No. _____

In the

Supreme Court of the United States

_____

Donald Ray Johnson,

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 sentencing courts are bound by the illustrations found in Guideline Commentary?

PARTIES TO THE PROCEEDING

Petitioner is Donald Ray Johnson, 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 Donald Ray Johnson seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The most recent published opinion of the court of appeals is reported at *United States v. Johnson*, 14 F.4th 342 (September 16, 2021). It is reprinted in Appendix A to this Petition. The first unpublished opinion of the court of appeals is reported at *United States v. Johnson*, 812 Fed. Appx. 252 (5th Cir. July 14, 2020)(unpublished). It is attached as Appendix B. The district court's most recent judgment of the district court was issued October 13, 2020 and is attached as Appendix C. Its first judgment, which was vacated, was issued July 19, 2019 and is attached as Appendix D. The district court issued two orders on remand. The first, which it later struck, was issued August 10, 2020, and is attached as Appendix E. The second was issued August 31, 2020, and is attached as Appendix F.

JURISDICTION

The opinion and judgment of the Fifth Circuit were entered on September 16, 2021. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES AND FEDERAL SENTENCING GUIDELINES

Section 994 of Title 28 states in relevant part:

> (a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—
>
> (1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—
> (A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;
(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;
(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and
(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—
(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;
(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;
(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;
(D) the fine imposition provisions set forth in section 3572 of title 18;
(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and
(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)

(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

***

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

***

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

***

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

***

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

Federal Sentencing Guideline 1B1.3 provides:

(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 acts and omissions of others that were--
(i) within the scope of the jointly undertaken criminal activity,
(ii) in furtherance of that criminal activity, and
(iii) reasonably foreseeable in connection with that 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.

***

Note 1 to USSG §1B1.3 provides:

Sentencing Accountability and Criminal Liability.--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.

Note 3 to USSG §1B1.3 provides in relevant part:

3. Jointly Undertaken Criminal Activity (Subsection (a)(1)(B)).--
(A) In General.--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:

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

The conduct of others that meets all three criteria set forth in subdivisions (i) through (iii) (i.e., "within the scope," "in furtherance," and "reasonably foreseeable") is relevant conduct under this provision. However, when the conduct of others does not meet any one of the criteria set forth in subdivisions (i) through (iii), the conduct is not relevant conduct under this provision.

(B) Scope.--Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of 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). In doing so, the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others. Accordingly, the accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).

In cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.

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.

(C) In Furtherance.--The court must determine if the conduct (acts and omissions) of others was in furtherance of the jointly undertaken criminal activity.

***

Illustration Six to Note 4 to USSG §1B1.3 provides:

Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity.

STATEMENT OF THE CASE

In the late Summer and Fall of 2018, Lubbock, Texas police conducted a series of controlled buys from a suspected drug house. *See* [Appx. A]; *United States v. Johnson*, 14 F.4th 342, 344 (5th Cir. Sept. 16, 2021). In November, they executed a search warrant for this house and encountered Petitioner in the kitchen. *See Johnson*, 14 F.4th at 344. He had 39.32 grams of cocaine base with him, along with $2,846 in cash. *See id.* When they searched further, they found $1,200 hidden behind a damaged dry wall in the kitchen, and $259 in the living room where they encountered and arrested a different person. *See id.* Officers found some mail addressed to Petitioner; other mail sent to the house had been addressed to two other people. *See id.* According to the Presentence Report, "…when questioned by police after his arrest, Johnson "claimed ownership of any property located inside the residence." *Id.*

Petitioner pleaded guilty to one count of possessing with intent to distribute cocaine base. *See id.* at 344. Over his objection, the court calculated his drug quantity for the purposes of the Sentencing Guideline by converting all of the cash found in the house to cocaine base and attributing it to the defendant. *See id.* at 345. This followed testimony from a police officer – unconnected to the investigation – who said that drug traffickers hide money in different places in drug houses to avoid robbery, and that even amounts like the $1,200 were usually intended to debts to a supplier. *See id.*

Petitioner appealed, contending that the district court had not adequately specified the basis for its conclusion that all of the cash in the house could be attributed to the defendant. *See id.* at 345-346; Appellant's Initial Brief in *United States v. Johnson*, No. 19-10887, 2019 WL 5789902, at **10-14 (5th Cir. Filed October 28, 2019).

The court of appeals agreed, vacated the sentence, and remanded. It noted that:

> [t]o hold Johnson indirectly accountable under § 1B1.3 for third-party drug sales, the district court was required to find the following: (1) Johnson agreed to participate jointly in drug sales with a third party, (2) the drug sales at issue were within the scope of that joint activity, and (3) Johnson could have reasonably foreseen the quantity of drugs represented by those sales in connection with the joint undertaking.

[Appx. B]; *United States v. Johnson*, 812 Fed. Appx 252 (5th Cir. 2020)(unpublished)(citing USSG §1B1.3(a)(1)(B), comment. (n.3(B)(D)), and *United States v. Smith*, 13 F.3d 860, 864-65 (5th Cir. 1994)). It also noted that the district court "did not make an express finding whether Johnson was directly or indirectly responsible for the disputed currency." *Johnson*, 812 Fed. Appx. at 252.

The court below aptly described the district court's response to this order:

> On remand and without conducting any additional fact-finding, the district court issued an order stating that it was making factual findings supporting a determination that Johnson was "indirectly" responsible for the entire $7,809 seized from the 2nd Street residence. The district court then made the following findings: "1. Defendant agreed to participate jointly in drug sales with a third party; 2. [t]he drug sales at issue were within the scope of that joint activity; [and] 3. Defendant could have reasonably foreseen the quantity of drugs represented by those sales in connection with the joint undertaking[.]"

Johnson, 14 F.4th at 344. After correcting its use of a $31.75/gram conversion rate – which rate had already been rejected by both parties, the government's expert, and the court itself, *see id.* at 346 – the court then resentenced Petitioner in absentia, *see* [Appx C]. The court denied Petitioner's motion for a new Addendum to the Presentence Report, and imposed the same sentence of 105 months. *See Johnson*, 14 F.4th at 346.

A new panel of the Fifth Circuit accepted this response to the prior panel's order, rejecting Petitioner's contention that the district court had failed to comply with its mandate. *See id.* at 347-349.

Petitioner also argued that the record would not support a finding that money found outside his presence arose from his jointly undertaken criminal activity. *See* Appellant's Initial Brief in *United States v. Johnson*, No. 20-11046, 2020 WL 7907052, at **15-21 (5th Cir. Filed December 23, 2020)("Second Initial Brief"). In support, he referred to language in Illustration Six in Application Note Four to USSG §1B1.3, the Relevant Conduct Guideline. *See* Second Initial Brief, at *18. In that Illustration, the Sentencing Commission said that drug dealers who work in the same geographic area and share a source of supply are not engaged in jointly undertaken criminal activity, so long as they "operate independently" and do not "pool[their] resources and profits." USSG §1B1.3, comment. (n. (4)(C)(vi)).

The court below rejected that claim too. *See Johnson*, 14 F.4th at 349-351. It said that the defendant's presence in the house with other drug dealers could give rise to a permissible inference of jointly undertaken criminal activity:

> First, Johnson plausibly agreed to jointly participate in drug sales. While the record does not indicate who those third parties were, it shows that Johnson was the resident of a home that was specifically used by multiple drug dealers to distribute narcotics. For starters, LPD's controlled buys at the house revealed that several individuals were selling drugs from that location. Moreover, Johnson and other individuals received mail that was addressed to the 2nd Street residence. On the night of the drug bust, Johnson and a second individual were arrested from the home. Williams testified unrebutted that the 2nd Street Residence was used as a "trap house" to deal drugs and that the amount and locations of currency found within the home were consistent with narcotics trafficking. These facts accord with the Sentencing Guidelines' broad definition of "jointly undertaken criminal activity," i.e., "a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy."

Id. at 349-350 (citation omitted)(quoting USSG §1B1.3, comment. n.(3)(A)).

Notably, the Fifth Circuit accepted that the government had produced no evidence that Petitioner and other dealers had pooled resources or shared profits. *See id.* at 350. Yet it found that such an arrangement was not necessary to a finding of jointly undertaken criminal activity,

Illustration Six notwithstanding. *See id.* ("…evidence suggests that Johnson is responsible for jointly undertaken criminal activity even though it does not reveal he and others pooled resources or profits.").

REASONS FOR GRANTING THE PETITION

The decision below conflicts with that of another United States Court of Appeals on an important matter, namely whether federal sentencing courts are bound by the Illustrations found in Guideline Commentary.

Hoping to contain sentencing disparity and provide proportional punishment for federal criminal offenses, Congress ordered the Sentencing Commission to promulgate a series of Sentencing Guidelines. *See* 28 U.S.C. §§ 994(f), 994(m). These Guidelines are accompanied by Application Notes and other official commentary. In the case of USSG §1B1.3, which governs the scope of conduct to be considered in applying Chapters Two and Three of the Guidelines, the Commission has promulgated a series of helpful illustrations. *See* USSG §1B1.3, comment. (n. (4)). These help show when the defendant's Guideline range may be adjusted upward based on the conduct of another. *See id.* Illustration Six in Application Note (4)(C) figures heavily in this case. It explains that drug dealers operating independently in the same physical space are not engaged in jointly undertaken criminal activity unless they pool resources and profits:

> Defendant P is a street-level drug dealer who knows of other street-level drug dealers **in the same geographic area** who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but **otherwise operate independently**. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, **pools his resources and profits with four other street-level drug dealers**. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity.

USSG §1B1.3, comment. (n. (4)(C)(vi))(emphasis added). Similar Illustrations may be found in USSG §2T1.1, comment. (n. 1), USSG §4A1.2, comment. (n. 11), and USSG §5G1.2, comment. (n. (3)(C)).

The Eleventh Circuit has held in terms that the Illustrations to USSG §1B1.3 bind federal courts applying that Guideline. *United States v. Reese,* 67 F.3d 902, 908 (11th Cir. 1995)("The commentary of section 1B1.3, and its examples, are binding on this court.")(citing *Stinson v. United States,* 508 U.S. 36 (1993)); *see also United States v. Aguera*, 281 F. App'x 893, 895–96 (11th Cir. 2008)(unpublished)(finding jointly undertaken criminal activity where defendant recruited additional participants to a fraudulent scheme).

The binding status of these Illustrations, and in particular Illustration Six, is also reflected in the precedent of the Second Circuit. That court has consistently vacated sentences that depend on the attribution of another's conduct to the defendant, absent evidence that the two designed a scheme together, pooled resources or profits, or tangibly benefitted from each other's success. *See United States v. Studley,* 47 F.3d 569, 575 (2d Cir. 1995)(vacating sentence in telemarketing fraud case, because Illustration vi "demonstrates, first, that a defendant's knowledge of another participant's criminal acts is not enough to hold the defendant responsible for those acts[, and] also demonstrates that a relevant factor in determining whether activity is jointly undertaken is whether the participants pool their profits and resources, or whether they work independently."); *United States v. Mulder,* 273 F.3d 91, 118–19 (2d Cir. 2001)(citing *Studley*); *United States v. Khandrius*, 613 F. App'x 4, 6–8 (2d Cir. 2015)(unpublished)(same); *United States v. Platt*, 608 F. App'x 22, 31 (2d Cir. 2015) (unpublished)(same).

The published decision below, however, directly contradicts the terms of Illustration Six. It relies on the bare fact of the defendant's co-presence with other third parties in a drug house to find that they engaged in a jointly undertaken criminal enterprise. *See* [Appendix A]*; United States v. Johnson*, 14 F.4th 342, 349-350 (5th Cir. September 16, 2021). Moreover, it does so notwithstanding the absence of any evidence that they co-designed the operation, nor that their

conduct benefitted each other. *See Johnson*, 14 F.4th at 349-350. Indeed, it explicitly holds that persons may engage in jointly undertaken criminal activity even if "there was 'no evidence'… that [actors] 'ever pooled their profits, loaned each other money, or shared each others' drugs[.]'" *Johnson*, 14 F.4th at 351 (quoting *United States v. Smith*, 13 F.3d 860 (5th Cir. 1994))(first brackets added, second brackets in original); *see also id.* ("And, like with Smith, evidence suggests that Johnson is responsible for jointly undertaken criminal activity even though it does not reveal he and others pooled resources or profits.").

This directly contradicts the Illustration. The Illustration states that drug dealers selling "in the same geographic area" do not engage in jointly undertaken criminal activity if "they otherwise operate independently," but do so engage if they "pool[their] resources and profits." USSG §1B1.3, comment. (n. (4)(C)(vi)). Again, the decision below found jointly undertaken criminal activity on the basis of geographic proximity, explicitly disclaiming the significance of unpooled resources and profits. *See Johnson*, 14 F.4th at 351.

Accordingly, the courts of appeals have divided on the significance of the Illustrations found in Guideline Commentary. The Second Circuit adheres to these Illustrations in construing the Relevant Conduct, and the Eleventh Circuit expressly holds them binding. But the court below disclaimed their significance in the instant case. The Illustrations found in the Relevant Conduct Guideline provide guidance on a range of diverse factual scenarios, covering case areas as diverse as drug trafficking and importation, distribution of child pornography, robbery, and check fraud. USSG §1B1.3, comment. (n. (4)(C)). The significance of the Illustrations should therefore be settled and uniform – it should not depend on the accident of the geography. The uniformity of federal sentencing in diverse geographic regions is, after all, a major purpose behind the Sentencing Guidelines. *See United States v. Booker*, 543 U.S. 220, 253-254 (2005).

This case well presents the issue. As noted, the court below reached a conclusion opposite to the Illustration on materially identical facts: 1) same physical space, 2) no pooling of resources, and 3) no pooling of profits. Indeed, it held that pooling of resources and profits is not necessary to jointly undertaken criminal activity. *See Johnson*, 14 F.4th at 351.

The outcome, moreover, likely depends on whether the Illustration is held to bind the sentencing courts. If the district court had attributed to Petitioner only the cash and drugs found in his immediate presence, his Guideline range would have been 77-96 months imprisonment. *See id*. at 345. The district court increased the range, however, to 84-105 months imprisonment on the basis of cash found elsewhere in the house, on the ground that Petitioner was indirectly responsible for the conduct of another. *See id.*

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 15th day of December, 2021.

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