

No. _____

In the
Supreme Court of the United States

Emmanuel Ashemuke,
Petitioner,

v.

United States of America,
Respondent.

On Petition for a 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

Whether federal courts should defer to the Commentary of the Federal Sentencing Guidelines when it expands the definition of a term used in the text of the Guidelines beyond the term's plain meaning?

Subsidiary question – whether this Court should grant certiorari in an appropriate case to resolve the question presented, hold the instant petition, then grant certiorari, vacate the judgment below, and remand for further proceedings?

PARTIES TO THE PROCEEDING

Petitioner is Emmanuel Ashemuke, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Emmanuel Ashemuke seeks 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The unpublished opinion of the court of appeals is reported at *United States v. Ashemuke*, No. 20-11142, 2021 WL 3745544 (5th Cir. August 24, 2021)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on August 24, 2021. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT FEDERAL SENTENCING GUIDELINE

Guideline 2S1.1(a) reads:

- (a) Base Offense Level:
 - (1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of § 1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined; or
 - (2) 8 plus the number of offense levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the laundered funds, otherwise.

Application Note One to USSG 2S1.1 reads in relevant part:

“Laundered funds” means the property, funds, or monetary instrument involved in the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of 18 U.S.C. § 1956 or § 1957.

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner Emmanuel Ashemuke came to the United States in 2015, where he went to school worked long hours in a dairy plant. *See* (Record in the Court of Appeals, at 10, 183, 229). Unfortunately, he also maintained contact with someone in Nigeria who ran a “romance scheme.” *See* (Record in the Court of Appeals, at 10-12, 218-219). In these schemes, people in Nigeria pose as American men in online forums, where they approach women they perceive as emotionally vulnerable. *See* (Record in the Court of Appeals, at 10-12, 218). The perpetrators develop romantic relationships in their online personas, before finally soliciting money from their victims. *See* (Record in the Court of Appeals, at 10-12, 218). Petitioner’s role in the scheme was limited – he sent the money back to Nigeria. *See* (Record in the Court of Appeals, at 10-12, 218-219).

Petitioner pleaded guilty to one count of conspiring to violate 18 U.S.C. §1957 for his role in the scheme. A Presentence Report (PSR) calculated a Guideline sentence of 60 months, the product of an offense level of 28, and a criminal history category of I, capped at the statutory maximum. *See* (Record in the Court of Appeals, at 230). Ordinarily, a level 28 offense and a category I defendant produce a range of 78-97 months imprisonment. *See* USSG Ch. 5A. The Guidelines cap the recommendation at 60 months, however, where this is the statutory maximum. *See* USSG §5G1.1.

The defense objected to several adjustments applied by the Guidelines. *See* (Record in the Court of Appeals, at 235-241). Relevant here, it argued that the PSR incorrectly applied a 16- level adjustment under USSG §2S1.1(a)(2) for an offense involving more than 1.5 million dollars in “laundered funds.” *See* (Record in the Court of Appeals, at 235-236). In support of this adjustment, the government argued that the defendant had undertaken transactions involving a little more than \$1,550,000 in laundered funds. *See* (Record in the Court of Appeals, at 243-244, 250, 253-254). This included a little more than \$75,000 wired to Nigeria by Petitioner’s friend, Mr. Abdulwahab-Kidiri, at Petitioner’s behest. *See* (Record in the Court of Appeals, at 243-244, 253-254). Replying, the defense pointed out that no evidence existed as to the origin of money transferred by Mr. Abdulwahab-Kidiri and Petitioner’s other friends. *See* (Record in the Court of Appeals, at 267-268). Addition of two levels on the basis of these funds, Petitioner contended, represented the improper use of “mere conjecture.” (Record in the Court of Appeals, at 267-268).

At sentencing, the court finally overruled all Guideline objections and found that the Guidelines therefore recommended a 60-month sentence. *See* (Record in the Court of Appeals, at 180-181). But it took care to note that if Petitioner had been charged under a different statute, his Guideline range would have been 78-97 months:

[h]ad defendant been charged under the other money laundering statute he would not be subject to that statutory cap, and based on his guide-line range would have been looking at somewhere between 78 and 97 months. However, we're capped at 60 months because the crime carries a five-year cap.

(Record in the Court of Appeals, at 181).

After allocution and argument, the court imposed 60 months imprisonment. *See* (Record in the Court of Appeals, at 104). It stated that it found the crime disturbing and serious, *see* (Record in the Court of Appeals, at 186), and that it would have imposed the same sentence even if the Guidelines were different, *see* (Record in the Court of Appeals, at 191). The Statement of Reasons also included a disclaimer as to the effect of the Guidelines. *See* (Record in the Court of Appeals, at 295).

B. Appellate Proceedings

Petitioner appealed, challenging, *inter alia*, the addition of two levels to his “value of laundered funds” score based on the money sent to Nigeria by Mr. Abdulwahab-Kidiri. *See* Initial Brief in *United States v. Ashemuke*, No. 20-11142, 2021 WL 855653, at *10-14 (5th Cir. Filed March 3, 2021)(“Initial Brief”). In particular, he contended that if the government’s evidence showed the money was criminally derived – which he did not concede – it did not show that it had been sent with the intent to disguise its criminal origin. *See* Initial Brief, at *13-14. And, he contended, the plain meaning of the term “laundered” – which the text of the Guideline utilized – required such an intent. *See id.* He conceded that the Commentary to the Guideline offered another operative definition of “laundered” that captured all funds used in transactions violating 18 U.S.C. § 1957. *See id.* But, he contended, the plain meaning of the Guideline text should control over a counter-intuitive definition found only in the Commentary. *See id.*

The court of appeals affirmed. *See* [Appx. A]; *United States v. Ashemuke*, No. 20-11142, 2021 WL 3745544 (5th Cir. August 24, 2021)(unpublished). It questioned

whether the standard of review should be plain error, but ultimately did not resolve that question. *See Ashemuke*, 2021 WL 3745544, at *1 (“Although Ashemuke preserved only his evidentiary challenge, we need not decide the standard of review because his arguments fail under any standard.”)(internal citations omitted)(citing *United States v. Nesmith*, 866 F.3d 677, 679 (5th Cir. 2017); *United States v. Chavez-Hernandez*, 671 F.3d 494, 497-98 (5th Cir. 2012); *United States v. Rodriguez*, 523 F.3d 519, 525 (5th Cir. 2008)). Its sole commentary on the merits of Petitioner’s claim regarding the meaning of “laundering” was as follows:

The Guideline does not require that for funds to be deemed ‘laundered’ the money transfer at issue must have been intended to disguise the criminal origin of the funds. *See* § 2S1.1, comment. (n.1).

Id. (citation in original).

REASONS FOR GRANTING THE PETITION

The courts of appeals are divided as to whether federal courts should defer to the Commentary of the Federal Sentencing Guidelines when it expands the definition of a term used in the text of the Guidelines beyond the term’s plain meaning; there is a reasonable probability that the answer to that question could affect the outcome of these proceedings.

Federal district courts imposing a criminal sentence must correctly apply the Federal Sentencing Guidelines to the defendant’s conduct. *See Gall v. United States*, 552 U.S. 38, 51 (2007). To assist in resolving ambiguity, the Sentencing Commission

has promulgated a series of Application Notes that construe each Guideline. “Unlike the Guidelines themselves, however, commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment.” *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (*en banc*).

The separation of powers concerns that attend lawmaking outside the legislative process have informed a circuit split regarding the effect of Guideline Commentary. Specifically, the courts of appeals have divided as to whether the Commentary controls when it expands the definition of a term found in the Guideline beyond the plain meaning of that term. **Compare** *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018), **and** *Havis*, 927 F.3d at 386–87 (6th Cir. 2019) (*en banc*), **with** *United States v. Adams*, 934 F.3d 720, 728 (7th Cir. 2019)(expressly acknowledging the split and collecting cases), **and** cases cited therein.

This circuit split has arisen most acutely in the particular context of USSG §4B1.2’s definition of “controlled substance offense” – specifically, whether it encompasses inchoate offenses. But it may affect all manner of Guideline Commentary. *See United States v. Riccardi*, 989 F.3d 476, 483-489 (6th Cir. 2020)(citing *Havis* and declining to defer to the Commentary insofar as it defined “loss” to include a minimum of \$500 for each stolen credit card); **compare** USSG §2D1.1(c)(calling on the sentencing court to determine the weight “of [a named controlled substance]”) **with** USSG §2D1.1, comment. (n. 1)(instructing the court to add the weight of material other than the named controlled substances, where they are difficult to separate from the controlled substance); **compare** USSG

§4A1.2(e)(requiring exclusion of prior convictions from the defendant's criminal history based on the time between prior conviction (or release) and "the commencement of the instant offense") **with** USSG §4A1.2, comment. (n. 8)(defining "commencement of the instant offense" to include relevant conduct preceding the instant offense).

In short, the level of deference owed to Guideline Commentary has given rise to a widespread and judicially acknowledged circuit split. This Court should grant certiorari to address the issue: it may affect a wide array of Guideline issues, and it affects the important question of how administrative agencies may make law without Congress.

The question is presented in this case. Here, Petitioner argued below that certain funds transferred to a Nigerian bank account ought not be considered "laundered funds" absent proof of an intent to disguise their criminal origin. This argument is supported by the plain language of the Guideline, which refers to "laundered funds." *See* USSG §2S1.1(a). This Court, after all, has observed that, "taking steps to make funds appear legitimate is the common meaning of the term 'money laundering.'" *Cuellar v. United States*, 553 U.S. 550, 557 (2008)(citing American Heritage Dictionary 992 (4th ed.2000) (defining "launder" as "[t]o disguise the source or nature of (illegal funds, for example) by channeling through an intermediate agent"); Black's Law Dictionary 1027 (8th ed.2004) (defining "money-laundering" to mean "[t]he act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced")).

The court below rejected this argument on the sole ground that the Commentary defines violations of certain criminal statutes to be “laundering” whether or not the transaction is undertaken with an intent to disguise. *See [Appx. A]; United States v. Ashemuke*, No. 20-11142, 2021 WL 3745544, at *1 (5th Cir. August 24, 2021)(unpublished)(“The Guideline does not require that for funds to be deemed ‘laundered’ the money transfer at issue must have been intended to disguise the criminal origin of the funds. *See* § 2S1.1, comment. (n.1).”)(citation in original). As such, the proper resolution of at least one issue in the case depends on the level of deference to be given to the Commentary. Specifically, it depends on the appropriate level of deference when the Commentary expands the plain meaning of an undefined term found in the Guideline text.

This case, however, may not be an appropriate candidate for a plenary grant of certiorari. The court below questioned the proper standard of review, though it declined to resolve the matter. *See Ashemuke*, 2021 WL 3745544, at *1. Further, while subtraction of the disputed amount from the total “laundered funds” would change Petitioner’s offense level, his Guideline range exceeded his statutory cap. This would be the case even if the two disputed levels were subtracted. *See* (Record in the Court of Appeals, at 181); USSG Ch. 5A. As such, the ultimate recommendation of the Sentencing Commission would remain a sentence of 60 months even if he prevailed. *See* USSG §5G1.1. These issues may mean that another case would be a cleaner vehicle to resolve the circuit split.

There is nonetheless a reasonable probability of a different result in the event that the Court grants certiorari on this important issue, and resolves it against deference to the Commentary in this circumstance. As noted, a conclusion that the Commentary cannot expand the definition of an undefined term in the Guideline would establish a misapplication of USSG §2S1.1. Further, even assuming that the issue were reviewed for plain error, Petitioner could take advantage of changes in the law until the conclusion of direct review to establish that error is “plain.” *See Henderson v. United States*, 568 U.S. 266 (2013). Finally, there is some evidence in the record that the district court was influenced by the extent to which the defendant’s Guideline range exceeded the statutory cap of 60 months. *See* (Record in the Court of Appeals, at 181). There is thus a reasonable probability that a reduced offense level would affect the outcome even if it did not affect the Commission’s ultimate recommendation.

As such, if this Court grants certiorari in the near future to resolve the circuit split identified in the question presented – and it should – it would be appropriate to hold the instant petition, grant certiorari, vacate the judgment below, and remand for further proceedings. *Lawrence on behalf of Lawrence v. Chater*, 516 U.S. 163, 167-168 (1996).

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 22nd day of November, 2021.

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