

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BENJAMIN FREDRICK CHARLES ROBINSON
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Petitioner sets forth the following issues for review:

- I. Whether a four (4) level upward departure for conduct underlying a dismissed count pursuant to USSG §5K2.21, bringing the defendant's sentence above the statutory mandatory minimum, is reasonable when the conduct underlying the dismissed count had already been taken into account in calculating the USSG base offense level, and had been taken into account by Congress in its enactment of the statutory mandatory minimum
- II. Whether restitution for funeral costs related to a dismissed count is reasonable.

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| 1. The District Court erred in applying a four (4) level upward departure for conduct underlying a dismissed count pursuant to USSG §5K2.21, bringing the defendant's guideline range above the statutory mandatory minimum, when the dismissed count had already been relied upon to set the USSG base offense level and to enhance the underlying statutory penalty to a mandatory minimum | |
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18 U.S.C. § 3553(b)

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21 U.S.C. §841(b)(1)(C)

21 U.S.C. § 846

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U.S.S.G §2D1.1

U.S.S.G §2D1.1(a)(2)

U.S.S.G. §3E1.1(a)

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U.S.S.G §5K2.21

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Petitioner, Benjamin Fredrick Charles Robinson, respectfully asks that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit, filed on May 1, 2018.

ORDER BELOW

The order of the United States Court of Appeals for the Sixth Circuit was issued on May 1, 2018, and is attached as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The order of the United States Court of Appeals for the Sixth Circuit for which petitioner seeks review was issued on May 1, 2018. The United States Court of Appeals for the Sixth Circuit issued an order affirming the District Court judgment. Petitioner did not file a Motion for Rehearing. This petition is filed within 90 days of the United States Court of Appeals for the Sixth Circuit order affirming the District Court's judgment.

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984)

2015 Guidelines Manual

18 U.S.C. § 3553(b)

21 U.S.C. § 841(a)(1)

21 U.S.C. §841(b)(1)(C)

21 U.S.C. § 846

U.S.S.G. §1B1.11

U.S.S.G §2D1.1

U.S.S.G §2D1.1(a)(2)

U.S.S.G. §3E1.1(a)

U.S.S.G. §5K2.1

U.S.S.G §5K2.21

STATEMENT

Following a guilty plea, on June 24, 2016, in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of Conspiracy to Distribute Fentanyl Resulting in Serious Bodily Injury, in violation of 21 U.S.C. §841(a)(1), 21 U.S.C. §846. On October 14, 2016, the District Court applied a four-level upward departure for conduct related to a death in a dismissed count pursuant to U.S.S.G. 5K2.21, and sentenced the petitioner to 262 months imprisonment, six (6) years of supervised release, and restitution of Four Thousand One Hundred Ninety Dollars (\$4,190.00).

The underlying facts are as follows. On December 17, 2015, the petitioner and five co-defendants were indicted by a federal grand jury on various charges related to Conspiracy to Distribute Fentanyl. The Petitioner and all co-defendants were indicted on Count 1 – Conspiracy to distribute a mixture or substance containing a detectable amount of heroin, a Schedule I controlled substance, and a mixture or substance containing a detectable amount of fentanyl, a Schedule II controlled substance, a violation of 21 USC §841(a)(1), all in violation of 21 USC §846. Petitioner and two co-defendants were indicted on Count 2 – Conspiracy to distribute a mixture or substance containing a detectable amount of fentanyl, a Schedule II controlled substance, the use of which resulted in the overdose death of C.B. a violation of 21 U.S.C. §841 (a)(1) all in violation of 21 U.S.C. 846. Petitioner and two co-defendants were indicted on Count 3 – Conspiracy to distribute a

mixture or substance containing a detectable amount of fentanyl, a Schedule II controlled substance, the use of which resulted in serious bodily injury to A.S., a violation of 21 U.S.C. §841(a)(1), all in violation of 21 U.S.C. § 846. (Indictment. RE 1, Page ID #1-5).

The Petitioner entered a guilty plea to Count 3 of the Indictment and upon the United States' motion, the Court in its Judgment Upon a Plea of Guilty dismissed counts (1) and (2) of the Indictment against Petitioner. (Judgment In A Criminal Case, RE 133, Page ID # 425). The Petitioner admitted that along with his co-defendants, he conspired to distribute fentanyl in Madison County and that A.S. overdosed on and was revived with Narcan. The penalty for Count 3, taking into consideration that death or serious physical injury occurred, enhanced the penalty to a mandatory minimum of 240 months. (Plea Agreement Paragraph 5).

The United States Probation Office completed a presentence investigation noting the Base Offense Level for the Count of conviction is found in U.S.S.G § 2D1.1(a)(2) setting the Base Offense Level at 38 when **death or serious bodily** injury results from the use of the substance involved. (*Emphasis added*). Petitioner received a 3 level reduction for acceptance of responsibility bringing his level to 35, with a range of 168 to 210 months, below the mandatory minimum of 240 months. Where the guideline range is below the statutory mandatory minimum, the mandatory minimum prevails. *See, United States v. Webb*, 655 F.3d 1238, (11th Cir 2011).

Initially the Probation Officer indicated the statutory mandatory minimum of 240 months as an appropriate sentence and stated “the probation officer is aware of no factors, either mitigating or aggravating, which would justify a departure from the guideline range.” (Initial Presentence Investigation Report, Part D, Paragraph 72 Part E, Paragraph 86, Part F. Paragraph 87). Although neither party objected to the PSR or requested a departure outside the guideline range, the final version of the PSR included departure and variance considerations. (Final Presentence Investigation Report, Part E, Paragraph 86, Part F. Paragraph 87.)

REASONS FOR GRANTING THE PETITION

- I. A FOUR (4) LEVEL UPWARD DEPARTURE BASED ON CONDUCT UNDERLYING A DISMISSED COUNT PURSUANT TO USSG §5K2.21, BRINGING THE DEFENDANT'S GUIDELINE RANGE FROM 168-210 MONTHS TO 235-293 MONTHS, IS UNREASONABLE WHEN CONDUCT UNDERLYING THE DISMISSED COUNT HAD ALREADY BEEN TAKEN INTO ACCOUNT IN CALCULATING THE BASE OFFENSE LEVEL AND BY THE LEGISLATURE IN SETTING A MANDATORY MINIMUM OF 240 MONTHS.

Congress implemented a mandatory minimum sentence of 240 months in the event of a conviction for trafficking in fentanyl where **death or serious bodily injury results**. 21 U.S.C. 841(b)(1)(C) (*Emphasis added*). Congress, by taking this measure, sent a clear message by requiring a severe penalty – a lengthy statutory mandatory minimum in which the judiciary would have no discretion. *See, Webb.*

Mandatory minimums are tailored to ensure consistency in penalty for select crimes with select factors being present. As a result, regardless of the calculated guideline range, the penalty imposed cannot be less than the stated mandatory

minimum penalty unless the safety valve applies or there is government assistance. The United States Sentencing Guidelines are the starting point for courts in determining a sentence but are not mandatory, unlike mandatory statutory penalties.

In Petitioner's case, the initial guideline calculation resulted in a range of 168 to 210 months with the upper range falling below the mandatory minimum. In this case however, the safety valve did not apply and there was no motion by the government for a downward departure for assistance, so the mandatory minimum of 240 applied regardless of the guideline range. The fact that petitioner fell in criminal history category 1 and had a guideline range, at the high end that was 30 months less than the mandatory minimum, illustrates that Congress' intention of separating defendants from the "heartland" and mandating a more severe sentence when death or serious physical injury is present was successful.

The Petitioner in this case, having only 1 criminal history point, was charged with crimes where "death or serious bodily injury" was present, and was convicted of a crime where "death or serious bodily injury" was present, resulting in a mandatory minimum sentence of 240 months in the federal penitentiary. The Guidelines call for the base offense level to be set at 38 because "death or serious bodily injury" resulted. USSG §2D1.1(a)(2). The Petitioner's base offense level was then reduced by 3 for acceptance of responsibility resulting in a total offense level of 35 with a range of 168-210 months.

Application of a four-level upward departure based on “death or serious bodily injury” was unreasonable since “death or serious bodily injury” had already been factored in to determine the applicable guideline range. See, ID. In cases where a court implements an upward departure and the result is a sentencing range with the high end higher than the mandatory minimum, the basis for the departure must not be the same factor(s) that triggered the mandatory minimum penalty. A court is authorized to depart upward under § 5K2.21 “to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case [. . .]; and (2) **that did not enter into the determination of the applicable guideline range.**” U.S.S.G. § 5K2.21 (*Emphasis added*). *United States v. Johnson*, 151 F.Supp.3d 1226, (2015).

The appellate court has previously vacated a sentence and remanded for resentencing when impermissible double counting was present. In *United States v. Morgan*, 687 F.3d 688, (6th Cir. 2012) “[W]hen the government requested an upward departure on the § 924(c) conviction (notably the same issue to which Morgan's counsel later objected in response to the Bostic question), the district court asked: “Isn't that incorporated in part, though, into the guideline calculation? We've just gone through this analysis of whether the guidelines should be enhanced because of attempted murder versus an assault issue.... Defense counsel commented in response that applying the upward departure in addition to the cross-reference to attempted murder ‘seems to me to be beating a dead horse.’”

In petitioner's case the sentencing court, by applying the 5K2.21 4 level departure engaged in double counting for "death or serious bodily injury" to impermissibly increase the petitioner's guideline range from 168-210 to 235-293. The court sentenced the petitioner to 262 months, in compliance with the mandatory minimum and, because of the impermissible double counting, or "beating of a dead horse", resulting in a higher guideline range, sentenced the petitioner within the guidelines. *See, Morgan*

II. WHETHER IMPOSITION OF RESTITUTION FOR COSTS RELATED TO UNCHARGED CONDUCT IS PLAIN ERROR.

The District Court erred in assessing restitution in the amount of four thousand one hundred ninety dollars (\$4,190.00). The initial Presentence Investigation Report did not include or recommend restitution. Further the person who died did not receive the substance directly from Petitioner. The proof indicated a female got a substance from Petitioner. She then gave it to another male and he gave it to the decedent. Either of the two intervening possessors could have added the substance which resulted in the death. Given the number of hands through which it passed there is no direct proof the substance which resulted in a death came from Petitioner. Therefore Petitioner should not be responsible for funeral expenses

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed this Petition through the ECF system and a copy of the foregoing was mailed via United States Postal Service, First-Class, postage prepaid, on this _____ day of _____, 2018 to:

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