

19-5159

ORIGINAL

No.

Supreme Court of the United States

QUINETTA GRANT,

ORIGINAL

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED

JUN 14 2019

OFFICE OF THE CLERK

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

PETITION FOR WRIT OF CERTIORARI

Quinetta Grant
Petitioner
16653-076
501 Capital Circle, NE
Tallahassee, FL 32301

QUESTIONS PRESENTED

Petitioner Quinetta Grant was charged in and pleaded to a One-Count Information charging violation of 18 U.S.C. § 1341 (mail fraud) (Count 1). Prior to sentencing, a hearing was held in the court's chambers where, absent the presence of Ms Grant, the judge, prosecutor and defense attorney resolved all factual and legal issues for the sentencing such that the actual sentencing hearing was nothing more than a ministerial act. Notably, Ms Grant cooperated with the government, for which she received U.S.S.G. § 5K1.1 downward departure but, as demonstrated within, the downward departure started from an erroneously high level due to violations of the Sentencing Guidelines. The Court of Appeals cited 3 conflicting out of Circuit decisions which addressed the right of defendants to their presence at sentencing but ignored binding authority by this Court and found no Fed. R. Crim. P. 52(b) plain error.

- 1.) Where the Court of Appeals failed to consider binding authority holding that a defendant's absence from a material sentencing proceeding constituted "plain error", should this Court vacate and remand for reconsideration?
- 2.) Where Ms Grant's sentence was enhanced by attribution of all acts and omissions of all individuals involved in the offense without making an explicit finding as to "the scope of the criminal activity jointly undertaken by the defendant", was Ms Grant denied her rights under U.S.S.G. § 1B1.3(a)(1)(B)?
- 3.) Where multiple additional errors affected petitioner's conviction and/or sentence in the courts below, should this Court exercise it's supervisory power to vacate her conviction and sentence?

PARTIES TO THE PROCEEDINGS

IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fifth Circuit.

More specifically, the Petitioner Quinetta Grant and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR A WRIT OF CERTIORARI

Quinetta Grant, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on 3-1-19.

OPINIONS BELOW

The 3-1-19 opinion of the Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision reported at 755 Fed. Appx. 432 *; 2019 U.S. App. LEXIS 6396 ** and is reprinted in the separate Appendix A to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Western District of Louisiana, was entered on 4-30-18, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

A petition for rehearing was timely filed and was denied by the Court of Appeals for the Fifth Circuit on 4-1-19. This opinion is an unpublished decision, and is reprinted in the separate Appendix C to this Petition.

The prior USDC Magistrate R&R to accept Ms Grant's plea was entered on 10-25-16, is an unpublished decision reported at 2016 U.S. Dist. LEXIS 149218 * and is reprinted in the separate Appendix D to this Petition.

The prior order of the United States District Court for the Western District of Louisiana accepting Ms Grant's plea of guilty was entered on 10-27-16, is an unpublished decision reported at 2016 U.S. Dist. LEXIS 149309 and is reprinted in the separate Appendix E to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 3-1-19. A petition for rehearing was timely filed and was denied by the Court of Appeals for the Fifth Circuit on 4-1-19. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

**CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES,
RULES AND REGULATIONS INVOLVED**

The Fifth Amendment to the Constitution of the United States provides in relevant part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ... *Id.*

The Sixth Amendment to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. *Id.*

18 U.S.C. § 1341 provides:

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$ 1,000,000 or imprisoned not more than 30 years, or both. *Id.*

U.S.S.G. § 1B1.3 provides in relevant part:

§ 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others *in furtherance of the jointly undertaken criminal activity*,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Commentary

Application Notes:

1. *The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability.* Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable

guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.

2. A "jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was *both*:

- (A) in furtherance of the jointly undertaken criminal activity; and
- (B) reasonably foreseeable in connection with that criminal activity.

Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the "jointly undertaken criminal activity") is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was in furtherance of the jointly undertaken

criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.

The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.

U.S.S.G. § 1B1.3 (As amended November 1, 2010 (see Appendix C, amendment 746)) (emphasis added).

Fed. R. Crim. P. 43 provides:

Rule 43. Defendant's Presence

(a) When Required. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

- (1) the initial appearance, the initial arraignment, and the plea;
- (2) every trial stage, including jury impanelment and the return of the verdict; and
- (3) sentencing.

(b) When Not Required. A defendant need not be present under any of the following circumstances:

- (1) Organizational Defendant. The defendant is an organization represented by counsel who is present.
- (2) Misdemeanor Offense. The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.
- (3) Conference or Hearing on a Legal Question. The proceeding involves only a conference or hearing on a question of law.
- (4) Sentence Correction. The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. §3582 (c).

(c) Waiving Continued Presence.

- (1) In General. A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:
 - (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;
 - (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or
 - (C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.
- (2) Waiver's Effect. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

Fed. R. Crim. P. 43 (As amended Apr. 22, 1974, eff. Dec. 1, 1975; Pub. L. 94-64, §3(35), July 31, 1975, 89 Stat. 376; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 26, 2011, eff. Dec. 1, 2011.)

Fed. R. Crim. P. 52 provides:

Rule 52. Harmless Error and Plain Error.

(a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. *Id.* (As amended Dec. 26, 1944, eff. March 21, 1946.)

STATEMENT OF THE CASE

On or about 7-6-16 Quinetta Grant was charged in an Information with violation of 18 U.S.C. § 1341 (mail fraud) (Count 1).

These charges arose from allegations of her involvement in mailing automobile title documents in several instances as a favor to her sister and a vehicle broker who was ostensibly providing her sister with an automobile at dealer's cost. Notably, there was no evidence produced to demonstrate that Ms Grant received any compensation or personal monetary benefit from the alleged acts and omissions.

She subsequently debriefed pursuant to a proffer agreement with the government and provided information which resulted in at least 2 indictments.

She was arraigned on or about 10-25-16 at which time she pleaded guilty to the charged violations.

No motion to suppress was filed or litigated.

When the Presentence Report was prepared, the Probation Officer recommended finding a Total Offense Level 34 and a Criminal History of II which resulted in a guideline sentencing range of 168-210 months. (Presentence Report, ¶¶65, 101)

On 4-24-18, Ms Grant appeared for sentencing but, prior to the sentencing, a hearing was held in the court's chambers where, *absent the presence of Ms Grant*, the judge, prosecutor and defense attorney resolved all factual and legal issues for the sentencing such that the actual sentencing hearing was nothing more than a ministerial act. See transcript of sentencing, 4-24-18 (CR 51)¹

¹ This refers to the district court "Clerk's Record, Entry #51)

On 4-24-18, Ms Grant was sentenced ministerially to 96 months incarceration plus 3 years supervised release, \$100.00 assessment, and \$300,112.80 restitution for violations of 18 U.S.C. § 1341 (mail fraud) (Count 1). This sentence represented Total Offense Level 34 and a Criminal History of II which resulted in a guideline sentencing range of 168-210 months with a downward departure *from that level* under U.S.S.G. § 5K1.1 for Ms Grant's cooperation. Notably, the Total Offense Level included all the acts and omissions of all of the charged and uncharged defendants. (Presentence Report ¶¶51-52) (Transcript of Sentencing 4-24-18, page 4) (Ms Grant Judgment & Commitment Order, Appendix B) This was especially egregious in light of the fact that the government conceded that multiple individuals were involved in the offense and also that they didn't know if Ms Grant actually was involved with all the vehicles (Transcript of Plea, page 27).

The judgment was entered on 4-30-18.

On 5-4-18, a Notice of Appeal was filed. On direct appeal, new counsel argued that the sentencing hearing, held in the court's chambers where, absent the presence of Ms Grant, the judge, prosecutor and defense attorney resolved all factual and legal issues for the sentencing such that the actual sentencing hearing was nothing more than a ministerial act, deprived Ms Grant of her statutory and constitutional rights as hereinafter more fully appears:

I. THE DISTRICT COURT VIOLATED GRANT'S RIGHT TO BE PRESENT AT SENTENCING WHEN IT CONDUCTED A LENGTHY CHAMBERS CONFERENCE ON FACTUAL ISSUES RAISED BY GRANT'S OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT	6
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(Grant USCA Brief, PDF page 4)	

On 3-1-19, the Court of Appeals denied Ms Grant's appeal. In denying the appeal, the Court of Appeals held, *inter alia*, that since there was no Fifth Circuit decision on point and the sentencing attorney failed to object to Ms Grant's exclusion from the sentencing hearing in the judge's chambers, there was no Fed. R. Crim. P. 52(b) plain error. While Court of Appeals cited 3 conflicting out of Circuit decisions which addressed the right of defendants to their presence at sentencing, the Court of Appeals ignored binding authority by this Court in its finding of no Fed. R. Crim. P. 52(b) plain error.

Counsel timely filed a petition for rehearing. On 4-1-19, the Court of Appeals denied rehearing. (Appendix C)

Ms Grant demonstrates within that (A) this Court should grant her Petition For Writ Of Certiorari because the court of appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT

- 1.) **THIS COURT SHOULD GRANT MS GRANT'S PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.**

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10. CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

- (a) a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision... *Id.*

Supreme Court Rule 10(a).

This Court has never hesitated to exercise its power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties. *McNabb v. United States*, 318 U.S. 332 (1943).² As the Court stated in *McNabb*:

... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.

² See also *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960)..

McNabb, 318 U.S. at 340.

1A.) The Court Of Appeals Failed To Consider Binding Authority Holding That A Defendant's Absence From A Material Sentencing Proceeding Constituted "Plain Error", Consequently, This Court Should Vacate And Remand For Reconsideration

A criminal defendant has a due process right to be present at a proceeding whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. The right to be present at all stages of one's trial constitutes a foundational principle underpinning the entire law of criminal procedure. Moreover, Fed. R. Crim. P. 43(a) states that the defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. *Id.* See *United States v. Doe*, 964 F.2d 157; 1992 U.S. App. LEXIS 11138 ** (2d Cir. 1992) (same); *Morales v. United States*, 651 Fed. Appx. 1; 2016 U.S. App. LEXIS 8373 (2d Cir. 2016) (same); *United States v. Spears*, 197 F.3d 465; 1999 U.S. App. LEXIS 30461 ** (10th Cir. 1999) (same); *United States v. Youngpeter*, 1998 U.S. App. LEXIS 7434 * (10th Cir. 1998) (same); *Bartone v. United States*, 375 U.S. 52, 84 S. Ct. 21, 11 L. Ed. 2d 11 (1963) (same -- increase of sentence without defendant's presence is plain error).

In Ms Grant's case, as set forth above, prior to sentencing, a hearing was held in the court's chambers where, absent the presence of Ms Grant, the judge, prosecutor and defense attorney resolved all factual and legal issues for the sentencing such that the actual sentencing hearing was nothing more than a ministerial act. Sentencing counsel failed to object to Ms Grant's exclusion from the hearing but new appellate counsel raised the issue in the Court of Appeals. In denying Ms Grant's appeal, the Court of Appeals cited 3 conflicting out of Circuit

decisions which addressed the right of defendants to their presence at sentencing but ignored binding authority by this Court and found no Fed. R. Crim. P. 52(b) plain error. Had the Court of Appeals followed *Bartone v. United States*, 375 U.S. 52, 84 S. Ct. 21, 11 L. Ed. 2d 11 (1963), *supra*, the lower court would have found plain error entitling Ms Grant to a new sentencing hearing. *Id.*

1B.) Enhancement Of Ms Grant's Sentence By Attribution Of All Acts And Omissions Of All Individuals Involved In The Offense Without Making An Explicit Finding As To "The Scope Of The Criminal Activity Jointly Undertaken By The Defendant" Violated U.S.S.G. § 1B1.3

As set forth above, U.S.S.G. § 1B1.3 provides in part:

§ 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) *in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,*

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

Commentary

Application Notes:

...2. A "jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:

- (i) in furtherance of the jointly undertaken criminal activity; and
- (ii) reasonably foreseeable in connection with that criminal activity.

Because a count may be worded broadly and include the conduct of many participants over a period of time, *the scope of the criminal activity jointly undertaken by the defendant (the “jointly undertaken criminal activity”) is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant*. In order to determine the defendant’s accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant’s agreement). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under the provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under the provision.

U.S.S.G. § 1B1.3 (emphasis added)

In other words, the scope of a “conspiracy” is not necessarily the same as the scope of “jointly undertaken criminal activity”. *United States v. Mitchell*, 49 F.3d 769; 1995 U.S. App. LEXIS 6154 (D.C. Cir. 1995), and consequently, the determination of a defendant’s “role in the offense” cannot simply be decided by determining the scope of a conspiracy. *Id. Cf. United States v. Irvin*, 682 F.3d 1254, 1277; 2012 U.S. App. LEXIS 7498 (10th Cir. 2012) (citing Introductory Commentary Preceding U.S.S.G. § 3B1.1).

To illustrate the point, in what happened to be a narcotics case, the Court of Appeals in *Mitchell* explained the rationale of U.S.S.G. § 1B1.3 as follows:

“reasonable foreseeability” alone does not suffice as a basis to attribute drugs to co-conspirators. See *United States v. Saro*, 24 F.3d 283, 288 (D.C. Cir. 1994). Rather, we observed, members of a conspiracy may engage in their own side deals for which their co-conspirators are not liable, and certain conspiracies operate on a “hub and spoke” model, in which “many participants ... are parties only to small sub-conspiracies.” *Saro*, 24 F.3d at 289. If either of these scenarios is plausible, then, the sentencing court must make findings about the scope of the conspiratorial agreement the defendant joined, and attribute to him only those drugs that are both reasonably foreseeable to him and in furtherance of that agreement. *Id.*

United States v. Mitchell, 49 F.3d 769; 1995 U.S. App. LEXIS 6154 (D.C. Cir. 1995)

The Courts construe U.S.S.G. § 1B1.3(a)(1)(B) to require substantial, and specific findings beyond the ‘conduct of the conspiracy’ before the acts and omissions of coconspirators can be used to determine the “relevant conduct” of an individual defendant. *United States v. Ekanem*, 555 F.3d 172; 2009 U.S. App. LEXIS 338 (5th Cir. 2009) (Medicare Fraud sentence reversed with holding that, in applying U.S. Sentencing Guidelines Manual § 1B1.3, a defendant’s mere awareness that another person is operating an identical fraudulent scheme is insufficient to hold the defendant responsible for the other person’s actions); *United States v. Rivera-Rodriguez*, 318 F.3d 268; 2003 U.S. App. LEXIS 1400 (1st Cir. 2003) (money laundering sentence reversed for failure to determine whether acts and omissions of others were reasonably foreseeable and in furtherance of jointly undertaken criminal activity); *United States v. Tabron*, 437 F.3d 63; 369 U.S. App. D.C. 315; 2006 U.S. App. LEXIS 3246 (DC Cir. 2006) (drug sentence reversed where the court failed to determine whether gun possessed by coconspirator was reasonably foreseeable and in furtherance of jointly undertaken criminal activity); *United States v. Tudeme*, 457 F.3d 577; 2006 U.S. App. LEXIS 20380 (6th Cir. 2006) (fraud sentence reversed where the court failed to determine whether acts and omissions of others were reasonably foreseeable and in furtherance of jointly undertaken criminal activity); *United States v. Bolden*, 325 F.3d 471, 499 (4th Cir. 2003) (vacating sentence because neither PSR nor district court made “particularized findings with respect to both the scope of the defendant’s agreement and the foreseeability of her co-conspirators’ conduct before holding defendant accountable for the scope of the entire conspiracy”)³.

³ See also *United States v. Jenkins*, 4 F.3d 1338 (6th Cir. 1993) (Finding that defendant could have foreseen full amount of cocaine charged to conspiracy was not sufficient to use full quantity for sentencing of defendant pursuant to the Sentencing Guidelines, absent finding on scope of

In the instant case, as set forth above, the district court enhanced of Ms Grant's sentence for all the acts and omissions of all of the charged and uncharged defendants and involving all 104 vehicle titles. (Presentence Report ¶¶51-52) This was especially egregious in light of the fact that the government conceded that multiple individuals were involved in the offense and also that they didn't know if Ms Grant actually was involved with all the vehicles (Transcript of Plea, page 27).

Based on the foregoing, Ms Grant's sentence is violative of U.S.S.G. § 1B1.3(a)(1)(B) and this Court should vacate the sentence and remand under Fed. R. Crim. P. 52(b). *Molina-Martinez v. United States*, 136 S. Ct. 1338, 194 L. Ed. 2d 444 (2016) (wrong guideline is plain error).

criminal activity of conspiracy that defendant agreed to jointly undertake; both prior version of guidelines and postsentencing clarifying amendment to guideline required differentiation between coconspirators); *United States v. Hernandez-Santiago*, 92 F.3d 97 (2nd Cir. 1996) (District Court improperly sentenced defendant to entire amount of drugs involved in conspiracy); *United States v. Chalarca*, 95 F.3d 239 (2nd Cir. 1996) (same); *United States v. McDuffy*, 90 F.3d 233 (7th Cir. 1996) (same); *United States v. Haynes*, 906 F.Supp. 5 (D.D.C. 1995) (before drugs can be attributed to defendant the Court must find that the drugs were within the scope of the jointly undertaken activity); *United States v. Patriarca*, 912 F.Supp. 596 (D. Mass. 1995) (Drug dealing by members of crime family was not within scope of joint criminal activity agreed to by defendant); *United States v. Melton*, 131 F.3d 1400, 1405 (10th Cir. 1997) (reasonable foreseeability "is not by itself sufficient to establish liability for the acts of coconspirators. . . . [S]uch acts also must be in furtherance of 'jointly undertaken criminal activity' ") (quotations omitted); *United States v. McDuffy*, 90 F.3d 233, 236 (7th Cir. 1996) (reasonable foreseeability not enough; "[A] defendant does not become liable in sentencing for the acts of coconspirators if those acts did not advance an objective within the scope of the conspiracy that he joined."); *United States v. Childress*, 58 F.3d 693, 723 (D.C. Cir. 1995) (reasonable foreseeability and jointly undertaken are separate requirements), *cert. denied*, 516 U.S. 1098 (1996); *United States v. Ebvbuomwan*, 992 F.2d 70, 72 (5th Cir. 1993) (same).

1C.) Multiple Errors In The Courts Below Mandate That Ms Grant's Conviction And/Or Sentence Be Vacated.

Ms Grant's Failure to Profit from Offense

Ms Grant's sentence is unlawful because she should have received a downward variance or downward departure due to the fact that no evidence produced to demonstrate that Ms Grant received any compensation or personal monetary benefit from the alleged acts and omissions. *United States v. Kalili*, 100 Fed. Appx. 903; 2004 U.S. App. LEXIS 11799 (4th Cir. 2004); *United States v. Ramos*, 2019 U.S. App. LEXIS 13255; __ Fed. Appx. __ (7th Cir. 2019) (same); *United States v. Walters*, 87 F.3d 663; 1996 U.S. App. LEXIS 15316 ** (5th Cir. 1996) (same).

Unreliable Evidence Used for Restitution

A criminal defendant "has a due process right to be sentenced on the basis of reliable information" *United States v. Campbell*, 985 F.2d 341, 348 (7th Cir. 1993), and the Guidelines themselves reflect the courts' concern with reliability. U.S.S.G. § 6A1.3(a) authorizes a court to "consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." *United States v. Beler*, 20 F.3d 1428, *; 1994 U.S. App. LEXIS 6042 (7th Cir. 1994) (collecting cases). Unreliable allegations must not be considered. *Id.*; U.S.S.G. § 6A1.3 commentary; *United States v. Ortiz*, 993 F.2d 204, 207 (10th Cir. 1993). The Third Circuit has instructed that section U.S.S.G. § 6A1.3(a)'s reliability standard must be rigorously applied *United States v. Miele*, 989 F.2d 659, 663-664 and [n.5] (3rd Cir. 1993).

In the instant case, as set forth above, Ms Grant was sentenced to \$300,112.80 restitution along with her prison sentence of 96 months. But, as further shown above, Ms Grant's sentence included all of the acts and omissions of all criminally culpable individuals, known and

unknown, in the offense without limitation by U.S.S.G. § U.S.S.G. § 1B1.3(a)(1)(B)(a)(1)(B). Consequently, her sentence of restitution is violative of U.S.S.G. § 6A1.3. *Id.*

Ineffective Assistance Of Counsel

Ms Grant's conviction and sentence is violative of the Sixth Amendment due to ineffective assistance of counsel as hereinafter more fully appears.

A.) **Proffer hearing**, Ms Grant provided substantial information that was not used to prosecute "big fish" and counsel did not pursue this with the government.

B.) **Guilty Plea** An attorney has a duty to advise a defendant, who is considering a guilty plea, of the available options and possible sentencing consequences. *Etheridge v. United States*, 2008 U.S. App. LEXIS 15924 (11th Cir. 2008) (citing *Brady v. United States*, 397 U.S. 742, 756, 90 S.Court. 1463, 25 L.Ed.2d 747 (1970) and *Beckham v. Wainwright*, 639 F.2d 262, 267 (11th Cir.1981) (holding counsel's misrepresentation that the defendant could only be sentenced to five years incarceration on withdrawal of his guilty plea fell "outside of the range of competence of attorneys in criminal cases") and *Finch v. Vaughn*, 67 F.3d 909, 915-16 (11th Cir.1995) (holding counsel's misrepresentation that the defendant's state sentence would be served concurrently with his federal sentence constituted erroneous advice and ineffective assistance of counsel)).

Where there is a reasonable probability that counsel's unprofessional omissions deprived a criminal defendant of a favorable downward adjustment or departure, or failed to prevent an improper upward adjustment, in the defendant's sentencing under the Sentencing Guidelines, the defendant's sentence is violative of the Sixth Amendment constitutional right to effective assistance of counsel and is, therefore, subject to collateral attack under 28 U.S.C. § 2255. *United States v. Londono*, 1998 U.S. App. LEXIS 7482 (10th Cir. 1998) (ineffective assistance of

counsel in failing to challenge leadership role); *United States v. Luessenhop*, 2005 U.S. App. LEXIS 15704 (4th Cir. 2005) (ineffective assistance of counsel in failing to challenge loss amount in fraud case).

As set forth above, as part of Ms Grant's plea and plea agreement, on advice of counsel, she stipulated to extensive factual matters which were above and beyond those necessary for a valid plea of guilty. The law did not and does not require stipulating to "relevant conduct" as part of a plea of guilty. *United States v. Frye*, 402 F.3d 1123, 1128 (11th Cir. 2005) (holding that factual basis for plea was met by the defendant's agreement to facts articulated at plea hearing by prosecution, which facts satisfied the elements of the offense); *United States v. Gilliam*, 987 F.2d 1009 (4th Cir. 1993) (plea valid without stipulation to relevant conduct); *United States v. Allen*, 65 Fed. Appx. 476; 2003 U.S. App. LEXIS 10844 (4th Cir. 2003) (same); *United States v. Reed*, 350 Fed. Appx. 675; 2009 U.S. App. LEXIS 24093 (3rd Cir. 2009) (same); *United States v. Patterson*, 381 F.3d 859, 866 (9th Cir. 2004) (a defendant may generally plead to the elements of a drug offense without admitting the drug quantity); *United States v. Thomas*, 355 F.3d 1191, 1198 (9th Cir. 2004) (same); These factual matters were subsequently used against Ms Grant in the determinations by the Probation Officer and by the court at sentencing to impose a sentence including relevant conduct involving 104 vehicles.. But for the stipulations, there is a reasonable probability that the enhancements would not have been given.

Proffer Meeting, Counsel was not present even though Ms Grant had at least a Fifth Amendment right to counsel. Had counsel been present and properly represented Ms Grant there is a reasonable probability that a substantially better plea agreement would have been negotiated.

Discovery: Counsel never provided Ms Grant an opportunity to review evidence against her in discovery..

Exclusion of Ms Grant from Court Sentencing Hearing: Counsel did not discuss this hearing and did not allow Ms Grant to attend. Moreover, counsel failed to object that the hearing was violative of the Fifth Amendment and Sixth Amendment and Fed. R. Crim. P. 43(a) so the issue was reviewed by the Court of Appeals under Fed. R. Crim. P. 52(b) instead of Fed. R. Crim. P. 52(a) making it substantially more difficult to win her appeal.

Additional Grounds

Ms Grant's conviction and sentence are violative of the First, Fourth, Fifth, Sixth, And Eighth Amendments to the constitution. More specifically, Ms Grant's conviction and sentence are violative of her right to freedom of speech and to petition and her right to be free of unreasonable search and seizure, her right to due process of law, her rights to counsel, to jury trial, to confrontation of witnesses, to present a defense, and to compulsory process, and her right to be free of cruel and unusual punishment under the constitution.

The evidence was insufficient. The government falsified and withheld material evidence. The District Court unlawfully determined Ms Grant's sentence.

These claims in Argument 1C are submitted to preserve Ms Grant's right to raise them in a motion pursuant to 28 U.S.C. § 2255 if this Court declines to reach their merits.

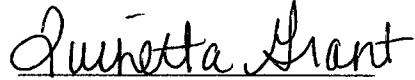
Based on the foregoing, the decision by the Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. *Id.* *McNabb v. United States*, 318 U.S. 332 (1943); *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Fifth Circuit in Ms Grant's case.

CONCLUSION

For all of the foregoing reasons, Petitioner Quinetta Grant respectfully prays that her Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming her direct appeal and **REMAND**⁴ to the court of appeals for reconsideration in light of the authorities set forth herein.



Quinetta Grant
Petitioner
16653-076
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Date: 6.14.19

⁴ For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).