NO. ______________

IN THE
SUPREME COURT OF THE UNITED STATES

CANDICE A. DAVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Eighth Circuit Court of Appeals erred in affirming the decision of the district court when it failed to conduct a requisite hearing on objections raised to the Presentence Report as mandated by the United States Supreme Court in *Gall v. United States*, 552 U.S. 38 (2007) resulting in a denial of due process under the Fifth Amendment of the United States Constitution.

PETITION FOR WRIT OF CERTIORARI

The Opinion of the United States Court of Appeals for the Eighth Circuit appears at **Appendix A** to the Petition. The Opinion can be found at ***United States of America v. Candice A. Davis,*** 875 F.3d 869 (8^{th} Cir. 2017).

JURISDICTION

The Eighth Circuit Court filed its decision on November 16, 2017, and entered its Order denying Petitioner's Motion for Rehearing and on December 29, 2017. A copy of the Order appears at **Appendix B.**

STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury, exception in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of lime or limb; nor shall be compelled in any criminal to be a witness against himself, ***nor be deprived of life, liberty, or property without due process;*** nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On December 17, 2015, a Grand Jury returned a multi-count Indictment against Candice A. Davis ("Davis") and Stacey Wilson ("Wilson"). Davis was charged under Count One, Wire Fraud, in violation of 18 U.S.C. § 1343, Count Two, Access Device Fraud, in violation of 18 U.S.C. § 1029 (a)(2), 18 U.S.C. 1029 (b)(1) and 18 U.S.C. 1029(c)(1)(A)(i); and Counts Three through Five, Aggravated Identity Theft, in violation of 18 U.S.C. §1928(A)(a)(1).

On August 18, 2016, Davis appeared before the district court pursuant to a Guilty Plea Agreement and pled Guilty to Counts One, Two, Three and Four. Count Five was dismissed at the sentencing hearing.

The Plea Agreement stated that the Government could prove the following facts:

> That between November 1, 2013, and December 1, 2015, Wilson and Davis recruited individuals (i) to open checking accounts or (ii) who had existing checking accounts at US Bank, and provided these individuals with debit cards and checks issued on the account.
>
> As early as November 1, 2013, Davis' vehicle was identified as the transportation utilized by Wilson. Upon receipt of debit cards and checks, Wilson and Davis drafted the fraudulently-obtained checks in the amounts of $195 to $2,300 before depositing them in different fraudulently-issued accounts through electronic wire transmissions. As a result of the transactions, Wilson, Davis and others obtained and attempted to obtain more than $79,000 in funds between September 1, 2013, and December 1,

2015. Wilson and Davis recruited more than 15 individuals to open accounts at US Bank or provide their own bank account information.

The Plea Agreement also stipulated that Davis retained the right to object at sentencing to a Chapter 3 adjustment for a four (4) level enhancement assessed on her role as a leader and organizer as well as Chapter 3 adjustment for acceptance of responsibility. In addition, Davis retained the right to object at sentencing that she was entitled to a two (2) level deduction for acceptance of responsibility.

The Presentence Report was received and Davis filed Objections to the PRS Report.

At the Sentencing Hearing on November 17, 2016, United States Postal Inspector Anne Kriedt ("Kriedt") testified that she was involved in the investigation of Davis and Co-Defendant Wilson. Kriedt described an encounter with an individual designated as "B.J." who was present at the sentencing of Co-Defendant Wilson. According to Kriedt, while waiting, B.J. stated that it was Davis who approached him and asked him to "help cash checks for me and my family" in November or December, 2014. B.J. agreed to do so.

Kriedt stated that originally B.J. told law enforcement he was recruited by Co-Defendant Wilson. However, at Wilson's sentencing, B.J. withdrew his statement as to Wilson and stated it was Davis who was responsible for his participation in the scheme.

Kriedt testified that she was then advised by B.J.'s mother, who was with him that day, that B.J.'s mental capacity was that of either a second grader or a nine year old. B.J.'s mother told Kriedt that she had been receiving Social Security disability for B.J.

since he was nine years old. Kriedt's conversation with B.J. and his mother on this occasion was in June, 2016.

Kriedt testified that B.J.'s recitation of the above-described events was not consistent with someone who had a mental acuity at a second grade level. His statement was not reduced to writing.

After that interaction with B.J., Kriedt stated she had went to his apartment approximately four (4) weeks thereafter but reported no further relevant information.

Kriedt testified that she was aware of Davis' objection as to the commencement of her involvement and that there was evidence to support her involvement in 2013 and 2014. Kriedt testified that Co-Defendant Wilson was arrested by the Maryland Heights Police Department in 2013. On the day of Wilson's arrest, although Davis was present, she was not arrested and there was nothing to tie Davis to Wilson other than her presence. Kriedt reviewed the police report from the Maryland Heights incident and determined that Davis was neither questioned nor charged in that case.

Kriedt testified that Davis was seen at an ATM drive-up on May 5, 2014, in a vehicle in which she was seen in 2013. On that date, Kriedt stated that Davis deposited a check in the amount of $305 into the account of G.J. and that said account was later determined to have been opened in order to be used fraudulently. Kriedt identified a surveillance photograph of the transaction as Davis. Kriedt stated, however, that all Davis did was to deposit a check into the account of G.J. Kriedt admitted that if an individual had handed Davis a check to deposit, there would be no indication that she knew anything about the check. Kriedt stated that as a result of the transaction in the account of G.J., the account was closed with a negative balance.

Kriedt also stated that between 2013 and 2014, Davis was with Co-Defendant Wilson while he was conducting criminal activity, but, according to Kriedt, admitted she only knew Wilson by the name of "Reginald Gallop."

The district court then proceeded to summarily overruled all of Davis' objections and including the fact that Davis should receive a three (3) level enhancement for designation as a manager or supervisor as well as the denial of a two (2) level decrease for acceptance of responsibility.

As a result of its rulings, the Court determined that Davis' Total Offense Level was a Level 20, with a Criminal History Category of VI, resulted in a Guideline range of punishment of 51 – 63 months relative to Counts One and Two.

The district court then sentenced Davis to a term of imprisonment of 75 months consisting of 51 months on Counts One and Two, to run concurrent, and 24 months on Counts Three and Four, to run concurrent with each other but consecutive to Counts One and Two, supervised release of three (3) years on all counts, to run concurrent, waived the fine, ordered restitution of $44,325.66 and $400 for the special assessment.

Davis objected to the sentence and timely filed her Notice of Appeal.

REASON FOR GRANTING THE PETITION

Whether the Eighth Circuit Court of Appeals erred in affirming the decision of the district court when it failed to conduct a requisite hearing on objections raised to the Presentence Report as mandated by the United States Supreme Court in *Gall v. United States*, 552 U.S. 38 (2007) resulting in a denial of due process under the Fifth Amendment of the United States Constitution.

Davis entered a voluntary plea of guilty to the charges of Wire Fraud, Unauthorized Use of an Access Devise and Aggravated Identity Theft. At the time of the change of plea, the Government and the Defendant "agreed to disagree" on the following points: (i) the amount of loss and (ii) to determine her role, if any, in a supervisory capacity. At the sentencing hearing, the Government presented one witness and little relevant testimony was presented; however, the district court denied each of the defendant's Objections to the Presentence Report.

This Court has held that the first step of a three-step process requires a district court to calculate a defendant's guideline sentencing range in the same way that it would have made its calculations prior to *United States v. Booker*, 543 U.S. 220 (2005). Further, this Court has held "that commentary in the Guidelines 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." *Stinson v. United States*, 508 U.S. 36 (1993). Finally, the failure to properly calculate a guideline range is a "significant procedural error." *Gall v United States*, 552 U.S. 38 (2007).

Fed. R. Crim. P. 32(i)(3)(B) provides that the sentencing court "must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing . . . ."

Agent Kriedt testified that her first conversation with B.J. was in June, 2016, and her second conversation occurred in November or December, 2016. Kriedt stated that when she took B.J.'s statement, it was only verbal. Kriedt testified that B.J., who had some type of documented mental disability, but he [B.J.] told her in specific detail about the alleged conduct of Davis – unfortunately, during Agent Kriedt's testimony at the sentencing hearing there was absolutely no time-frame attributed to his testimony. Moreover, if the Government believed that B.J.'s testimony may have been utilized at the sentencing of Co-Defendant Wilson, absent any testimony about his inability to testify, he could have been present and testified at the sentencing of Davis.

Although the situs of the case was within the Eighth Circuit, the Government relied solely on the Ninth Circuit case of the *United States v. Petri*, 731 F.3d 833, 840 (9th Cir. 2013) in which the district court was asked to resolve the defendant's grammatical dissection of a 2002 Amendment to Fed. R. Crim. P. 32(1)(3). The Ninth Circuit determined that there was no violation of Rule 32 because a "controverted matter" under the rule extended only to the objections to the PSI that made a difference in the formulation of the appropriate sentence.

Contrast the factual scenario of the facts of *Petri* with that of Davis – the Plea Agreement specifically acknowledged the differences between the Government and Davis concerning her conduct in 2013 and 2014 and agreed that Davis could make objections to the PSR in that regard and the matters would be resolved at the sentencing hearing.

At no time did Davis ever recant her admissions at the Plea Hearing that she was, in fact, responsible for her actions outlined in Counts One (Wire Fraud); Two (Use of

Unauthorized Access Devices); Three and Four (Aggravated Identity Theft), all of which conduct occurred in 2015. The stipulation of facts provided in the Plea Agreement was predicated on the statement of the Government that if it went to trial it could prove certain facts against Davis. At no time did Davis ever agree to each and every statement contained in that section of the Plea Agreement.

The Eighth Circuit failed to acknowledge its own holding in the *United States v. Greene*, 41 F.3d 383, 386 (8th Cir. 2006), concerning the evidentiary basis of evidence:

> If the sentencing court chooses to make a finding with respect to the disputed facts, it must do so on the basis of evidence, and not the presentence report.

Further, *Greene* cites the long-standing principle of the Eighth Circuit that "unless a defendant has admitted the facts alleged in a presentence report, the presentence report is not evidence and not a legally sufficient basis for making findings on contested issues of facts." *Greene*, 41F.3d at 386 *citing United States v. Hammer,* 3 F.3d 266, 272 (8th Cir. 1993)).

Davis preserved her objections by timely filing her Objections to the Presentence Report. As articulated in *Greene*, "[t]he government bears the burden of proof on the disputed issues because they relate factors which would enhance the sentence." *Greene*, 41F.3d at 386.

As is the law of Eighth Circuit,

> If the sentencing court chooses to make a finding with respect to [any] disputed facts, it must do so ***on the basis of evidence***, and not the presentence report. *United States v. Morehead*, 375 F.3d 677, 679 (8th Cir.

2004)(emphasis in original)(*quoting United States v. Greene*, 41 F.3d 383, 386 (8th Cir. 1994)).

The err of the Eighth Circuit is that it failed to adhere to its holding in *Greene*, that is, although the district court held a hearing, the evidence presented at the hearing did not address the matters raised in the objections to the Presentence Report. As is evidenced by the testimony presented, the district court relied solely on statements in the Plea Agreement which the defendant did not agree to but which the Government believed it could prove if the case would have went to trial.

The fact that the defendant did not admit to the full scope of the Government is attested to by the fact that the Government and defendant agreed that the defendant could raise certain objections to the Presentence Report and, in fact, said objections were contemplated to at the time of the change of plea.

As a result of the erroneous findings by the Eighth Circuit, Davis was denied the rights and privileges afforded her under the Fifth Amendment.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari and reverse the decision of the Eighth Circuit Court of Appeals inasmuch as the trial court's findings were contrary to the rights and privileges afforded Davis under the Fifth Amendment and, is, therefore, contrary to law.

Respectfully submitted,

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