22-653

No. _____

IN THE

Supreme Court of the United States

MELVIN RAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Pro se
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QUESTION PRESENTED

Under § 2B3.1(b)(4)(A) of the United States Sentencing Guidelines ("U.S.S.G"), a four- level increase applies to a defendant's offense level, " if any person was abducted to facilitate commission of the offense or to facilitate escape."And the guideline commentary defines "abducted" as follows: Abducted means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction. U.S.S.G. § 1B1.1 cmt.n.1(A). (emphasis added).

Federal courts have interpreted the term "different location as used in 1B1.'s cmt.n.1(A), in a way that has developed a split of authority over whether the forced movement of victims from one room or area to another room or area within the same building constitute an abduction for purposes of § 2B3.1(b)(4)(A). Accordingly, if Commentary in the Guideline Manual that interprets or explains a guideline of authoritative. Stinson v. United States, 508 U.S. 36,38 (1993). To read "different location" in a way that does not comports with rest of the commentary's abducted definition would raise a "authoritative concern" that "defies judicial proceedings." A court would apply the four-level abduction enhancement to defendants where the only minimum movement was within a single building.

The case raises the following important issues: Whether the failure to follow the commentary's abduction definition engendered a broad circuit split — and if so, do it show that the victims were ""abducted within the meaning of § 2B3.1(b)(4)(A)?

PARTIES TO THE PROCEEDINGS AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Petitioner is Melvin Ray. He was the defendant in the district court and appellant in the court of appeals.

Respondent is United States of America, Respondent was the plaintiff in the district court and appelle in the court of appeals

The related proceedings below are:

1) United States v. Ray, No. 20-20367, Appeal from the United States District Court for the Southern District of Texas USDC No. 4:19-CR-380-2 – Judgment entered July 14, 2020

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PETITION FOR WRIT OF CERTIORARI

Melvin Ray, Petitioner, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is unpublished and reproduced in Petitioner's Appendix A. The order denying the petition for panel rehearing are reproduced at Appendix B.

JURISDICTION

Petitioner filed a timely appeal to the Fifth Circuit Court of Appeals, which affirmed the district court's decision on March 30, 2022. Petitioner filed a petition for panel rehearing. On May 31, 2022, the Fifth Circuit of Appeals denied the petition. This court has jurisdiction under 28 U.S.C § 1254(1).

STATUTES AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions involved in this case are: U.S.S.G § 1B1.1 comment.n.1(A), U.S.S.G § 1B1.7, U.S.S.G § 2B3.1(b)(4)(A), and 18 U.S.C. § 3742.

INTRODUCTION

This case presents important issues with respect to the United States Sentencing Guidelines. The Fifth Circuit have interpreted the term "different location" in a way that does not comports with the rest of the commentary's abducted definition. That has engendered a broad circuit split, a lack of uniformity and unportionailty in sentences that this court eschewed in Stinson v. United States, 508 U.S. 36, 38(1993). In Stinson, this court held that "Commentary in the Guideline Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."

Under the Fifth Circuit's interpretation, however, Stinson would result in a different outcome: Commentary would not be authoritative because the term "different location" – by itself is inherently vague being that it can be interpreted at many different levels of generality, causing it to read inconsistent with §2B3.1(b)(4)(A).

The Fifth Circuit's interpretation of the term "different location" provides a "counter attack" to Stinson's holding, knocking it out of the ring before the fight even starts.

This interpretation of the term "different location" started in United States v. Hawkins, 87 F. 3d 722 (5th Cir. 1996). In Hawkins, the defendant beat the victims at one location in a parking lot and then dragged them at gunpoint 40 or 50 yards away. The court upheld a four-level abduction enhancement in that situation, pointing out that it was not necessary to cross a property line or threshold of a building to establish a change of location. The Fifth Circuit then concluded that the term

"different location" as used in 1B1.1 cmt.n.1. (A) to be flexible and thus susceptible of multiple interpretations which are to be applied case by case to particular facts under scrutiny, not mechanically based on the presence or absence of doorway, lot lines, threshold and the like.

Fourteen years later, this interpretation of the term "different location" has repeatedly cause district courts to apply the four-level abduction enhancement to cases where a defendant or defendants forcefully moved a victim from one area to another area within a single building and not a place outside of it during the course of a robbery. See United States v. Johnson, 619 F. 3d 469, 472 (5th Cir. 2010), referring to Hawkins to support its finding that Johnson abducted his victim during the robbery, even though the victim remained within a single building. Johnson, then became binding precedent in the Fifth Circuit.[1]

In doing so, the Fifth Circuit turn the "blind eye" to Petitioner's contention that he did not abducted his victims because the term "different location" as used in 1B1.1 cmt.n.1.(A) is best read to refer to a place other than the bank being robbed, not to

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The Fifth Circuit affirming the four-level abduction enhancement to defendants because of its binding precedent. See United States v. Smith, 822 F.3d 755, 763-64(5th Cir. 2016); United States v. Bonner, 575 F. App'x, 250,251(5th Cir. 2014)(unpublished); United Statesv. Holiday, 582 F. App'x, 551-552(5th Cir. 2014)(unpublished); United States v. Love, No. 20-20615(2021); United States v. Burns, 802 Fed. App'x. 860(5th Cir. 2020); See also United States v. Harris, 823 Fed. Appx. 272(5th Cir. 2020); US Supreme Court Certiorari denied by Harris v. United States, 2021 U.S. LEXIS 795(U.S., Feb 22, 2021); United States v. Shofner, 810 Fed. Appx. 36(5th Cir. 2020); United States v. Alexander, 809 Fed. Appx. 269(5th Cir. 2020); United States v. Mosley, 782 Fed. Appx. 353(5th Cir. 2019); US Supreme Court Certiorari deneid by Mosley v. United States, 2020 U.S. LEXIS 1839 (U.S., Mar. 23, 2020); United States v. Ray, No. 20-20367(2022).

a separate area or spot within that bank as the example the commentary provides. Petitioner, also refer to the Sixth, Seventh and Eleventh Circuit's that agree with him on the issue as persuasive law.

This "blind eye" has allowed the district court to improperly apply the four-level abduction enhancement and departing upward from the recommended guideline range. Petitioner was sentenced to 324 months of incarceration, even though he is a first time offender with a Criminal History Category of I.

The Fifth Circuit "blind eye" is at odds with this Court's decision in Gall v. United States, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007).

Additionally, a "split of authority" has developed over whether the forced movement of victims from one room or area to another room or area within the same building constitute an abduction for purpose of § 2B3.1 (b)(4)(A). The Third, Fourth and Tenth Circuits reached the same conclusion as the Fifth Circuit holding that any different "position" in a building count as a "different location." See United States v. Reynos, 680 F. 3d 289 (3rd Cir. 2012); United States v. Osborne, 514 F. 3d, 377,389-90 (4th Cir. 2008); United States v. Archuleta, 865 F. 3d, 1285-88 (10th Cir. 2017).

On the other hand, the Sixth, Seventh and Eleventh Circuit's have reached different conclusions. These courts held that the customer area of a store or bank typically will not qualify as a "different location" from that back room or vault area of that store or bank. See United States v. Hill, 963 F. 3d 528 (6th Cir. 2020); United States v. Eubanks, 593 F. 3d 652-54 (7th Cir. 2010); United States v. Whatley, 719 F. 3d 1206, 1221-23 (11th Cir. 2013).

This unresolved circuit split exist because the Fifth, Third, Fourth and Tenth Circuits or construing the words "different location" in U.S. Sentencing Guidelines Manual § 2B3.1(b)(4)(A). Those courts are ultimately determining the meaning of the term "abducted" in the guideline. Instead of placing in the words "different location" in the context with the rest of the commentary's abducted definition, as the Sixth, Seventh and Eleventh Circuit's have done.

STATEMENT OF THE CASE

On October 2, 2018, February 21, 2019, and February 22, 2019, persons later identified as Petitioner Melvin Ray and co-defendant Jonathan Carter robbed several Capital One banks located in the Southern District of Texas. During each of the robberies, bank employees were moved within the bank by force or threat by either Mr. Carter and/or Mr. Ray.

On October 5, 2018, co-defendant, Jayden Simmons, who aided Mr. Carter and Mr. Ray in planning the bank robberies, told a friend name Jeiyla James that Mr. Ray and Mr. Carter committed the October 2, 2018 bank robbery. Ms. James believed that Simmons was joking and called Simmons' mother to tell her what Simmons had told her. Sometime thereafter, Ms. James began to receive what she perceived to be threatening messages on her Instagram application from a person she believed to be Melvin Ray. Ms. James advised that the threats were generic in nature but stated, "snitches get stitches." Ms. James also received a message from a person she believe was Melvin Ray that included her address and an image of praying hands.

On December 17, 2019, a five-count superseding indictment was returned by the grand jury in the United States District Court for the Southern District of Texas,

Houston Division against Ray and two co-defendants. Ray was charged in Counts 1, 3, and 4 with aiding and abetting bank robbery, in violation of 18 U.S.C. 2113(a) and 2, for bank robberies occurring October 2, 2018, February 21, 2019, and February 22, 2019 respectively. Ray was charged in Count 5 with aiding and abetting the brandishing of a firearm during a crime of violence in violation of 18 U.S.C. 924(c)(1)(A)(ii) and 2.

On January 13, 2020, Mr. Ray proceeded to jury trial with counsel on Counts 1, 3, 4 and 5 of the superseding indictment. On January 14, 2020, during the second day of trial, Mr. Ray was rearranged with counsel before United States District Judge David Hittner and entered a guilty plea without a plea agreement of Counts 1, 3, 4 and 5 of the superseding indictment.

On July 8, 2020, the District Court sentenced Mr. Ray. The District Court overruled Mr. Ray's objections and adopted the PSR. At sentencing, the government recommended a guideline sentence of 121 months on Counts 1S, 3S, and 4S. The District Court varied upward from the guidelines and sentenced Mr. Ray to 240 months imprisonment on counts 1S, 3S, and 4S. The District Court sentenced Mr. Ray to an additional 84 months to run consecutively on Count 5S, totaling up to 324 months.

The court also sentenced Mr. Ray to a three-year term of supervised release, no fine, a $100 special per count, and restitution of $50,634.00.

On July 13, 2020, Mr. Ray timely filed his notice of appeal. On appeal, counsel David Nachtigall argued that an enhancement under U.S.S.G. 3C1.1 for obstruction of justice as to Count 1 of the superseding indictment was improperly included in

Ray's guideline calculation as determined by the District Court. Nachtigall further argued that the latter position is foreclosed by Fifth Circuit precedent, and raised this issue only for the purpose of future review by the United States Supreme Court. After briefing by Ray and the government, the Fifth Circuit issued an unpublished opinion on March 30, 2022 affirming the District Court findings.

Nachtigall, then concluded that seeking further review by filing a petition for writ of certiorari would be futile, and filed a motion to withdraw. Ray then proceeded pro se seeking further review by filing a petition for panel rehearing which was denied on May 31, 2022 and the court issue a mandate. Ray now filed this petition for writ of certiorari seeking further review.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit "decided an important federal question in a way that conflicts with [a] relevant decision of this court." S. Ct. Rule 10(c). In Stinson, this Court held that the "Commentary in the Guideline Manual that interprets or explains a guideline is authoritative unless it violates the constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."

Under the Fifth Circuit's interpretation, however, Stinson would result in a different outcome: Commentary would not be authoritative because the term "different location" – by itself is inherently vague being that it can be interpreted at many levels of generality causing it to read inconsistent with § 2B3.1(b)(4)(A).

The Fifth Circuit's interpretation of the term "different location" directly conflicts with the Court's unanimous decision and provides a counter attack to Stinson's holding.

The Fifth Circuit's decision is also in conflict with the Court's decision in Gall v. United States, 552 U.S. 38, 128 S Ct 586, 169 L Ed 2d 445 (2007). In Gall, this Court held that "Federal Courts of Appeals held required to review all federal criminal sentences whether inside, just outside, or significantly outside Federal Sentencing Guideline range – under deferential abuse-of-discretion standard." Because the Fifth Circuit's binding precedent of the term "different location" effectively leaves Petitioner without a remedy allowing the district court to improperly apply abduction enhancement, it is in conflict with the court's precedent.

The Fifth Circuit also "entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter." S. Ct. Rule 10(a). Specifically, the Sixth, Seventh and Eleventh Circuits has repeatedly held that "the customer area of a store or a bank typically will not qualify as a "different location" from that back room or vault area of that store or bank," would not constitute an abduction for purposes of § 2B3.1(b)(4)(A). See United States v. Hill, 963 F.3d 528 (6th Cir. 2020); United States v. Eubanks 593 F. 3d 652-54 (7th Cir. 2010); United States v. Whatley, 719 F. 3d 1206-1221-23 (11th Cir. 2013). While the Fifth Circuit have repeatedly applied the abduction enhancement to defendants that forcefully move a victim to any area or spot within a single building. This "split of authority has cause a lack of uniformity and unportionailty in sentences.

Finally, the Fifth Circuit "has decided an important question of federal law that has not been, but should be, settle by this Court." S. Ct. Rule 10(c). The Fifth Circuit have applied the abduction enhancement to defendants that forcefully move a victim to any area or spot within a single building because it have construed the words "different location" as used in § 1B1.1 cmt.n.1(A), in a way that does not comports

with the rest of the commentary abduction definition. This decision is a "counter attack ruling" the type that this Court has eschewed. And it knocks out an important question of law without so much as asking what was the problem in the first place: Whether the failure to follow the commentary's abduction definition engendered a broad circuit split — and if so, do it show that the victims were "abducted" within the meaning of U.S.S.G § 2B3.1(b)(4)(A)? That question is deserving of scrutiny and reasoned analysis.

A. The Fifth Circuit's Decision Conflicts with the Court's Decision in Stinson.

The Fifth Circuit's interpretation of the term "different location" as used in 1B1.1, cmt.n.1(A) conflicts this Court's opinion in Stinson. In Stinson, The District Court sentenced him as a career offender under United States Sentencing Commission Guidelines Manual § 4B1.1, which requires, that "the instant offense of conviction be a crime of violence." The court found that Stinson's offense of possession of a firearm by a convicted felon, 18 U.S.C. § 922(g), was a "crime of violence" as that term was then defined in U.S.S.G § 4B1.2(1).

While the case was on appeal, however, the Sentencing Commission promulgated Amendment 433, which added a sentence to the § 4B1.2 commentary that expressly excluded the felon-in-possession offense from the "crime of violence" definition. The court of Appeals nevertheless affirmed Stinson's sentence, adhering to its earlier interpretation that the crime in question was categorically a crime of violence in holding that the commentary to the Guidelines is not binding on the federal courts.

This court granted certiorari and unanimously vacated the judgment of the Court of Appeals for the Eleventh Circuit and remanded the case for further proceedings. Stinson, 508 U.S. 36, 38 (1993), holding that commentary in the Manual that interprets or explains a guideline is authoritative, unless it violates the constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.

If commentary in the Guideline Manual that interprets or explains a guideline is authoritative, however the Fifth Circuit interpretation of the term "different location" is counter attacking the commentary itself. This court in Stinson would have been required to address whether the commentary's abduction definition in § 1B1.1, cmt.n.1(A) is inconsistent with U.S.S.G § 2B3.1(b)(4)(A).

Instead, this court held that commentary that interprets or explains a guideline is authoritative. Even the guideline itself makes this proposition clear. See U.S.S.G § 1B1.7.

Section 1B1.1's commentary defines "abducted" as follows: Abducted means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction...U.S.S.G. § 1B1.1, cmt.n.1(A).

This example, however, treats the getaway car as the second "location" and so adheres to the view that the place to which a robber accompanies a victim must be different from the robbed bank itself. Not only that, the example identifies the customer's initial location as the bank, not as, for example, the bank-teller window, and so supports the level of generality at which the Sentencing Commission has

define that "location." Even though a circuit split develop over this issue, it is obvious that this commentary interprets "different location" and explains as how it should be applied.

After reading this commentary it would be difficult to reasonably suggest that the United States Sentencing Commission envisioned application of the abduction enhancement in scenarios in which the only movement of a victim was within a single building.

While Petitioner and Respondent do not dispute the historical facts of the case, they do, however dispute the legal significance of these facts: Do they show that the victims were "abducted" within the meaning of U.S.S.G § 2B3.1(b)(4)(A)? Petitioner was held responsible for the movement of employees within a single building.

The Fifth Circuit rejected Petitioner's contention that he did not abduct his victims within the meaning of U.S.S.G § 2B3.1(b)(4)(A) because he did not force his victims out of the bank. The Fifth Circuit, however, concluded that the term "different location" as used in 1B1.1, cmt.n.1(A) to be flexible and thus susceptible of multiple interpretations, which are to applied case by case to particular facts under scrutiny, not mechanically based on the presence or absence of doorway, lot lines, threshold, and the like. Instead of interpreting the words "different location" in a way that best comports with the rest of the commentary's abduction definition.

For all of the foregoing reasons, the Fifth Circuit's opinion conflicts with the Court's decision and Stinson.

B. The Fifth Circuit's Decision Conflicts with the Decisions from the Sixth Circuit and Other Circuits.

In United States v. Hill, 963 F. 3d 528 (6th circuit 2022), two armed robbers entered the Universal Wireless store, took four victims from the sales floor to a back room at gunpoint, tied the victims up with zip ties, grabbed cell phones and cash, and exited out the back door. The Sixth Circuit held that the district court erred in applying a four-level abduction enhancement under U.S. Sentencing Guidelines Manual § 2B3.1(b)(4)(A) to defendant's sentence because the phrase "different location" was best read to refer to a place different from the store that was being robbed, and the store's back room did not qualify as a "different location" from the store as it was part of the robbed location.

Next, in United States v. Eubanks 593 F. 3d 645, 654 (7th Cir. 2010), the Seventh Circuit addresses two robberies committed by the same defendants. In the first, one of the defendants Eubanks' co-defendants "forced an employee to the back of the beauty supply store to retrieve a surveillance video." In the second, Eubanks dragged a jewelry store employee "less than six feet" within the store. The Seventh Circuit concluded that "under these facts, and taking into account the physical dimensions of the structures at issues, transporting the victims from one room to another was simply not enough for "abduction."

Lastly, in United States v. Whatley, 719 F. 3d 1206-1221-23 (11th Cir. 2013), the Eleventh Circuit concluded that Whatley's movement of the bank employees inside each branch bank did not constitute abduction.

All of these courts have interpreted the term "different location" in a way that best comports with the rest of the commentary's abduction definition. This broad circuit split has caused a lack of uniformity and unportionality in sentences, and had Petitioner been in the Sixth, Seventh or Eleventh Circuits the abduction enhancement would not be applicable in this situation.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals.

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APPENDIX