

No.

IN THE
SUPREME COURT OF THE UNITED STATES

TIFFANY FRANKLIN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Karen H. Jackson*
Law Offices of Karen H. Jackson
560 S. McDonough St., Ste., D
Montgomery, Alabama 36104
Telephone: 334.491.1102
Email: khjlawoffices@gmail.com

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*Counsel of Record

QUESTION PRESENTED

This is a case of first impression of whether a two-point enhancement for the abuse of position of trust under USSG § 3B1.3 should apply to a vault teller whose job duties do not rise to the level of a fiduciary. The Circuits are split on the determining factors for consideration on whether the sentence enhancement is proper. This Court should establish a bright line rule that a fiduciary duty must exist for the purposes of applying the sentence enhancement.

LIST OF PROCEEDINGS

United States v. Franklin, Appeal number 21-14358-AA
(11th Cir. 2022).

United States v. Franklin, 2:20-cr-44-LSC-SMD (M.D. AL
December 1, 2021).

TABLE OF CONTENTS

QUESTION PRESENTED	ii
LIST OF PROCEEDINGS	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION.....	1
RELEVANT U.S.S.G. § 3B1.3 PROVISIONS	2
INTRODUCTION	3
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT.....	5
I. The Circuits are split in deciding the determining factors for the application of U.S.S.G. § 3B1.3 to the position of vault teller..	5
II. The Eleventh Circuit's reasoning and decision conflicts with other Courts of Appeal.....	11
CONCLUSION.....	18

TABLE OF AUTHORITIES

Cases

United States v. Milligan, 958 F.2d 345 (11 th Cir. 1992)..	10, 14, 16
United States v. Brelsford, 982 F.2d 269 (8 th Cir. 1992)	12
United States v. Brogan, 238 F.3d 780 (6 th Cir. 2001).....	15, 16
United States v. Fisher, 7 F3d 69, (5 th Cir. 1993).....	12
United States v. Franklin, Appeal number 21-14358-AA (11th Cir. 2022).....	iii, 1, 10, 11
United States v. Hodge, 259 F.3d 549 (6th Cir. 2001).....	14
United States v. Humphrey, 279 F.3d 372 (6 th Cir. 2002).....	13, 16
United States v. Issacson, 155 F.3d 1083 (9 th Cir. 1998).....	11
United States v. Johnson, 4 F.3d 904 (10 th Cir. 1993),cert. denied 510 U.S. 1123 (1994).....	11
United States v. Ragland, 72 F.3d 500 (6 th Cir. 1996).....	16
United States v. Sweet, 630 F.3d 477 (6 th Cir. 2011).....	12, 13, 16
United States v. Tribble, 206 F.3d 634 (6 th Cir. 2000).....	8, 16

Statutes

18 U.S.C. §1343.....	4
18 U.S.C. §1344(1)	4
18 U.S.C. §656.....	4
28 U.S.C. §1257(a)	1

Other Authorities

U.S.S.G. § 3B1.3.....	passim
U.S.S.G. § 3B1.3 comment. (n.1)	3
U.S.S.G. § 3B1.3 comment. (n.4)	3, 7

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Tiffany Franklin, respectfully requests that this Court grant her writ of *certiorari* to review the judgment of the Eleventh Circuit Court of Criminal Appeals, which concluded that no plain error was found in the lower court’s application of U.S.S.G. § 3B1.3 sentencing enhancement and affirmed Ms. Franklin’s conviction and sentence “in all respects.”¹

OPINIONS BELOW

The opinion of the United States Court of Criminal Appeals for the Eleventh Circuit denying Ms. Franklin’s direct appeal is unpublished and is included in Petitioner’s Appendix.²

JURISDICTION

The judgment of the United States Court of Criminal Appeals for the Eleventh Circuit was filed on October 7, 2022.³ The deadline for filing the Petition for a Writ of Certiorari is January 5, 2023. The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

¹ *United States v. Franklin*, Appeal number 21-14358-AA (11th Cir. 2022). Pet. App. 1a.

² *Id.*

³ *Id.*

RELEVANT U.S.S.G. § 3B1.3 PROVISIONS

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under § 3B1.1 (Aggravating Role); if this adjustment is based solely on the use of special skill, it may not be employed in addition to an adjustment under § 3B1.1 (Aggravating Role).

Commentary

Application Notes:

1. “Public or Private Trust” refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant’s responsibility for the offense more difficult). This adjustment, for example, applies in the case of an embezzlement of a client’s funds by an attorney serving as a guardian, a bank executive’s fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment does not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized

by the above-described factors. U.S.S.G. § 3B1.3 comment. (n.1).

2. “Special Skill” refers to a skill not possessed by members of the general public and usually requiring substantial education, training, or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts. U.S.S.G. § 3B1.3 comment. (n.4).

INTRODUCTION

This case is a case of first impression of whether U.S.S.G. § 3B1.3 applies to a vault teller who has no special skill. U.S.S.G. § 3B1.3 allows for a two-point sentencing enhancement if the Government can show by a preponderance of the evidence that the sentence enhancement is applicable because the circumstances existed that the defendant was in a position of “Public or Private Trust” or the defendant used or possessed a “special skill” that significantly facilitated the commission or concealment of the offense. In Franklin’s case at trial, the government failed to show that either circumstance existed.

STATEMENT OF THE CASE⁴

Tiffany Franklin was tried and convicted of one count of Theft or Embezzlement by Bank Employee in violation of 18 U.S.C. §656, two counts of Bank Fraud in violation of 18 U.S.C. §1344(1) and three counts of wire fraud in violation of 18 U.S.C. §1343.⁵

Her sentencing hearing was held on December 1, 2021, before the Honorable Judge L. Scott Coogler.⁶ There were no objections to the Presentence Investigation Report (hereinafter “PSR”) prepared by the United States Probation Office.⁷ The district court adopted the findings of the PSR that the offense level should be 19 and the criminal history level is I, with a guideline range of 30-37 months, the supervised release period is two to five years on counts one through three, and one to three years on counts five, six, and eight, with a fine range of \$10,000 to \$1 million..⁸

⁴ Citations to the trial court record are to the volume and page number as indicated in Appellant’s Record Excerpts, which was filed in the Eleventh Circuit below.

⁵ App. R. Ex. 97.

⁶ App. R. Ex. Doc. 129 at 1.

⁷ *Id.* at 2.

⁸ App. R. Ex. Doc. 129 at 2.

The PSR reflected a 17 point base offense level and a 2 point enhancement for abuse of position.⁹ After witnesses addressed the court, the court then sentenced Franklin to 37 months, for each count, to be served concurrently, with a supervised release period of five years for counts 1, 2, and 3 and a period of three years supervised release for counts 5, 6, and 8 with special conditions.¹⁰ The district court further ordered Franklin to pay restitution to the financial institutions in the amount of \$202,000, \$550.00, and to Goodwyn Middle School \$13,866.¹¹ Ms. Franklin's direct appeal against her conviction and sentence was rejected.¹²

REASONS FOR GRANTING THE WRIT

I. The Circuits are split in deciding the determining factors for the application of U.S.S.G. § 3B1.3 to the position of vault teller.

In this case, the PSR simply asserts that the enhancement is justified because Franklin used her positions as banker, vault teller, and bookkeeper at Wells Fargo, BB&T, and Goodwyn Middle

⁹ App. R. Ex. Doc. PSR at 7-8.

¹⁰ App. R. Ex. Doc. 129 at 15.

¹¹ *Id.* at 16.

¹² *Franklin* Pet. App. A 1a-11a.

School, respectively, to facilitate the fraud schemes. However, at trial, the Government presented no evidence that either circumstance existed to warrant the application of the U.S.S.G. § 3B1.3 sentence enhancement.

Franklin did not Possess Professional or Managerial Discretion

The trial testimony established that the extent of Ms. Franklin's discretionary authority as vault teller entailed maintaining a key and combination to the vault that allowed her to be in the vault on her own (without another employee present) and exercising her judgment in determining when to contact one of her supervisors to ship the bank's assets from Old Farm branch office to the BB&T main office and to exchange one money denomination held in the vault for another.¹³ Testimony at trial evidenced that other BB&T employees had access to the vault by exercising a procedure termed dual control, where two employees went together into the vault.¹⁴

¹³ *Franklin* Pet. App. B 12a, 16a, 18a (Testimony of Lisa Parr).

¹⁴ *Id.*, *Franklin* Pet. App. B 18a (Testimony of Lisa Parr ... Bank vault procedures were not followed).

A substantial number of the Government witnesses testified that Franklin was hired at low level employment positions that were capable of being subjected daily to supervision and audit.¹⁵ As a bank and vault teller, Ms. Franklin submitted daily transaction reports for both cash drawers.¹⁶ At least two of Ms. Franklin's BB&T supervisors called by the Government testified that just by a brief glance at daily reports generated by Franklin that it was immediately apparent that something was wrong.¹⁷

Ms. Franklin did not Possess Special Skills

“Special Skill” refers to a skill not possessed by members of the general public and usually requiring substantial education, training, or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts. *U.S.S.G. § 3B1.3 comment. (n.4).*

¹⁵ *Franklin* Pet. App. B 13a, 15a, 16a -17a (Testimony of Lisa Parr... Ms. Parr had the authority and responsibility to audit the vault).

¹⁶ *Id.* (Testimony of Lisa Parr).

¹⁷ *Franklin* Pet. App. B 16a, 17a, 18a (Testimony of Lisa Parr... received a report every Monday for review and she was aware for weeks that the cash management of Old Farm Branch did not agree with the bank's stated goals; reviewed Franklin's balance sheet and recognized the problem immediately). *Franklin* Pet. App. C 19a ln. 17, Pet. App. 20a ln. 5 (Testimony of Karey Wilbeck..... her review of Franklin's daily balance sheet report indicated a problem and a red flag).

The government failed to present any evidence of a special skill possessed by Ms. Franklin to facilitate or conceal the offense of embezzlement and fraud. The evidence at trial did not demonstrate that Ms. Franklin, as vault teller, had any special skill significantly different from that of an ordinary bank teller.

The evidence supporting Ms. Franklin's conviction for embezzlement showed that the offense was committed in the same manner and with the same skills of an ordinary bank teller.¹⁸ An ordinary embezzlement by a bank teller entails the teller dipping into the till, manipulating the bank's computer system, and fabricating reports by force balancing the drawer to conceal the embezzlement.¹⁹ The only notable and insignificant difference is that Ms. Franklin was able to do the same typical embezzlement scheme through the bank's drive through teller window and the bank's vault.

In *United States v. Tribble*, 206 F.3d 634, 636-637 (6th Cir. 2000), the postal worker was convicted for a scheme of

¹⁸ *Franklin* Pet. App. B 14a ln. 21.

¹⁹ *Franklin* Pet. App. B 13a, 15a.(Testimony of Lisa Parr..."every cash box – and the vault was considered a cash box – was required to be counted daily");

manipulating his computer transactions by issuing fraudulent money orders to himself, followed by force balancing his drawer to cover his scheme. At sentencing, the district court applied the two-point enhancement for abuse of trust position. On appeal, the Sixth Circuit reversed the enhancement finding Tribble's postal position to no more than a typical bank teller with no higher level of employer's trust and his scheme of embezzlement was no more advanced than that of an ordinary bank teller. Simply stated, Franklin was convicted of a very ordinary embezzlement scheme that could be easily detected with a tight accounting system and bank oversight. Ms. Franklin, as a bank and vault teller, exercised no more discretionary authority or possessed any higher skill or fiduciary duty than an ordinary bank teller.

In affirming her sentence, the Eleventh Circuit did not properly consider and place emphasis on the factors set forth in its precedent *Milligan* in deciding to affirm the district court's application of the enhancement to Franklin's sentence. In *Milligan*, the Eleventh Circuit determined that among the factors that should be considered in determining whether a defendant abused a

position of trust are: the extent to which the position provides the freedom to commit a difficult-to-detect wrong and whether an abuse could be simply or readily noticed; the defendant's duties as compared to other employees; the level of specialized knowledge; the level of authority in the position; and the level of public trust.²⁰ Had the Eleventh Circuit fully considered these same factors in regards to the facts in Franklin, Ms. Franklin's case would have been remanded for re-sentencing.

The connection between facts in *Franklin* and *Milligan* are tenuous at best, yet the Eleventh Circuit affirmed the District Court's ruling allowing the enhancement to apply to Ms. Franklin's sentence based on its finding that Ms. Franklin's employment circumstances were like Milligan's employment as a postal clerk.²¹ Had Ms. Franklin's case been decided in the Sixth Circuit or given

²⁰ *U.S. v. Milligan*, 958 F.2d 345 (11th Cir. 1992) (Milligan's sentence enhancement for abuse of trust was affirmed because he occupied a position of trust where as a postal worker, he was among a small group of postal workers with control of a mailroom key that provided access to large sums of money that were not subject to tight accounting controls as those of a bank teller). Notably, the USSG 3B1.3 application note emphasizes that due to special nature of the U.S. mail, any postal worker who engages in the destruction of theft of the mail will be deemed to be in a position of trust.

²¹ *Franklin*, Pet. App. A 10a.

proper consideration under the factors established by the Eleventh Circuit, Ms. Franklin's case would have been remanded to the district court for re-sentencing.

II. The Eleventh Circuit's reasoning and decision conflicts with other Courts of Appeal.

Notably, the Eleventh Circuit points out in its decision there is no prior caselaw for the application of the sentence enhancement U.S.S.G. § 3B1.3 to vault tellers in the Eleventh Circuit or this Court.²² Other Circuits have addressed the issue of applying the enhancement to vault tellers and others with differing opinions on the emphasis placed on the facts.

The Ninth Circuit in *United States v. Issacson*, 155 F.3d 1083 (9th Cir. 1998) upheld the enhancement where the vault teller had lengthy tenure and was not subjected to all of the bank's security checks. The Tenth Circuit in *United States v. Johnson*, 4 F.3d 904 (10th Cir. 1993), cert. denied 510 U.S. 1123 (1994) upheld the

²² *Franklin*, Pet. App. A 10a.

enhancement where the vault teller managed the vault responsibilities. The Fifth Circuit in *United States v. Fisher*, 7 F3d 69, (5th Cir. 1993) upheld the enhancement where the defendant, a head cashier, began to embezzle after her supervisor stopped conducting monthly spot-checks. The Eighth Circuit in *United States v. Brelsford*, 982 F.2d 269, 272 (8th Cir. 1992) upheld the enhancement and noted that the defendant was a teller supervisor who monitored other tellers.

The division among the Circuit decisions of whether to apply the enhancement seems to occur where the Circuits have over emphasized the employer's supervision, or the lack thereof of the employee, as opposed to determining whether the employee has a higher fiduciary duty contemplated by the legislature in the commentary application of U.S.S.G. § 3B1.3.

The Eleventh Circuit's determining factors for consideration in applying the enhancement more closely align with the cases decided by the Sixth Circuit in examining whether a fiduciary duty exists for the defendant. The Sixth Circuit in *Sweet* found that the application for the enhancement did not apply where the evidence

showed that Sweet's position was slightly above an ordinary bank teller.²³ Although Sweet had been entrusted with auditing other tellers' cash drawers, or certifying the existence of a teller's cash shortage, the court held that Sweet's position did not entail more than normal duties of honesty and fealty imposed on all employees and he did not possess the substantial discretion to manage the bank's funds to warrant the abuse of trust enhancement.²⁴

In reversing the district court's application of the enhancement to Sweet's sentencing, the Sixth Circuit relied on its precedents set forth in *Humphrey*, *Brogan*, and *Tribble*. All three cases on appeal resulted in the reversal of the district court's application of the sentence enhancement for abuse of a position of trust.²⁵

Humphrey, a bank vault teller, was convicted by a jury for the embezzlement of over \$500,000 in the bank's shipments of food

²³ *United States v. Sweet*, 630 F.3d 477, 482 (6th Cir. 2011) (Sweet, as a Customer Service Lead for National City Bank, was convicted for stealing money from other tellers' drawers by gaining their access codes. Sweet had been given additional duties by the bank to perform cash drawer audits, teller coaching, reviewing the tellers' reports, and etc).

²⁴ *Id.*

²⁵ *Id.* at 481.

stamps.²⁶ At sentencing, the district court applied the abuse of trust enhancement. On appeal, the Sixth Circuit reversed and remanded for re-sentencing.²⁷ The court noted that it is the level of discretion the employee exercises in her position, not the amount of supervision exercised over the employee, that is the touchstone for application of the enhancement.²⁸

The court found that as a vault teller, Humphrey's position fell somewhere between ordinary bank teller and bank executive, the two positions exemplified in the application notes.²⁹ The court considered the undisputed fact that although Humphrey had little to no direct supervision, she had no authority to exercise substantial professional or managerial discretion in her position, which is a critical consideration in determining the application of the enhancement.³⁰ Although the Eleventh Circuit has noted similar considerations set forth in *Milligan*, Franklin's facts in her case did not receive the critical consideration by the Eleventh

²⁶ *United States v. Humphrey*, 279 F.3d 372, 375 (6th Cir. 2002).

²⁷ *Id.* at 382.

²⁸ *Id.* at 380.(citing to *United States v. Hodge*, 259 F.3d 549, 556 (6th Cir. 2001)).

²⁹ *Id.* at 380.

³⁰ *Id.* at 381.

Circuit in its decision to affirm the application of the enhancement to Franklin’s sentence.

Kevin Brogan, as an assistant corporate treasurer, had the job duty of setting up and formatting corporate wire transfers. Brogan prepared a \$8 million dollar request payable to a phony corporation, gained his supervisor’s approval, and then transferred the money to his own personal account.³¹

In *Brogan*, the Sixth Circuit found that the district court had improperly considered what in fact happened, rather than inquiring into the “inherent nature of the work” that Brogan performed and the discretion he was accorded in his position.”³² The court found that Brogan lacked the authority to transfer any funds without a supervisor’s approval, the fact that Brogan was lightly supervised, or the company used laxed auditing procedures, did not support application of the enhancement.³³

The *Brogan* court also noted a critical distinction between employees who “handle” an employer’s property, and those who

³¹ *United States v. Brogan*, 238 F.3d 780 (6th Cir. 2001).

³² *Id.* at 784.

³³ *Id.* at 785.

“administer” the property, because only the latter will merit application of the sentencing enhancement.³⁴ The court rationalized that the sentencing enhancement is akin to punishment for a breach of fiduciary duty, a higher duty than the ordinary one placed on all employees and breached by conversion.³⁵ Again, the Eleventh Circuit failed to make this distinction in the facts in Franklin’s case, Franklin had a duty to handle the bank’s money the same as any bank teller.

In this case, it is clear from the evidence at trial that Ms. Franklin’s employment positions are not ones that warrant the application of the sentence enhancement. The facts in Ms. Franklin’s case readily align with similar employment positions found in *Sweet, Humphrey, Brogan, and Tribble*, not *Milligan*. Ms. Franklin’s employment positions did not create a fiduciary duty between her and her employers. In her employment, Ms. Franklin had the duty of handling her employer’s property with the normal

³⁴ *Id.* at 783.

³⁵ *Id.* at 783. (citing to *United States v. Ragland*, 72 F.3d 500, 503 (6th Cir. 1996)(Ragland, a bank teller, forged bank officer’s signatures on certificates of deposits and managed to steal over a million dollars. On appeal, the Sixth Circuit found that her position did not warrant application of the enhancement).

duties of honesty and fealty imposed on all employees. Even as a vault teller, she did not possess the substantial discretion to manage the bank's property to warrant the abuse of position of trust enhancement.

Ms. Franklin exercised the same job skills as an ordinary bank teller regardless of her job title as vault teller. Her position and duties as vault teller were not significantly different from an ordinary bank teller. Ms. Franklin lacked the ability to conceal her embezzlement where it was simply a matter of time that bank oversight or an audit would reveal the embezzlement, which is indeed what happened. Her performance was supervised by the Team Leader, Branch manager, Area Operations manager, and a regional V.P. manager.

Ms. Franklin is serving a sentence contrary to legislative intent and her re-sentencing should be mandated. Certiorari is appropriate in this case to make the determining factors in the lower Courts' application of U.S.S.G. § 3B1.3 uniform.

CONCLUSION

For the forgoing reasons, Tiffany Franklin's Petition for Writ of Certiorari should be granted.

Respectfully submitted on this the 5th day of January, 2023,

/s/Karen H. Jackson
Karen H. Jackson*
Law Offices of Karen H. Jackson
560 S. McDonough St., Ste., D
Montgomery, Alabama 36104
Telephone: 334.491.1102
Email: khjlawoffices@gmail.com

*Counsel of Record