

No. –

IN THE
SUPREME COURT OF THE UNITED STATES

LARRY WAYNE STINNETT,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. This Court should grant review to determine whether the Fifth Circuit has so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's supervisory power where the Court of Appeals has ignored an intervening and controlling Supreme Court opinion, *Esquivel-Quintana v. Sessions*, 137 F.3d 1562 (2017) in deciding an issue that was raised and briefed by the Petitioner in his initial brief.

PARTIES

Larry Wayne Stinnett is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

TABLE OF CONTENTS

Question Presented..	ii
Parties..	iii
Table of Contents..	iv
Index to Appendices..	v
Table of Authorities..	vi
Opinion Below..	1
Jurisdictional Statement..	1
Rules and Statutory Provisions..	2
Statement of the Case..	4
Reasons for Granting the Writ..	7
I. This Court should grant review to determine whether the Fifth Circuit has so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court’s supervisory power where the Court of Appeals has ignored an intervening and controlling Supreme Court opinion, <i>Esquivel-Quintana v. Sessions</i>, 137 F.3d 1562 (2017) in deciding an issue that was raised and briefed by the Petitioner in his initial brief.	7
Conclusion..	10

INDEX TO APPENDICES

Appendix A Judgment and Opinion of Fifth Circuit

Appendix B Judgment and Sentence of the United States District Court for the Northern
District of Texas

Appendix C Opinion of the United States Court of Appeals denying rehearing.

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

<i>Davis v. Sherer</i> , 468 U.S. 183 (1984).	7
<i>Elder v. Holloway</i> , 510 U.S. 510 (1994).	6, 7, 9
<i>Esquivel-Quintana v. Sessions</i> , 137 S. Ct. 1562 (2017).	5, 6, 7, 8, 9
<i>Henderson v. United States</i> , 133 S. Ct. 1121 (2013).	9
<i>United States v. Brace</i> , 145 F.3d 247 (5th Cir. 1998).	9
<i>United States v. Gonzalez-Aparicio</i> , 663 F.3d 419 (th Cir. 2011).	5, 8
<i>United States v. Mondragon-Santiago</i> , 564 F.3d 357 (5th Cir. 2009).	9
<i>Larry Wayne Stinnett</i> , 707 Fed. Appx. 821 (5th Cir. January 3, 2018).	1

FEDERAL RULES

Sup. Ct. R 10.	7
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FEDERAL STATUTES

8 U.S.C. § 1101(a).	8
18 U.S.C. § 2243(a).	8
18 U.S.C. §2252A.	5
18 U.S.C. §2252A(a)(5)(B).	4
18 U.S.C. §2252A(b)(2).	2, 4, 7
28 U.S.C. § 1254(1).	1

STATE STATUTES

Texas Penal Code § 21.02(c).	3
Texas Penal Code § 21.11.	2, 7

UNITED STATES SENTENCING GUIDELINES

U.S.S.G. § 2G2.2..... 4

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Larry Wayne Stinnett, 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 unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *Larry Wayne Stinnett*, 707 Fed. Appx. 821 (5th Cir. January 3, 2018)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The judgment of conviction and sentence was entered March 18, 2016, and is also provided in the Appendix to the Petition. [Appx. B]. Stinnett filed a timely motion for rehearing which was denied February 22, 2018. The order denying the motion for rehearing is provided in the appendix. [Appx C].

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on January 3, 2018. [Appx. A]. The Petitioner's motion for rehearing was denied February 22, 2018. [Appx C]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. §2252A(b)(2) provides:

2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

Texas Penal Code § 21.11 (1997) defines the offense of indecency with a child as follows:

Sec. 21.11 INDECENCY WITH A CHILD. (a) A person commits an offense if, with a child younger than 17 years of age, whether the child is of the same or opposite sex, the person:

(1) engages in sexual contact with the child or causes the child to engage in sexual contact; or

(2) with intent to arouse or gratify the sexual desire of any person:

(A) exposes the person's anus or any part of the person's genitals, knowing the child is present; or

(B) causes the child to expose the child's anus or any part of the child's genitals.

(b) It is an affirmative defense to prosecution under this section that the actor:

(1) was not more than three years older than the victim and of the opposite sex;

(2) did not use duress, force, or a threat against the victim at the time of the offense; and

(3) at the time of the offense:

(A) was not required under Chapter 62, Code of Criminal Procedure, to register for life as a sex offender; or

(B) was not a person who under Chapter 62 had a reportable conviction or adjudication for an offense under this section.

(b-1) It is an affirmative defense to prosecution under this section that the actor was the spouse of the child at the time of the offense.

(c) In this section, "sexual contact" means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person:

(1) any touching by a person, including touching through clothing, of the anus, breast,

or any part of the genitals of a child; or

(2) any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person.

(d) An offense under Subsection (a)(1) is a felony of the second degree and an offense under Subsection (a)(2) is a felony of the third degree.

Texas Penal Code § 21.02(c) defines “act of sexual abuse” as follows:

(c) For purposes of this section, "act of sexual abuse" means any act that is a violation of one or more of the following penal laws:

(1) aggravated kidnapping under Section 20.04(a)(4), if the actor committed the offense with the intent to violate or abuse the victim sexually;

(2) indecency with a child under Section 21.11(a)(1), if the actor committed the offense in a manner other than by touching, including touching through clothing, the breast of a child;

(3) sexual assault under Section 22.011;

(4) aggravated sexual assault under Section 22.021;

(5) burglary under Section 30.02, if the offense is punishable under Subsection (d) of that section and the actor committed the offense with the intent to commit an offense listed in Subdivisions (1)-(4);

(6) sexual performance by a child under Section 43.25;

(7) trafficking of persons under Section 20A.02(a)(7) or (8); and

(8) compelling prostitution under Section 43.05(a)(2).

STATEMENT OF THE CASE

A. Facts and Proceedings Below¹

On June 10, 2015, a three-count indictment was returned against Larry Wayne Stinnett (Stinnett). Count One charged Stinnett with possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). Count Two charged Stinnett with a second count of possession of child pornography, also in violation 18 U.S.C. § 2252A(a)(5)(B). Count Three was a forfeiture count. Both Count One and Count Two alleged the enhanced statutory sentencing range of not less than 10 years nor more than 20 years set forth in 18 U.S.C. § 2252A(b)(2) as the result of a prior Texas conviction for the offense of indecency with a child. (ROA.8-13). On August 28, 2015, Stinnett entered a guilty plea to Count One of the Indictment, pursuant to a written plea agreement. (ROA.32,121-130).

The Probation Department prepared a pre-sentence report (PSR) using the November 1, 2015, edition of the United States Sentencing Guidelines. (ROA.140). Applying U.S.S.G. §2G2.2, the probation officer calculated the total of offense level to be a level 33 (ROA.141). The probation officer found that Stinnett had a criminal history score of 3 and was a Criminal History Category II. (ROA.143). The probation officer found that based on a Total Offense Level 33 and a Criminal History Category II, the advisory Guideline imprisonment range was 151-188 months. (ROA.148). The Probation officer also found that the imprisonment range of not less than 10 years nor more than 20 years, enhanced by a prior conviction pursuant to 18 U.S.C. §2252A(b)(2), was applicable. (ROA.148).

At the sentencing hearing, the district court sentenced Stinnett to 160 months imprisonment, ten years supervised release, no fine, no restitution, and a \$100.00 mandatory special assessment. (ROA.112-113).

Stinnett waived his right to appeal his sentence as a part of the written plea agreement. (ROA.125). The Government has advised they intend to enforce the plea agreement. However, the

¹ For the convenience of the Court and the parties, the Petitioner is citing to the page number of the record below in this statement of facts.

single issue raised in this appeal falls within the exception of appealing a sentence exceeding the statutory maximum. (ROA.125).

B. The Appeal

On direct appeal, Petitioner filed his initial brief on September 21, 2016. In the brief, Petitioner raised for the first time the argument that the Petitioner's prior conviction for Texas Indecency with a Child did not qualify as predicate offense supporting the sentencing enhancement in 18 U.S.C. § 2252A because the offense was broader than the generic offense of aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward. In the initial brief, the Petitioner argued the proposition that the generic offense of sexual abuse of a minor includes four elements: "1) a mens res level of knowingly; 2) a sexual act; 3) with a minor between the ages of 12 and 16; 4) and an age difference of at least four years between the defendant and the minor." *quoting United States v. Gonzalez-Aparicio*, 663 F.3d 419, 430 (9th Cir. 2011). (See Appellant's Initial Brief, p. 11).

The Petitioner also specifically argued:

The Texas statute for Indecency With A Child is broader than the generic definition of "sexual abuse of a minor" because it simply does not contain the same elements of a generic "sexual abuse of a minor. Moreover, the Texas Indecency With a Child Statue does not require at least a four year age differential and it does not limit the age of the child to less than 16 years of age.

(Appellant's Brief p. 14).

The government moved for a summary affirmance, which was denied, and filed it's brief on April 4, 2017. The Petitioner filed his reply brief on April 25, 2017, in which he continued to argue that Texas indecency with a child was clearly broader than the generic offense of sexual abuse of a minor, including for the reason that the Texas statute allows for the offense to be committed against a person 16 years old or younger.

On May 30, 2017, this Court decided *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017), which appears to unequivocally answer the question "Where sexual intercourse is abusive soley because of age of the participants, the victim must be younger than 16." *Id.* at 1572. Neither the

Petitioner nor the Government supplemented the briefing with *Esquivel-Quintana*.

On January 3, 2018, 15 months after Petitioner had filed his initial brief --the Court of Appeals for the Fifth Circuit entered an opinion affirming Petitioner's sentence, and noting that neither party had cited *Esquivel-Quintana*. [Appx. A]. There was no request by the Fifth Circuit for supplemental briefing. The Petitioner filed a petition for rehearing, pointing out that the very argument decided in *Esquivel-Quintana* had been raised in his brief and was supported by case law that was both cited and quoted. Petitioner also pointed out the court's obligation to follow known controlling precedent, citing *Elder v. Holloway*, 510 U.S. 510, 516 (1994). On February 22, 2018, the Court of Appeals for the Fifth Circuit denied the petition for rehearing, wrongly stating that there was only one sentence in the Petitioner's brief raising this issue without citing case authority. [Appx. C]. That statement was simply not true. As is set forth above, the Petitioner raised this argument in at least two places in his argument and cited and quoted case authority supporting the argument.

REASON FOR GRANTING THE PETITION

I. This Court should grant review to determine whether the Fifth Circuit has so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's supervisory power where the Court of Appeals has ignored an intervening and controlling Supreme Court opinion, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017) in deciding an issue that was raised and briefed by the Petitioner in his initial brief.

Rule 10 of the Supreme Court Rules, entitled "Considerations Governing Review on Certiorari" provides, in part, the following:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; *or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power*;

Rule 10, Supreme Court Rules (*emphases added*).

"A court engaging in review . . . Should therefore use it's 'full knowledge of its own [and other relevant] precedents.'" *Elder v. Holloway*, 510 U.S. 510, 516 (1994), *quoting Davis v. Sherer*, 468 U.S. 183, 192, n. 9 (1984).

As was discussed fully in Stinnett's initial brief, 18 U.S.C. § 2252A(b)(2) provides a statutory sentencing enhancement from 0-10 years to 10-20 years if the person has a prior conviction relating to "aggravated sexual abuse", "sexual abuse", or "abusive sexual conduct involving a minor or ward." Again, as was discussed in Stinnett's initial brief, the only question in this appeal is whether Stinnett's prior conviction for the Texas offense of indecency with a child, Texas Penal Code § 21.11(a)(1) qualifies as a generic "abusive sexual conduct involving a minor or a ward" (sexual abuse of a minor).

Stinnett argued that the Texas offense of indecency with a child does not contain the same elements as the generic offense of “sexual abuse of a minor”. The basis of Stinnett’s argument was that the elements of a generic offense of “sexual abuse of a minor are: 1) knowingly engaging in a sexual act with another person; 2) who has attained the age of 12 years but has not attained the age of 16 years; and 4) there is an age difference of at least 4 years. *See* (Appellant’s Brief p. 11); *citing United States v. Gonzalez-Aparicio*, 663 F.3d 419; and 18 U.S.C. § 2243(a).

Stinnett pointed out that the Texas statute of indecency with a child: 1) allows for a conviction based on conduct that includes touching the breast of a child, including over the clothing; 2) it allows for a conviction of conduct with someone who is 16 years of age; and 3) it allows for a conviction even when there is a four year or less age differential. (Appellant’s Brief pp. 12). Moreover, the Appellant pointed out the *Shepard* documents, including the charging instrument, in Stinnett’s previous case allowed for a conviction based on contact of a breast of a child 16 years of age.

After briefing was completed in this case, this Court decided *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568-73 (2017). In *Esquivel-Quintana*, the Court address the generic offense of “sexual abuse of a minor” in the context of the 8 U.S.C. § 1101(a)(43)(A) – provisions of the Immigration and Nationality Act (INA).

In *Esquivel-Quintana*, the Court specifically stated, “to qualify as sexual abuse of a minor, the statute of conviction must prohibit certain sexual acts based at least in part on the age of the victim.” *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1569. The Court ultimately held “Absent some special relationship of trust, consensual sexual conduct involving a younger partner who is at least 16 years of age does not qualify as a sexual abuse of a minor under the INA, regardless of the age differential between the two parties.” *Id.* at 1572.

Esquivel-Quintana, appears to resolve the very issue presented by Stinnett in his favor. This issue was raised on appeal and was supported by case authority and statutory authority cited by Stinnett. The Court of Appeals must use its “full knowledge of its own [and other relevant]

precedents,” in addressing an issue that was clearly presented and briefed. *Elder v. Holloway*, 510 U.S. at 516. This is not a situation where the court of appeals would need to “craft a new issue or otherwise search for them in the record.” *United States v. Brace*, 145 F.3d at 255. *Brace* just simply does not apply to Stinnett’s case where the issue was clearly raised in the brief and supported by case and statutory authority.

There is no doubt from the Fifth Circuit’s opinion issued on January 3, 2018, referring directly to this Court’s opinion in *Esquivel-Quintana*, that the panel was aware of the precedent and chose to ignore it.

Moreover, in a petition for rehearing, the Petitioner brought to the court of appeals’ attention that this issue had been raised and supported by case authority in the Petitioner’s initial brief. The Petitioner also pointed out the Fifth Circuit’s obligation to apply all known precedent. The Fifth Circuit panel also recognized that the issue had been raised, although they chose to ignore that the issue had been addressed in more than just one sentence and chose to ignore that the Petitioner had not only cited case authority, but actually quoted it in support of the very argument that was addressed in *Esquivel-Quintana*.

Under Rule 10 of this Court’s Rules, this certiorari should be granted, the opinion of the Fifth Circuit should be vacated, and this case should be remanded for consideration in light of *Esquivel-Quintana*.

Petitioner recognizes that the substantive issue will be reviewed under the plain error standard and has addressed the four prongs of plain error in his initial brief. However, the plain-ness of error is determined at the time of appeal, not at the time of trial proceedings. *See Henderson v. United States*, 133 S.Ct. 1121, 1124-1125 (2013). There simply is no question that if Stinnett was sentenced under the wrong statutory range of punishment, that would result in plain error. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 368-69 (5th Cir. 2009).

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, and vacate the judgment below.

Respectfully submitted this 23rd day of May, 2018.

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