v. State, 278 S.W.3d 170, 176 (Mo. 2009) (en banc)).

been different.'"[233] Based on the Supreme Court of Missouri's reasoning, this will be a difficult showing for Perry. The court determined Perry failed to show his sentence was based on the materially false belief regarding the applicable sentencing range.[234] The court determined Perry was not given the minimum sentence and the trial court followed the prosecutor's recommendation.[235] Based on this determination, a showing of prejudice does not seem possible. If Perry's sentence was not based on the mistaken belief, but instead other factors, the outcome would not have been different had the sentencing judge imposed the correct range because those other factors are likely still present. If more evidence exists, Perry could introduce new evidence in a postconviction relief proceeding. However, this is unlikely because the transcript of the sentencing hearing is the strongest evidence in this case, and the Supreme Court of Missouri had access to this on appeal. For these reasons, Perry will likely fail on an ineffective assistance of counsel claim, and once again, his relief will be denied.

D. Judicial Integrity and Public Confidence

The lack of relief for Perry seriously hinders judicial integrity and public confidence. The federal courts have frequently addressed how the application of an incorrect sentencing range impacts "the fairness, integrity, or public reputation of judicial proceedings," as this is a factor of the federal plain error analysis.[236] Multiple federal courts have stated that sentencing a defendant in the wrong Guideline range strongly influences the public's perception of the judiciary and the justness of the result.[237] The Tenth Circuit has provided thoughtful analysis in this area:

> [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? Especially when the cost of correction is so small? A remand for resentencing, after all, doesn't require that a defendant be released or retried but simply allows the district court to exercise its authority to impose a legally permissible sentence.[238]

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233. *Id.* (quoting Deck v. State, 68 S.W.3d 418, 429 (Mo. 2002) (en banc)).

234. State v. Perry, 548 S.W.3d 292, 301 (Mo. 2018) (en banc).

235. *Id.*

236. *See* United States v. Sabillon-Umana, 772 F.3d 1328, 1333 (10th Cir. 2014).

237. United States v. Ford, 88 F.3d 1350, 1356 (4th Cir. 1996); *see also* United States v. Weaver, 161 F.3d 528, 530 (8th Cir. 1998) ("[W]e believe that the public's confidence in the judicial process would be undermined if an inadvertent typographical error were to be allowed to influence the length of a criminal defendant's sentence.").

238. *Sabillon-Umana*, 772 F.3d at 1333–34.

The same concerns apply at the state level. In *Perry*, the prosecutor argued the incorrect range of punishment, the trial judge adopted this range, and the defense counsel thought the sentencing range was correct, all of which resulted in an eight-year sentence.[239] On appeal, the Supreme Court of Missouri allowed this error to stand by affirming the decision of the trial court.[240] Further, as explained above, postconviction relief is unlikely. A reasonable citizen could certainly have less respect for, and confidence in, the judicial process given these circumstances. The law was not followed, and, consequently, Perry might be subjected to a longer sentence as well as a more serious deprivation of liberty. "The fairness, integrity, and public reputation of our judicial system demand that we correct . . ." some types of sentencing errors.[241] In situations like *Perry*, the demand is strong. Not only was the law incorrectly applied but also no other reasons were advanced for the imposed sentence.[242] Perry should have an opportunity for relief. Even if the same result is produced, at least the new sentence will result from a correct application of the law.

VI. CONCLUSION

In *State v. Perry*, the Supreme Court of Missouri did not grant relief under plain error review even though the trial judge used the incorrect sentencing range. The court's decision places a heavy burden on defendants and, in most cases, eliminates defendants' opportunities to obtain relief. As a result, an obvious error, which could adversely impact Perry's prison sentence, has been allowed to stand. Not only is Perry hurt by the Supreme Court of Missouri's decision but also public confidence in the judicial system is rightly diminished. After all, reasonable citizens can easily have a lesser view of the judicial system when courts refuse to correct errors they ultimately created.[243] Perry, and future similarly situated defendants, should have a "right to a sentence . . . that [is] imposed pursuant to correctly applied law."[244] In Missouri, however, it seems no such right is guaranteed – at least when plain error review is applied.

239. *Perry*, 548 S.W.3d at 300–01.
240. *Id.* at 301.
241. *Ford*, 88 F.3d at 1350.
242. *See Perry*, 548 S.W.3d at 301.
243. *See Sabillon-Umana*, 772 F.3d at 1333–34.
244. United States v. Knight, 266 F.3d 203, 210 (3d Cir. 2001).