

No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

TOMMY NELSON, JR.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. This Court should grant certiorari because there is a split in the circuits as to the proper application of a 7 level guideline enhancement for the discharge of a weapon when the defendant never intended a gun to discharge. *See, United States v. Gordon*, 64 F.3d 281, 283 (7th Cir. 1995) (discharge of weapon by security guard cannot support the enhancement because for the enhancement to apply the defendant must have actually intended or desired for the weapon to be discharged, and since “a criminal would have to be suicidal to intend that a guard discharge a firearm during a robbery,” the enhancement cannot apply “where a non-participant in the crime discharges a firearm”). *See, also, United States v. Hill*, 381 F.3d 560, 561-63 (6th Cir. 2004) (enhancement does not apply absent a showing “that the defendant willfully caused the discharge of the weapon”).

PARTIES

Tommy Nelson, Jr. is the Petitioner; he was the defendant-appellant below.

The United States of America is the Respondent; it was the plaintiff-appellee below.

TABLE OF CONTENTS

Question Presented.....	ii
Parties	iii
Table of Contents.....	iv
Index to Appendices.....	v
Table of Authorities	vi
Opinions Below	1
Jurisdictional Statement.....	1
Constitutional and Statutory Provisions Involved.....	1
Statement of the Case	2
Reasons for Granting the Writ.....	4
 I. This Court should grant certiorari because there is a split in the circuits as to the proper application of a 7 level guideline enhancement for the discharge of a weapon when the defendant never intended a gun to discharge. <i>See, United States v. Gordon</i> , 64 F.3d 281, 283 (7th Cir. 1995) (discharge of weapon by security guard cannot support the enhancement because for the enhancement to apply the defendant must have actually intended or desired for the weapon to be discharged, and since “a criminal would have to be suicidal to intend that a guard discharge a firearm during a robbery,” the enhancement cannot apply “where a non-participant in the crime discharges a firearm”). <i>See, also, United States v. Hill</i> , 381 F.3d 560, 561-63 (6th Cir. 2004) (enhancement does not apply absent a showing “that the defendant willfully caused the discharge of the weapon”).	
Conclusion.....	5

INDEX TO APPENDICES

Appendix A Judgment and Opinion of Fifth Circuit

Appendix B Judgment and Sentence of the United States District Court
for the Northern District of Texas

Table of Authorities

Cases

<i>United States v. Gordon</i> , 64 F.3d 281 (7th Cir. 1995)	4, 5
<i>United States v. Hill</i> , 381 F.3d 560 (6th Cir. 2004)	4
<i>United States v. Roberts</i> , 203 F.3d 867 (5th Cir. 2000)	3

Statutes

18 U.S.C. § 2113(a)	2
28 U.S.C. § 1254(1)	1

Rules

Sup. Ct. R. 13.1	1
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United States Sentencing Guidelines

USSG § 2B3.1	2
USSG § 2B3.1(b)(2)(A)	1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Tommy Nelson, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Tommy Nelson, Jr.*, No. 17-11214, and is provided in the Appendix to the Petition. [Appx. A]. The district court entered judgment on October 5, 2017, which judgment is attached as an Appendix. [Appx. B].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on May 16, 2018. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

Section 2B3.1(b)(2)(A) of the United States Sentencing Guidelines states as follows:

“If a firearm was discharged, increase by 7 levels.”

STATEMENT OF THE CASE

A. Trial Court Proceedings

On January 24, 2017, in the Northern District of Texas, Fort Worth Division, Mr. Nelson was charged by indictment with Bank Robbery in violation of 18 U.S.C. § 2113(a). On April 4, 2017, Mr. Nelson entered a plea of guilty to the indictment plea colloquy. The Presentence Report (PSR) applied USSG § 2B3.1, the guideline for robbery cases, and determined the base offense level was 20, applied a two level enhancement because the victim was a bank, and added a 7 level enhancement because a firearm was discharged in the robbery. It is this 7 level enhancement for the discharge of the weapon that is the focus of this petition. The PSR subtracted 3 levels for timely acceptance of responsibility, resulting in total offense level of 26, and with a criminal history category of IV, the guideline range was determined to be 92-115 months. Mr. Nelson objected to the 7 level enhancement on the basis that the defendant did not intend for the gun to discharge (did not willfully induce it), it went off accidentally, it was in the possession of the security guard (it was in the guard's holster), and indeed, Mr. Nelson, not the guard, was the person who was shot (one of his fingers was shot off his hand). The district court overruled the objection and sentenced Mr. Nelson to 105 months, 10 months below the maximum of the guideline range. Without the 7 level enhancement based on the guard shooting Mr. Nelson, the guideline range would have been 46 – 57 months. Thus, because the guard shot Mr.

Nelson, not only did Mr. Nelson lose a finger, but his sentence of imprisonment was more than doubled.

B. Circuit Court Proceedings

Nelson appealed the district court's decision to overrule his objection to the enhancement. His appeal was in the Fifth Circuit, and this issue was foreclosed in that Circuit. *See, United States v. Roberts*, 203 F. 3d 867, 870 (5th Cir. 2000) (applied the enhancement where the deputy shot the defendant). Accordingly, the Fifth Circuit affirmed the district court's application of the enhancement.

REASONS FOR GRANTING THE WRIT

- I. This Court should grant certiorari because there is a split in the circuits as to the proper application of a 7 level guideline enhancement for the discharge of a weapon when the defendant never intended a gun to discharge. *See, United States v. Gordon*, 64 F.3d 281, 283 (7th Cir. 1995) (discharge of weapon by security guard cannot support the enhancement because for the enhancement to apply the defendant must have actually intended or desired for the weapon to be discharged, and since “a criminal would have to be suicidal to intend that a guard discharge a firearm during a robbery,” the enhancement cannot apply “where a non-participant in the crime discharges a firearm . . .”). *See, also, United States v. Hill*, 381 F.3d 560, 561-63 (6th Cir. 2004) (enhancement does not apply absent a showing “that the defendant willfully caused the discharge of the weapon . . .”).

The United States Sentencing Guidelines were designed to lessen disparity in sentencing, to help ensure similarly situated defendants (based on conduct and history) receive similar sentences. They were also drafted to ensure increases in sentences based on increases in culpability. A 7 level increase in the guideline range based on conduct of third parties that the defendant never intended, and never would

intend, frustrates the goal of ensuring increases in the sentence are based on increased culpability. As one Circuit has noted: “a criminal would have to be suicidal to intend that a guard discharge a firearm during a robbery” *Gordon*, 64 F.3d at 283. And the goal of lessening disparity is defeated by the split in the Circuits.

Conclusion

This Court should grant certiorari to unify the circuits, lessen disparity, and correct the Fifth Circuit.

Respectfully submitted this 14th day of August, 2018.

/s/ *Peter Fleury*

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