

No. _____

In The
Supreme Court of the United States

LINWOOD EARL STEPHENS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether the Fourth Circuit Court of Appeals below erred in holding it did not have jurisdiction to review a decision to deny a departure under the United States Sentencing Guidelines when that decision was based on a clearly erroneous fact.

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ORDER BELOW

The order appealed from is the Judgment located at the CM/ECF Docket of the Fourth Circuit in United States v. Linwood Stephens, Case No. 20-4241, Docket Entry No. 32, entered on March 4, 2021. A copy of the per curiam unpublished opinion of the Fourth Circuit is attached.

JURISDICTIONAL STATEMENT

This petition for writ of certiorari is from a final judgment by the Fourth Circuit Court of Appeals on March 4, 2021 on direct appeal of a sentence imposed against Petitioner Linwood Stephens in the United States District Court for the Middle District of North Carolina for a criminal violation of 21 U.S.C. §§ 922(g)(1) and 924(e)(1). Accordingly, this Court has jurisdiction over this petition for writ of certiorari and the matter referenced herein pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2101.

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall be . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend V.

STATEMENT OF THE CASE

A. Procedural History

On April 30, 2019, a federal grand jury convened in the Middle District of North Carolina returned a one-count Indictment against Mr. Stephens. [J.A. at 10-11].¹ That indictment charged that:

¹ Citations to the record below are taken from the Joint Appendix filed in the Fourth

On or about March 23, 2018, in the County of Forsyth, in the Middle District of North Carolina, LINWOOD EARL STEPHENS, having three previous convictions in any court for a violent felony or a serious drug offense, or both, committed on occasions different from one another, and each conviction being for a crime punishable by imprisonment for a term exceeding one year, knowingly did possess in commerce and affecting commerce a firearm, that is, a Hi-Point 9mm handgun; in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e)(1).

[J.A. at 10.] On July 29, 2019, a federal grand jury in the Middle District of North Carolina returned a one-count Superseding indictment against Mr. Stephens. [J.A. at 14-16.] Count One of the Superseding charged that

On or about March 23, 2018, in the County of Forsyth, in the Middle District of North Carolina, LINWOOD EARL STEPHENS, having three previous convictions in any court for a violent felony or a serious drug offense, or both, committed on occasions different from one another, and each conviction being for a crime punishable by imprisonment for a term exceeding one year, knowingly did possess in commerce and affecting commerce a firearm, that is, Hi-Point 9mm handgun, with knowledge of a previous conviction for a crime punishable by imprisonment for a term exceeding one year; in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e)(1).

On October 9, 2019, Mr. Stephens pled guilty to the Superseding Indictment. [J.A. at 21-34.] Mr. Stephens pled pursuant to a written plea agreement. [J.A. at 14-20.]

On December 11, 2019, the Middle District of North Carolina Probation Office filed a draft Pre-Sentence Investigation Report. [J.A. at 69-98.] On December 20, 2019, Mr. Stephens' trial counsel filed a response and objection to the Draft Presentence Investigation on his behalf. [J.A. at 98-101.] On December 23, 2019, the Government filed its response to the Draft Presentence Investigation Report. [J.A. at

102-04.] On January 13, 2020, the Defendant filed a Position Paper with respect to the sentencing factors. [J.A. at 105-117.] On January 30, 2020, the Probation Officer filed the Final Presentence Report, with Addendum of Objections. [J.A. at 118-148.]

On February 26, 2020, the trial court conducted a sentencing hearing and sentenced Mr. Stephens to 198 months of imprisonment, four years of supervised release, and a \$100.00 special assessment. [J.A. at 35-58.] On March 23, 2020, the written Judgment was filed. [J.A. at 59-66.]

On March 24, 2020, Mr. Stephen's trial counsel filed a timely notice of appeal on his behalf to the United States Circuit Court for the Fourth Circuit. [J.A. at 67-68.] After the appeal was briefed, the Fourth Circuit upheld the Middle District of North Carolina in an unpublished per curiam opinion and judgment dated March 4, 2021.

B. Statement of the Facts:

According to the Presentence Report filed in this case (hereinafter "PSR"),

3. On March 6, 2010, Linwood Earl Stephens was convicted in Forsyth County Superior Court, Winston-Salem, NC, of three counts of Felony Robbery with a Dangerous Weapon (00CRS58141, 00CRS58143, and 00CRS58144) (paragraph 30) and Felony Common Law Robbery (00CRS58145) (paragraph 30). The defendant received two consecutive sentences of 46 to 65 months imprisonment. On February 3, 2015, Linwood Earl Stephens was convicted in Forsyth County Superior Court, Winston-Salem, NC, of Felony Possession with Intent to Sell/Deliver Cocaine and Felony Trafficking Cocaine (13CRS60614) (paragraph 40). The defendant was received a sentence of 35 to 51 months imprisonment.

4. On March 23, 2018, officers with the Winston-Salem Police Department (WSPD), Winston-Salem, NC, were assigned to the District Three Street Crimes Unit (SCU). At approximately 10:55 a.m., officers attempted to conduct a traffic stop on a black 2001 Chevrolet Tahoe,

bearing North Carolina license plate, DLZ7248, for traveling 50 miles per hour in a posted 35 mph area. The officers activated their lights and sirens to initiate a traffic stop. The vehicle failed to stop and drove on the wrong side of the road into oncoming traffic lanes. At that point, officers deactivated the emergency equipment, but continued to follow the vehicle. The vehicle continued south on Martin Luther King, Jr. Drive, Winston-Salem, NC., where the driver lost control of the vehicle and nearly crashed at 2098 Martin Luther King Drive. The vehicle stalled out while facing oncoming traffic. Once the vehicle appeared to be inoperable, officers approached the vehicle. The driver, subsequently determined to be Linwood Earl Stephens, was observed trying to restart the vehicle. A male was in the passenger seat, later identified as Javier Hernandez. Both individuals were given numerous verbal commands to exit the vehicle, which were ignored. The windows in the car remained up and the vehicle's doors were locked. An officer used his baton to break the passenger side front window to gain control of the subjects. At that point, Linwood Earl Stephens placed a black semi-automatic handgun into his mouth threatening suicide. Officers withdrew their service weapons and demanded the passenger exit the vehicle. Javier Hernandez eventually unlocked the passenger side door and was removed from the vehicle to a safe location away from Linwood Earl Stephens.

5. Javier Hernandez was searched and no weapons were found in his possession. Within a short period of time, Linwood Earl Stephens was able to get the vehicle started as he fled the scene a second time. Javier Hernandez only knew the driver as "dreads." Officers broadcasted a lookout via radio including the vehicle's make, model, color, tag number (as well as the broken out-front passenger side window), suspect description, and last known direction of travel.

6. Later the same day, the black 2001 Chevrolet Tahoe driven by Linwood Earl Stephens was located at 2618 Dudley Street, Winston-Salem, NC. The resident of that address gave consent to search the residence. Officers searched the residence and did not locate Linwood Earl Stephens. However, the resident advised officers that her granddaughter and her vehicle were missing. Shortly thereafter, Artesia Wright, the missing female, arrived at the residence. Artesia Wright said that she gave a male, later identified as Linwood Earl Stephens, a ride to another residence. Artesia Wright stated that earlier, Linwood Earl Stephens was outside of the residence at 2618 Dudley Street sounding the car horn. Artesia Wright went outside and noticed Linwood Earl Stephens climb out of a vehicle, holding a firearm, and he appeared to be injured. Linwood Earl Stephens asked Artesia Wright

which vehicle belonged to her. Linwood Earl Stephens, armed with a firearm, walked to her vehicle. She got into her vehicle, and Linwood Earl Stephens directed her where to drive. Artesia Wright stated during the car ride Linwood Earl Stephens took out “crack,” snorted it, and ingested some pills. He kept the gun in his lap as Ms. Wright drove. When they arrived at the location, a black female, later identified as Jessica Allen, came out of the residence. Artesia Wright said that she and Jessica Allen helped Linwood Earl Stephens walk to the residence. While Jessica Allen was assisting Linwood Earl Stephens out of the vehicle, Linwood Earl Stephens stated he was shot in the leg. Artesia Wright left the scene after Linwood Earl Stephens and Jessica Allen went into the residence. Artesia Wright recalled that she saw Linwood Earl Stephens drop a “clip” out on the ground. She described the firearm as black and stated the clip had “gold looking bullets.” Artesia Wright explained to officers that she did not know the address where she took Linwood Earl Stephens, but would be able to identify it. The interview of Artesia Wright was captured via body camera. Ms. Wright described the incident to law enforcement. She explained the defendant had his gun by the side of his leg to “show me he had it.” She went on to state, “my hands were shaking so bad when I tried to use my phone GPS to get back home.” As Ms. Wright was describing her ordeal, she was visibly upset by crying. She admitted to officers that she feared for her life.

7. Artesia Wright agreed to ride with officers back to the residence where Linwood Earl Stephens directed her to drive. Artesia Wright identified the residence where she dropped off Linwood Earl Stephens as 239 Mentor Street, Winston-Salem NC.

8. Special Weapons and Tactics (SWAT) Officers responded to 239 Mentor Street. Officers went to the front door and Olivia Allen opened the door. Olivia Allen denied that any males were in her house and refused to allow officers inside the residence. Due to Linwood Earl Stephens placing the firearm in his mouth, displaying a firearm to Artesia Wright to encourage her to drive him away, and learning that Linwood Earl Stephens had been shot, officers made entry into the residence. Linwood Earl Stephens was found hiding under a bed. Defendant Stephens refused to place his hands behind his back and he was Tasered to gain his compliance. He was placed in handcuffs and taken to the hospital. Officers obtained a search warrant for 239 Mentor Street. During the search of the residence, a black **Hi-Point, 9mm pistol, serial number PI641694**, was found as well as one magazine and nine rounds of 9mm ammunition. Investigative reports did not report the firearm as stolen.

9. Olivia Allen, the homeowner, was read her *Miranda* rights and agreed to speak with officers. She stated the seized items, including the pistol, magazine, and ammunition did not belong to her and must belong to Linwood Earl Stephens.

10. On March 25, 2018, Linwood Earl Stephens was charged with Misd. Resisting Public Officer, Felony Flee/Elude Arrest with Motor Vehicle, Misd. Reckless Driving-Wanton Disregard (18CR 52618), Speeding, Misd. Driving While License Revoked Not Impaired Revocation (18CR 52619), Felony Possession of a Firearm by Felon (18CR 52620), and Felony Second Degree Kidnapping (18CR 52621). These charges were voluntarily dismissed in Forsyth County District Court, Winston-Salem, NC, on June 18, 2019.

11. On March 25, 2018, the defendant was transported, under police escort, to Wake Forest Baptist Medical Center, Winston-Salem, NC. Records indicated, "Patient is a 34-year-old male who presents in the custody of police. Patient is extremely agitated upon arrival and unable to contribute history. The police officers report that they were attempting to arrest him when he fled. Per report, he then ended up in another woman's home, proceeding to kidnap this woman, had the woman drive him to another home, and at that this home the SWAT team arrested the patient. When they arrived at the home, the patient was in the bed and not responding to their request. At that time, he picked up a gun and placed it in his mouth. The police officers proceeded to Taser him. The patient then began grabbing at his left leg and screaming 'the rod, the rod.' Here patient is unable to contribute further to history."

[J.A. at 71-74.]

The Probation Officer calculated Mr. Stephens' base offense level as 24, in that he committed the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense. [J.A. at 74.] In addition, the Probation Officer added a four level enhancement pursuant to U.S.S.G. § 2K2.1(b)(6)(B) for possessing the firearm in connection with another felony offense, as well as two levels for recklessly creating a substantial risk of death or bodily injury during flight pursuant to U.S.S.G. § 3C1.2. [J.A. at 75.]

Although this led to an Adjusted Offense Level of 30, Mr. Stephens was found to be an Armed Career Criminal pursuant to 18 U.S.C. § 924(e). Thus, Mr. Stephens was subjected to the Armed Career Criminal statutory sentencing range of 15 years to life, with an offense level of 34 and a criminal history category of VI. [J.A. at 75, 83.] After deducting three levels for acceptance of responsibility, Mr. Stephens' advisory guideline range was calculated at 188 to 235 months. [J.A. at 92.]

Mr. Stephen's trial counsel filed fourteen objections to the original pre-sentence report. [J.A. at 98-101.] In his position paper, however, Mr. Stephens' trial counsel withdrew twelve of the fourteen objections and requested a downward departure pursuant to U.S.S.G. § 5H1.3 and/or variance based on Mr. Stephen's mental health condition. [J.A. at 105-17.]² Mr. Stephens' trial counsel requested that the Court sentence Mr. Stephens to the statutory minimum of 180 months.

In Defendant's Position Paper, Mr. Stephen's trial counsel discussed a number of facts in the Presentence Report concerning his background. He began with Mr. Stephens' unstable childhood starting when he was three years old, which contributed to Mr. Stephens' mental and emotional instability. He wrote:

The history and characteristics of this particular Defendant and the nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1) merit leniency at sentencing. The Defendant did not have a great foundation at a young age as he lived in an unhealthy home environment that included domestic violence between his parents. PSR ¶ 52. The Defendant advised that his father kicked, punched and hit his mother while he was living in the home. PSR ¶ 52. The Defendant had been placed in approximately ten foster or group homes starting when he was three years old. PSR ¶¶ 52, 53, 55.

² The remaining objection concerned Mr. Stephens' gang affiliation and were withdrawn at the sentencing hearing. [J.A. at 40.]

The Defendant was initially removed from his home when he and his siblings were left at home alone and the Defendant accidentally started a fire by playing with a lighter. PSR ¶ 52. A wheelchair-bound woman who lived on the other side of the complex was killed in the fire. PSR ¶ 52.

The Defendant was placed in the care of the Forsyth County Department of Social Services in June of 1987. PSR ¶ 53. Neglect was substantiated in the home and Social Services was in the process of terminating parental rights. PSR ¶ 53. The Defendant was never adopted. PSR ¶ 58.

While in group or foster homes, the Defendant reported that he was abused by other older children in the group home. PSR ¶ 53. The Defendant also reported that a man attempted to sexually assault him when he was approximately 12/13 years old. PSR ¶ 55. Ms. Shemelya, the mother of one of the Defendant's children, reported that the Defendant was molested in one of his group homes. PSR ¶ 58.

[J.A. at 109-10.] Mr. Stephen's trial counsel also noted that he had also experienced mental and emotional instability throughout his life.

The Defendant reported that he was diagnosed with Attention Deficit/Hyperactivity Disorder and bipolar disorder at the age of four/five. PSR ¶ 67. Wake Forest Baptist Medical Center records indicate that the Defendant was given a psychological exam on December 4, 1990 and the Defendant was receiving weekly counseling sessions through Forsyth County Social Services. PSR ¶ 68.

The Defendant noted that he was treated at the Behavioral Unit of Brenner's Children's Hospital and was prescribed various psychotropic medications as a child and as a young man. PSR ¶ 67.

These medications included Haldol, Depakote, Adderall and Nortriptyline. PSR ¶ 67. The Defendant has not taken any mental health medications since he was 15/16 years old. PSR ¶ 67.

The Defendant admitted that he attempted suicide at the age of 11/12. PSR ¶ 69. The Defendant stated that he was being driven from a group home and he jumped out of a moving van into the road. PSR ¶ 69.

He noted that he also was trying to kill himself with all of the drugs that he was using. PSR ¶ 69.

A psychological evaluation was also conducted in 1994 through the Winston-Salem/Forsyth County Schools. PSR ¶ 70. The psychological evaluation noted that the Defendant was initially referred for evaluation in 1990 while the Defendant was in second grade. PSR ¶ 70. The projective testing indicated that the Defendant “is a child who has intermittent feelings of inadequacy, helplessness, and insecurity in his current environment. These emotional issues are probably related to his early experiences with neglect and changes in foster care placements. PSR ¶ 70.

[J.A. at 110-12.] These issues continued for Mr. Stephens and were exasperated in the time period leading up to the instant offense.

Approximately five to six months prior to the instant offense, the Defendant was evicted from his residence and, as a result, was staying and sleeping in his car. PSR ¶ 60. The Defendant reported to probation that he was depressed and that “I would cry alone in my car. I did not have a lot of trust.” PSR ¶ 60.

Days prior to the offense, the Defendant reported that he was involved in an argument with his mother in which his mother blamed him for the fire when he was a child. PSR ¶ 66. His mother further blamed the Defendant for all the troubles that came after that time. PSR ¶ 66. The Defendant reported that he was “not in a good space” at that time. PSR ¶ 66.

A week prior to the instant offense, the Defendant was treated at Wake Forest Baptist Medical Center for a gunshot wound to his left thigh. PSR ¶ 65. The Defendant sustained a displaced subtrochanteric fracture of the left femur and an operation to correct the fracture occurred on March 19, 2018. PSR ¶ 65. Defendant was released from the hospital on March 23, 2018 with the following diagnosis: “acute blood loss anemia, left leg pain, altered mental status, suicidal ideation, leukocytosis, CRP elevated, cocaine abuse and marijuana abuse. PSR ¶ 65.

[J.A. at 112.]

Finally, Mr. Stephens’ trial counsel argued that he was suffering from a mental and emotional crisis during the instant offense that was connected and consistent with his previous problems. He noted that Mr. Stephens had put a handgun to his

mouth and threatened to commit suicide during his encounter with law enforcement. [J.A. at 114.] After Mr. Stephens was arrested, he was transported to Wake Forest Baptist Medical Center. [J.A. at 114.] Mr. Stephens was

transported to the medical center for a “psych” consult regarding suicidal threats when he placed a gun in his mouth. PSR ¶ 72. Baptist medical records indicated that the Defendant arrived extremely agitated and unable to contribute to medical history. PSR ¶ 11. The Defendant received the psychiatric diagnosis of Unspecified Bipolar and related disorder, Unspecified Depressive Disorder, Cannabis Use Disorder (moderate), and Cocaine Use Disorder (moderate).

[J.A. at 114.]

On this basis, Mr. Stephens’ trial counsel argued that Mr. Stephens suffered from mental and emotional conditions to an unusual degree which distinguished his case from the typical cases covered by the guidelines, thereby making him eligible for a formal downward departure under U.S.S.G. § 5H1.3, as well as a variance. [J.A. at 114-115.] Mr. Stephens’ trial counsel asked the trial Court to impose a sentence below the guideline range, and at the statutory minimum of 180 months. [J.A. at 115.]

At the sentencing hearing, the trial judge told Mr. Stephen’s trial counsel at the outset that she was “not inclined to find a departure based on my reading of your position paper.” [J.A. at 41.] She explained: “The things that you argued every defendant that comes in this courtroom can argue, and so my inclination is to address it as a variance and not as a departure.” [J.A. at 42.] After a brief colloquy with Mr. Stephen’s trial counsel in which he tried to point out the particular severity of Mr. Stephen’s mental and emotional condition, the trial judge then finalized her position. “All right. At this point the Court is not going to find a basis for a departure.” [J.A. at 44.]

Mr. Stephen's trial counsel then argued that the Court should vary downward to 180 months based upon his mental and emotional history. [J.A. at 44-46.] The Government pointed to Mr. Stephens' criminal history and the circumstances of the offense, and supported the Probation Officer's recommendation of a middle of the guideline sentence. [J.A. at 46-48.] After Mr. Stephens spoke to the court, the trial judge announced the sentence:

The Court has taken into consideration the 3553(a) factors. There's no question that Defendant grew up in a chaotic home. There is no question that he had endured substantiated neglect and was in foster care, at least ten different foster cares; that he has significant mental health history, as outlined in 64 through 70 of the PSR. There's no question that the – that mental health treatment is indicated in this case.

He has a substantial substance abuse history and a substantial criminal history that has put him in the category of being an armed career criminal on substantial acts of violence as a part of his record, including this particular offense. I think, based on my count, there have been at least nine years of incarceration between all of those offenses on your record.

Having considered the advisory guidelines and having addressed the factors outlined in 18 U.S.C. 3553, the Court is going to order that you be incarcerated for a term of 198 months. The Court believes that is reasonable under the facts of this case and is sufficient, but not greater than necessary, to address the sentencing factors.

J.A. at 52.]

On direct appeal to the Fourth Circuit, Stephens argued that his sentence was procedurally unreasonable because the district court made an erroneous finding of fact with respect to the nature of Mr. Stephens' mental condition with respect to other individuals. He also argued that his sentence was substantively unreasonable in its decision to deny his request for a downward departure because the district court

failed to adequately consider his mental health in analyzing the § 3553(a) factors. Appellant Opening Br. at 12-22.

Quoting its precedent in United States v. Louthian, 756 F.3d 295, 306 (4th Cir. 2014), the Fourth Circuit held that “[w]e are unable, however, to review a sentencing court’s decision not to depart unless the court mistakenly believed that it lacked the authority to do so.” Ex. A. Because, as in Louthian, the district court considered Stephens’ request for a downward departure but concluded that none was appropriate, the Fourth Circuit held that “because the court understood its authority, but declined to exercise it on the facts of this case,” Mr. Stephens could not contest the district court’s decision not to depart downward on appeal. Id. (quoting Louthian, 756 F.3d at 306).

Further, the Fourth Circuit held that Mr. Stephens failed to rebut the presumption that his within-Guidelines-range sentence is reasonable, and affirmed the trial court’s judgment. Ex. A.

This petition follows.

REASONS CERTIORARI SHOULD BE GRANTED

I. The Court Should Grant Certiorari to Reexamine Its Precedent Holding that Appeals Courts Have No Jurisdiction to Review a Decision to Deny a Departure Under the United States Sentencing Guidelines.

The Fourth Circuit precedent in United States v. Louthian, 756 F.3d 295, 306 (4th Cir. 2014), and previous cases is consistent with prior precedent of this Court and other Courts of Appeal.

Specifically in United States v. Ruiz, 536 U.S. 622, 627 (2002), the Court, in interpreting 18 U.S.C. § 3742(a), noted that:

Every Circuit has held that this statute does *not* authorize a defendant to appeal a sentence where the ground for appeal consists of a claim that the district court abused its discretion in refusing to depart. See, e.g., *United States v. Conway*, 81 F.3d 15, 16 (CA1 1996); *United States v. Lawal*, 17 F.3d 560, 562 (CA2 1994); *United States v. Powell*, 269 F.3d 175, 179 (CA3 2001); *United States v. Ivester*, 75 F.3d 182, 183 (CA4 1996); *United States v. Cooper*, 274 F.3d 230, 248 (CA5 2001); *United States v. Scott*, 74 F.3d 107, 112 (CA6 1996); *United States v. Byrd*, 263 F.3d 705, 707 (CA7 2001); *United States v. Mora-Higuera*, 269 F.3d 905, 913 (CA8 2001); *United States v. Garcia-Garcia*, 927 F.2d 489, 490 (CA9 1991); *United States v. Coddington*, 118 F.3d 1439, 1441 (CA10 1997); *United States v. Calderon*, 127 F.3d 1314, 1342 (CA11 1997); *In re Sealed Case No. 98-3116*, 199 F.3d 488, 491-492 (CA DC 1999).

United States v. Ruiz, 536 U.S. 622, 627 (2002). The Court also adopted this interpretation of 18 U.S.C. § 3742(a). Ruiz, 536 U.S. at 627.

After the Court's opinion in United States v. Booker, 543 U.S. 220 (2005), this interpretation was continued not just by the Fourth Circuit, but also a number of other circuit courts.

"We follow the Courts of Appeals for the First, Sixth, Eighth, Tenth, and Eleventh Circuits in declining to review, after *Booker*, a district court's decision to deny departure." *U.S. v. Cooper*, 437 F.3d 324, 333 (3d Cir. 2006) citing *United States v. Burdi*, 414 F.3d 216, 220 (1st Cir. 2005) (finding no jurisdiction to review a decision not to depart after *Booker*); *United States v. Puckett*, 422 F.3d 340, 345 (6th Cir. 2005) (same); *United States v. Frokjer*, 415 F.3d 865, 874-75 (8th Cir. 2005); *United States v. Sierra-Castillo*, 405 F.3d 932, 936 (10th Cir. 2005) (declining to review decisions not to depart after *Booker*); *United States v. Winingear*, 422 F.3d 1241, 1245-46 (11th Cir. 2005) (same).

U.S. v. Cooper, 437 F.3d 324, 332 (3d Cir. 2006).

Respectfully, the Court should consider granting certiorari and revisit the question of whether or not federal appellate courts have the jurisdiction to review trial court decisions to deny departure under the United States Sentencing Guidelines after the Court's seminal holding in United States v. Booker, 543 U.S. 220 (2005). This is especially pertinent for cases such as this case where the trial court decision not to depart was based on an error of fact.

Notably, 18 U.S.C. § 3742(e) states:

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

18 U.S.C. § 3742(e). Here, in this case particularly, the Court should grant certiorari in order to address the implications of its holding in United States v. Booker, 543 U.S. 220 (2005). Notably, as argued below the district court made a clearly erroneous finding in its stated reason for declining to exercise its discretion to downwardly depart. The Court should clarify that its pre-Booker precedent of United States v. Ruiz, 536 U.S. 622, 627 (2002), set forth in should not be applied in such a reflexive, mechanical across the board rote fashion. Rather, the Court should ensure that the actual statutory language that is the basis of its holding in Ruiz is not overlooked in cases where the district court factually erred in its stated reasons for not departing downward.

Respectfully, the Court should grant certiorari, reverse the holding of the Fourth Circuit Court of Appeals, and remand for further proceedings.

CONCLUSION

For the above stated reasons, Petitioner respectfully requests that the Court grant his petition for writ of certiorari to the Fourth Circuit Court of Appeals, and grant whatsoever other relief may be just and proper.

Respectfully submitted this the 27th day of May, 2021.

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