

NO. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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BRANDON SHANE EUSTICE,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

\_\_\_\_\_  
On Petition For a Writ of Certiorari to  
the United States Court of Appeals  
for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Section 4A1.2 (f) of the United States Sentencing Guidelines provides that a diversionary disposition resulting from a finding or admission of guilt in a judicial proceeding is counted as a sentence under § 4A1.1 (c) and is treated as a 1-point offense for criminal history purposes.

1. Where a sentencing court later imposes 255 days of imprisonment for revocation of the 3-year probation imposed for the diversionary disposition, does the imprisonment change the diversionary disposition into a sentence counted under § 4A1.1 (b), based on the number of days of imprisonment rather than a diversionary disposition?
2. Where a sentence is based on an incorrect calculation of a defendant's Guideline range, and results in a higher upper end of that range, is such a sentence based on erroneous and material information and assumptions in violation of due process?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, BRANDON SHANE EUSTICE, respectfully petitions for a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered on March 18, 2020.

### OPINION BELOW

The published opinion of the United States Court of Appeals for the Fifth Circuit *United States v. Brandon Shane Eustice*, 952 F.3d 686 (5th Cir. 2020), is reproduced in the Appendix. (Pet. App. 1a-11a).

### JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States which provides that:

“[no] person shall be...deprived of life, liberty, or property without due process of law.”

STATEMENT OF THE CASE

BRANDON SHANE EUSTICE ("petitioner") was charged on June 27, 2018 in a one count Indictment in the Northern District of Texas, Fort Worth Division with Conspiracy to Possess With Intent to Distribute a controlled substance in violation of 21 U.S.C. § 846 and 841(a)(1) and 841(b)(1)(B). On July 30, 2018, petitioner pleaded guilty to the offense without a written plea agreement. On November 13, 2018, petitioner was sentenced to 84 months in prison.

Petitioner asserted three errors on appeal: (1) the district court erred in calculating the quantity of drugs attributable to him, (2) the district court erred in applying a sentencing enhancement for maintaining a drug premises, and (3) the district court erred in assigning two criminal history points for his state fraud conviction. This petition involves only the third alleged error involving criminal history points, which petitioner contends placed him in the wrong criminal history category under the United States Sentencing Guidelines ("Guidelines") and resulted in improperly calculating petitioner's Guidelines range, thereby committing significant procedural error. *See Molina-Martinez v. United States*, 136 S.Ct. 1338, 1345-46 (2016).

The Fifth Circuit affirmed the judgment of the district court in an opinion which concluded, in pertinent part, that petitioner's 255-day imprisonment sentence for his state fraud conviction, which was imposed upon adjudication of guilt based on the revocation of his deferred adjudication probation, fell within the definition of "prior sentence" in § 4A1.2 (a)(1), U.S.S.G. and that § 4A1.1 (b) applied by its own terms, making the district court's assignment of two criminal history points for a 255 day imprisonment proper under the Guidelines.

#### REASONS FOR GRANTING THE WRIT

**I. The Fifth Circuit Court of Appeals decision is in conflict with at least one other Circuit over whether a court must, where a defendant has pled guilty to a prior crime and adjudication has been withheld, count that diversionary disposition as a single criminal-history point under § 4A1.1 (c) of the Guidelines, regardless of whether the sentencing court later imposed 255 days of imprisonment for revocation of the probation.**

1. Petitioner's Prior Fraud Offense Resulted in a Deferred Adjudication Proceeding with a Guilty Plea, Qualifying him for only a Single Criminal-History Point.

The Fifth Circuit's interpretation of the Guidelines in this case is in conflict with the decision of the Eleventh Circuit in *United States v.*



*Baptiste*, 876 F.3d 1057 (11th Cir. 2017). In *Baptiste*, the defendant had a state court conviction described in the PSR as "[a]djudication withheld, 198 days time served." *Baptiste*, 876 F.3d at 1059. The court in *Baptiste* held that "where, as here, a defendant has pled guilty to a prior crime and adjudication has been withheld, the disposition must be counted for a single criminal-history point under § 4A1.1 (c) of the Guidelines, regardless of whether the sentencing court purported to impose--or even actually imposed--198 days or no days of imprisonment. *Id.*

Section 4A1.2 (f) of the Guidelines instructs how to account for "diversionary dispositions" and says that a diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding is counted as a sentence under § 4A1.1 (c) "even if a conviction is not formally entered." The "even if" language shows that a diversionary disposition is treated as a 1-point offense *whether or not* a conviction is entered. When the Fifth Circuit determined that the 255 day sentence for revocation of the three year probation was a sentence subject to § 4A1.1 (b), it ignored the clear instruction of § 4A1.2 (f) that such a diversionary disposition is governed by § 4A1.1 (c). The revocation of probation and assessment of 255 days is a part of that initial judicial

proceeding. Petitioner should have been assessed only 1-point for criminal history of that offense.

The disposition of petitioner's prior proceeding at issue here was a "diversionary disposition *resulting from* a finding or admission of guilt." U.S.S.G. § 4A1.2(f) (emphasis added). Such a disposition in a judicial proceeding "is counted as a sentence under § 4A1.1 (c) even if a conviction is not formally entered .... U.S.S.G. § 4A1.2 (f). That proceeding resulted in a "disposition" that was eligible (and required) to be counted as a sentence under § 4A1.1 (c) after the court issued its ruling placing petitioner on deferred adjudication probation. At that point, the proceeding constituted a diversionary disposition. When the probation was revoked a year later and a sentence imposed, it was still a part of that diversionary disposition. The disposition was, by the clear words of the Guideline, to be counted as a sentence under § 4A1.1 (c) and assessed a single criminal history point. When the district court assessed 2 criminal history points, it moved petitioner into a higher criminal history category and a longer sentence. This was significant procedural error and resulted in longer imprisonment and affected petitioner's substantial rights.

The Fifth Circuit, in this case, found that petitioner's sentence was imposed upon adjudication of guilt, when his probation was revoked, and therefore fell within the definition of "prior sentence" and § 4A1.1 (b) applied by its own terms and need not be read into § 4A1.2 (f), "where Congress *may have* intentionally excluded it." (emphasis added). The Fifth Circuit's decision treated the 255 day sentence when petitioner's probation was revoked as a "sentence imposed upon adjudication of guilt" rather than simply a part of a "diversionary disposition" which could only be given 1 criminal-history point under the clear language of § 4A1.2 (f). This is in direct conflict with the Eleventh Circuit's approach in *Baptiste* and appears to be contrary to the clear intent of § 4A1.2 (f).

The Fifth Circuit, in its opinion in this case, admitted that the application of "expressio unius" to Guideline § 4A1.2 (f) "could support Eustice's contention that § 4A1.1 (a) and (b) are never applicable to deferred adjudications." *United States v. Eustice*, 952 F.3d at 694. The Fifth Circuit stated that "Eustice's sentence was imposed upon adjudication of guilt--when his probation was revoked" and therefore falls within the definition of "prior sentence" and § 4A1.1 (b) applies by its own terms. However, if the entire proceeding is looked at from the perspective that all of the actions

arose out of, and were part of, a "diversionary disposition" then it is clear that the entire proceeding is governed by § 4A1.1 (c). The deferred adjudication proceeding which granted the three year probation and later revoked that probation and assessed 255 days incarceration, was all a part of the diversionary proceeding. And for criminal history purposes, all parts of that proceeding are governed by § 4A1.2 (f) and "any sentence imposed in that case" cannot qualify as a "prior sentence" under § 4A1.2 (a)(1).

## **II. The Fifth Circuit Court of Appeals Has Decided an Important Question of Federal Law that Has Not Been, But Should Be Settled by this Court.**

### **1. Sentences Based on Erroneous and Material Information or Assumptions Violate Due Process.**

It violates due process to sentence a defendant to additional prison time based on erroneous and material information. *Townsend v. Burke*, 334 U.S. 736, 740 (1948). Due process "guarantees every defendant a right to be sentenced upon information which is not false or materially incorrect." *See, e.g., United States v. Tavano*, 12 F.3d 301, 305 (1st Cir. 1993). *See also, United States v. Galbraith*, 200 F.3d 1006, 1012 (7th Cir. 2000) (a defendant has a due process right to be sentenced on the basis of reliable information).

It is a procedural error for a district court to premise a sentence upon a clearly erroneous fact. *Gall v. United States*, 552 U.S. 38, 51 (2007). Due process guarantees every defendant a right to be sentenced upon information which is not false or materially incorrect. *United States v. Grant*, 493 F.3d 464, 468 (5th Cir. 2007).

### CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

DATED: July 31, 2020

Respectfully submitted,

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