

IN THE SUPREME COURT OF THE
UNITED STATES

24-7062
(to be supplied)

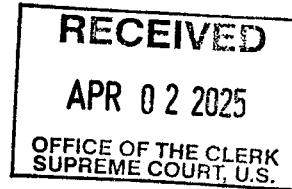
Damone D. Oakley

Petitioner

v.

United States of America

Respondent



Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

Damone D. Oakley
10110-510
FCI Edgefield
P.O. Box 725
Edgefield, SC, 29824

QUESTION PRESENTED

Whether the statutory enhancement under 18 U.S.C. § 2326(2) and Guideline
enhancements implemented by the Sentencing Commission constitute double counting.

LIST OF PARTIES OF THE CASE

All interested parties are listed in the caption of the case.

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APPENDIX

- A. District Court Judgment
- B. Decision of United States Court of Appeals

TABLE OF AUTHORITY

United States v. Smith
133 F.3d 737, 749-50 (10th Cir. 1997)

United States District Court
Middle District of Pennsylvania
3:21-CR-00179-ROM(1)

United States v. Damone Oakley
Appeal No.: 23-3101
U.S. Court of Appeals 3rd Circuit, Filed 1/28/2025

STATUTES/GUIDELINE PROVISION

18 U.S.C. § 2326(2)

USSG § 2B1.1
USSG § 2F1.1
USSG § 3A1.1
USSG § 5K2.0

OTHER

U.S. Sentencing Commission, Telemarketing Fraud Offense:
Explanation of Recent Guideline Amendments (Oct. 1998)

OPINIONS BELOW

The United States District Court entered Judgement on November 9, 2023 and is provided at Appendix A.

The United States Court of Appeals Decision was filed on January 28, 2025 and found in Appendix B.

STATEMENT OF JURISDICTION

The Judgement of the District Court was entered on 11/16/2023. The United States Court of Appeals Opinion was entered on 1/28/2025. Petitioner timely requested an extension of time which was granted up and until UNKNOWN. This Court has Jurisdiction Pursuant to 28 U.S.C. 2101e.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

The Fifth Amendment to the U.S. Constitution's due process clause.

Statutory Provisions

18 U.S.C. § 2326(2)

Guideline Provisions

USSG § 2B1.1

USSG § 2F1.1

USSG § 3A1.1

USSG § 5K2.0

Other

U.S. Sentencing Commission, Telemarketing Fraud Offense: Explanation of Recent Guideline Amendments (Oct. 1998),

STATEMENT OF THE CASE

Appellant Damorie Oakley received a double - the top of the Guidelines range - sentence based on the District Court's application of the statutory sentencing enhancement in 18 U.S.C. § 2326(2). Mr. Oakley received a 96 month top-of-the-Guidelines range sentence for his substantive Counts of conviction; and a consecutive sentence for the sentencing enhancement in 18 U.S.C. §§ 2326(2) resulting in an aggregated sentence of 192 months of imprisonment.

Petitioner seeks this Court's review to determine whether the statutory and Guideline enhancement constitutes double counting.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals For The Third Circuit has entered in conflict with the decision of another United States Court of Appeals on a matter of grave significance that has potential to cause a deep Circuit split in this Country. This Court is needed to resolve that important question by addressing the question presented.

DISCUSSION

The Court should affirmatively settle whether the statutory and sentencing Guidelines enhancement constitute double counting.

A.) Statutory History & Sentencing Guidelines History Of 18 U.S.C. § 2326

Section 2326(2) provides a sentencing enhancement of up to 10 years additional imprisonment for telemarketing fraud that targets older victims:

A person who is convicted of an offense under Section 1028, 1029, 1341, 1342, 1343, 1344, or 1347 [See Endnote 1] or Section 112B of the Social Security Act (42 U.S.C. 1320a-7b), or a conspiracy to commit such an offense, in connection with the conduct of telemarketing or email marketing--

- (1) shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those Sections, respectively; and
- (2) in the case of an offense under any of those Sections that--
 - (a) victimized ten or more persons over the age of 55; or
 - (b) targeted persons over the age of 55,

shall be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those Sections, respectively.

18 U.S.C. § 2326 (2017).

The statutory enhancement was originally enacted in the Senior Citizens Against Marketing Scams (SCAMS) Act of 1994, Public Law 103-322, Title XXV, § 250002(a)(2), 108 Stat. 2082 (9/13/1994). As originally enacted, the statutory enhancement was permissive, rather than mandatory:

A person who is convicted of an offense under Section 1028, 1029, 1341, 1342, 1343, or 1344 in connection with the conduct of telemarketing--

(1) may be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those Sections, respectively; and

(2) in the case of an offense under any of those Sections that--

(a) victimized ten or more persons over the age of 55; or

(b) targeted persons over the age of 55,

may be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those Sections, respectively.

18 U.S.C. § 2326 (1994) (emphasis added).

In 1998, however, the permissive language ("may") was amended to compulsory language ("shall"), in the Telemarketing Fraud Prevention Act. Public Law 105-184, § 3 & 4, 112 Stat. 520 (6/23/1998). The list of substantive offenses that qualify for such enhancement was also expanded. *Id.* And, importantly, Congress directed the Sentencing Commission to implement § 2326 in the Sentencing Guidelines. See *Id.* § 6, 112 Stat. 521.

Specifically, in the 1998 Act, Congress directed the Sentencing Commission to:

- 1.) "[P]romulgate Federal sentencing guidelines or amend existing sentencing guidelines (and policy statements, if appropriate) to provide for substantially increased penalties for persons convicted of offenses described in Section 2326 of Title 18, United States Code, as amended by this Act, in connection with the conduct of telemarketing." Public Law 105-184, § 6(b)(1), 112 Stat. 521;
- 2.) Report the Sentencing Commission's efforts to Congress, *Id.* § 6(b)(2);

- 3.) Include "an additional appropriate sentencing enhancement for cases in which a large number of vulnerable victims, including but not limited to victims described in Section 2326(2) of Title 18, United States Code, are affected by a fraudulent scheme or schemes," Id. § 6(c)(3); and
- 4.) Promulgate these Guidelines amendments on an expedited basis, Id. § 6(d).

The Sentencing Commission issued a report to Congress, as directed in § 6(b)(2) of the 1998 Act: U.S. Sentencing Commission, Telemarketing Fraud Offenses: Explanation of Recent Guideline Amendments (Oct. 1998) ("1998 Report"). [See Endnote 2]. The Commission reported that it promulgated during that 1998 amendment cycle "two important guideline changes designed to enhance the punishment for telemarketing frauds and other similar offenses." U.S. Sent. Comm., 1998 Report, at 2.

"First, the Commission added a two-level enhancement (on average an approximate 25% sentence increase) in the fraud guideline for offenses that are committed through mass-marketing." Id. This 2-level enhancement was originally in subsection (b)(3) of U.S.S.G. § 2F1.1: "if the offense was committed through mass-marketing, increase by 2 levels." U.S. Sent. Comm. 1998 Report, at 11-12. U.S.S.G. § 2F1.1 "was deleted by consolidation with § 2B1.1 effective November 1, 2001." See U.S.S.G. § 2F1.1, Historical Note (2023). Thus, this 2-level enhancement is now located in subsection (b)(2)(A) or § 2B1.1:

(b) Specific Offense Characteristics

.....

(2) (Apply the greatest) If the offense--

(a)(i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;

U.S.S.G. § 2B1.1(b)(2)(A) (2023).

"Second, the Commission added a two-level enhancement (on average, an additional 25% sentence increase) for fraud offenses that involve conduct...that makes it difficult for law enforcement authorities to discover the offense or apprehend the offenders." U.S. Sent. Comm., 1998 Report, at 3. The Commission learned that "fraudulent telemarketers increasingly are conducting their operations from Canada and other locations outside the U.S.," and promulgated a 2 level increase of a "substantial part of a fraudulent scheme was committed from outside the United States. U.S. Sent. Commission, 1998 Report, at 3, 12. This 2-level enhancement was enacted as subsection (b)(5) of U.S.S.G. § 2f1.1, but is now located in subsection (b)(10) of U.S.S.G. § 2B1.1, See U.S.S.G. § 2B1.1 (2023); see also U.S.S.G. § 2F1.1, historical note £2023..

The Commission as promulgated, in U.S.S.G. § 3A1.1, an additional 2 level increase "for cases in which a large number of vulnerable victims, including but not limited victims described in Section 2326(2) of Title 18, United States Code, are affected by a fraudulent scheme or schemes." U.S. Sent. Comm., 1998 Report, at 6 14-15. Section 3A1.1 already contained a pre-existing 12 level increase for one or more vulnerable victim(s), but this 1998 amendment added an additional 2 level increase for offenses "involv[ing] a large number of vulnerable victims." Id. at 14. See also U.S.S.G. § 3A1.1(b)9 1998).

U.S. Sent. Comm., 1998 Report, at 9.

These November 1, 1998 amendments to the Guidelines appear to be the last time the Sentencing Commission took up the issue of implementing the statutory sentencing enhancement in 18 U.S.C. § 2326. [See Endnote 3].

Similarly, Congress's only post-1998 amendment to § 2326 merely expanded the list of substantive offenses that potentially trigger the enhancement (adding Section "1347 [and] Section 112B of the Social Security Act (42 U.S.C. 1320a-7b)"'), and broadening the conduct that triggers the enhancement to include "email marketing." See Public Law 115-70, Title IV, § 402(a)(3), 131 Stat. 1214 (10/18/2017).

B.) There Are Conflicting
Decisions As To Whether Those
Two Enhancements Constitute
Double Counting

In the Tenth Circuit the Courts have held that enhanced penalties from § 2326 are at least partly incorporated into the sentencing guidelines. See United States v. Smith, 133 f.3d 737, 749-50 (10th Cir. 1997) (finding "to the extent the [§ 2326] upward departure is based on the number of victims, it is not supported by aspect of the offense sufficiently distinct from that supporting the multiple victim enhancement.") In sum, the Tenth Circuit found that to apply those two enhancements constitute double counting and runs afoul of the U.S. Constitution's due process clause.

However, the Third Circuit although has not spoken on the issue. [See Appellate opinion below], the panel found the Tenth Circuit finding unprevasive to establish a clear error. In sum, there is clearly a developing Circuit split as to this double counting.

C.) The Court Should Accept
This Case To Clarify This Point
That Has Far Reaching
Significance

Mr. Oakley, plead guilty in good faith and waived his appellate rights. In doing so, prayed that the Courts of this Country could properly interpret the statutory and guideline intent of Congress and the Sentencing Commission. However, as reflected by the different opinions of the Courts around this Country, it is clear this Court is needed to resolve this substantial question presented. Accordingly, the Court should grant the Petitioner review to maintain uniformity of the United States District Courts and U.S. Court of Appeals.

CONCLUSION

The Court should grant review.

Respectfully Submitted on

3-28-2025



Damorie Oakley
10110-510
FCI Edgefield
P.O. Box 725
Edgefield, SC, 29824