Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HERMAN MAJORS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a defendant in a drug conspiracy case suffers prejudice when his attorney fails to argue at sentencing that foreseeable drug quantity is limited to the amount distributed during the duration of the defendant's participation in the conspiracy.

II. Whether trial counsel's failure to argue for a sentence concurrent to petitioner's 10-year state sentence constitutes ineffective assistance under the Sixth Amendment to the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS AND ORDERS BELOW

The judgment of the district court on the Petitioner's amended motion for relief under 28 U.S.C. § 2255 [App. 9a] reflects docket number 3:15-cv-799 in the United States District Court for the Middle District of Tennessee. The judgment and opinion affirming the district court's judgment, issued by the United States Court of Appeals for the Sixth Circuit (per Bush, J.), was entered on April 10, 2018. [App. 1a]. That case is numbered 17-5034. It is an unpublished opinion.

STATEMENT OF JURISDICTION

The Sixth Circuit entered its opinion and order on April 10, 2018. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Facts Material to Consideration of the Questions Presented

1. Herman Majors was named as a co-conspirator in Bassim Fardos's and Adrian Patterson's cocaine distribution organization which operated from January 1, 2004 until December 1, 2006. Mr. Majors' participation, according to government witnesses and the prosecutor at trial, ended on December 31, 2004. Petitioner maintained his innocence throughout the trial proceedings and on appeal.

2. At trial, members of the Fardos-Patterson organization testified that Petitioner served as a drug courier, driving passenger vehicles outfitted with hidden compartments to and from California and Clarksville, Tennessee, until he was arrested in Oklahoma on December 31, 2004 and charged with possession of 26 kilograms of cocaine found in a hidden compartment in the Volkswagen Eurovan in which he was traveling. That charge was voluntarily dismissed by the government on August 9, 2005, and the Petitioner was released from custody; he was later charged in the Fardos-Patterson conspiracy case which underlies this matter.

3. The quantity of cocaine distributed during Petitioner's involvement with Adrian Patterson was established at trial by testifying co-conspirators who established the total number of trips during Petitioner's involvement, the number of trips in each of the vehicles driven by Petitioner, and the number of kilograms of cocaine which could be stored in the secret compartments in each of those vehicles–a Volkswagen Eurovan, a Ford F-150 pickup truck, and a Mitsubishi Montero SUV. Based upon the evidence, the quantity transported during the Petitioner's involvement in the drug conspiracy ranged from 60 - 106 kilograms of cocaine.

4. Bassim Fardos testified that he orchestrated the purchases of kilos of cocaine in California

to be distributed in Tennessee by Patterson and, until December 31, 2004, relied on Patterson to supply the couriers. He testified that, after the Volkswagen Eurovan containing 26 kilograms of cocaine was stopped in Oklahoma on December 31, 2004, he stopped using Adrian Patterson's couriers and the passenger vehicles and began using 18-wheeler tractor-trailers. From January 1, 2005 until the operations of the drug conspiracy concluded on December 1, 2006, therefore, Petitioner's services as a courier were not needed, and he had no involvement in the conspiracy.

5. The Presentence Investigation Report ("PSR") asserted that Petitioner was responsible for over 150 kilograms of cocaine, which amount included the quantities shipped in tractor-trailers *after* December 31, 2004, when Petitioner was arrested and, by all accounts, his involvement ended.

6. Petitioner's trial counsel failed to offer a factually and legally sustainable objection to the PSR's drug calculation which was easily derived by simple arithmetic. Instead of asserting a quantity which was particularized and measurable based on the trial testimony, trial counsel insisted, without any legal or factual basis and contrary to concept of "relevant conduct" under the Guidelines, that Petitioner could be held responsible for only the 26 kilograms which were seized during his December 31, 2004 arrest. Had trial counsel made the obvious Guidelines argument based on simple arithmetic and reached the potential maximum quantity of 106 kilograms, the applicable Sentencing Guideline range, including consideration of his Criminal History Category, would have been 324 - 405 months applicable, at the time of sentencing in 2011, to at least 50 but less than 150 kilograms rather than 360 to life imprisonment applicable to 150 kilograms or more. The Petitioner was sentenced to 360 months imprisonment based on a quantity in excess of 150 kilograms.

7. At the time of sentencing, Petitioner was serving a 10-year sentence imposed by the State of Tennessee in an unrelated matter. Trial counsel offered no argument, let alone a legal basis, for

concurrent sentencing. Petitioner began serving his 30-year federal sentence only after completing that 10-year state sentence.

8. Petitioner's counsel failed to raise on appeal the errors in the Guideline calculation as to drug quantity.

9. Following direct appeal, Petitioner sought relief under 28 U.S.C. § 2255, alleging ineffective assistance of counsel among other issues. The district court denied relief but issued a certificate of appealability as to counsel's performance related to drug quantity calculations and the failure to seek concurrent sentencing. As to the Guidelines calculation issue, the court noted that the Petitioner never asserted that he had withdrawn from the conspiracy and found that his level of involvement during the period of his "direct participation" made the quantities distributed after his participation ended foreseeable to him and found no prejudice in counsel's failure to present a sentencing argument focused on the duration of Petitioner's participation in the drug conspiracy. As to the consecutive sentencing issue, in the face of a silent record, the court presumed the trial judge considered the law applicable to consecutive versus concurrent sentencing and determined the argument would have been futile. The Sixth Circuit affirmed the finding of no Sixth Amendment violation. This petition followed.

ARGUMENT: REASONS FOR GRANTING THE PETITION

Question Presented No. 1: Whether a defendant in a drug conspiracy case suffers prejudice when his attorney fails to argue at sentencing that foreseeable drug quantity is limited to the amount distributed during the duration of the defendant's participation in the conspiracy.

The lower courts found no Sixth Amendment violation because they determined that "relevant conduct" would include drug quantities distributed after Petitioner's active participation

in the conspiracy ended, deeming such additional quantities "foreseeable" under U.S.S.G. § 1B1.3. This Court should grant the petition to resolve a split in the circuits as to the basis for determining the quantity of drugs reasonably foreseeable to a participant in a drug-trafficking conspiracy.

The district court determined that the Fardos-Patterson conspiracy trafficked 178 kilograms of cocaine during its entire period of operation, from January 2004 - September 2006. [App. 26a]. That quantity included two loads of 25 - 35 kilograms each which were transported by tractor-trailer after Petitioner was arrested in December 2004, *id.,* and, by all accounts, he no longer participated. Even assuming the low end of the district court's calculation of the amount transported by tractor-trailer after Petitioner's participation ended, i.e., 50 kilograms, the maximum quantity of cocaine trafficked during Petitioner's participation would be 128 kilograms.[1] As such, his Guideline Offense Level would be, at most, that which was then-applicable to more than 50 but less than 150 kilograms (Level 36) rather than that which was then-applicable to over 150 kilograms (Level 38). Based on Petitioner's Criminal History Category, Level 36 yielded a range of 324-405 months, and Level 38 yielded a range of 360 months to life imprisonment. The trial court determined the Offense Level to be 38 and sentenced Petitioner to the low end of the range, that is, 360 months imprisonment.

The district court found that

> even assuming that counsel's performance in failing to challenge the amount of drugs attributed to Majors was deficient, Majors cannot establish prejudice. The law is clear that, for sentencing purposes, "[w]here a defendant is part of a 'jointly undertaken criminal activity' involving drugs, 'the defendant is accountable for all quantities of contraband with which [he] was directly involved and ... all reasonably foreseeable quantities of contraband that were within the scope of the criminal

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[1] Although this figure is higher than Petitioner's estimate of 60 - 106 kilograms, it falls within the same Guideline range applicable to 50-150 kilograms.

> activity that [he] jointly undertook.'" *United States v. Begley*, 602 Fed. Appx. 622, 626 (6th Cir. 2015) (quoting U.S.S.G. § 1B1.3 cmt. 2). A "jointly undertaken criminal activity" includes a conspiracy. *United States v. Watson*, 620 Fed. Appx. 493, 513 (6th Cir. 2015); U.S.S.G. § 1B1.3 cmt. 3 (2016).

App. 25a.

The Sixth Circuit endorsed the district court's analysis under *Watson*, 620 Fed. Appx. 493, then determined that counsel's failure to present the simple calculations that placed the quantity in the 50 - 150 kilogram range was not deficient performance, as follows:

> Because there was significant evidence that Majors had been an integral member of the conspiracy and was involved in both planning and executing the scheme to distribute cocaine, and because the sentencing court would have only needed to find that Majors had jointly undertaken the entire conspiracy by a preponderance of the evidence, *see United States v. Jordan*, 20 F. App'x 319, 324-25 (6th Cir. 2001), it is likely that the sentencing court would not have accepted Major's preferred argument, had it been made.
>
> This prevents Majors from successfully making his ineffective-assistance-of-counsel claim for two related reasons. First, trial counsel's tactical decision to make the weak argument that Majors was responsible only for 26 kilograms of cocaine, which is already "virtually unchallengeable," *Buell v. Mitchell*, 274 F.3d 337, 360 (6th cir. 2001) (internal quotation marks omitted), does not appear so foolhardy once we recognize that the alternative argument was similarly weak. If one is highly likely to strike out, one might as well swing for the home run.
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> Second, even assuming that trial counsel's decision was deficient, the weakness of Majors's preferred argument prevents him from showing prejudice. *Because it unlikely that the sentencing court would have accepted the argument that the cocaine shipments made after Majors's arrest were not "relevant conduct," Majors cannot show that there is a reasonable probability that his counsel's failure to make this argument resulted in his receiving a longer sentence. See Glover* [*v. United States*], 531 U.S. [198] at 200 [(2001)].

App. 6-7a. (emphasis added).

In short, even with uncontroverted evidence–endorsed by the prosecutor in closing argument at trial–that Petitioner's participation in the drug conspiracy ended on December 31, 2004, the Sixth

Circuit deemed "relevant conduct" to include conduct occurring throughout the duration of the conspiracy, even that which transpired outside the date range of the defendant's involvement, and without any evidence that he was even aware that the drug conspiracy continued after December 31, 2004.

The Sixth Circuit's interpretation of "relevant conduct" under U.S.S.G. § 1B1.3 is in stark conflict with the First Circuit's interpretation. In *United States v. Santos-Rivera,* 726 F.3d 17 (1st Cir. 2013), the proof demonstrated differing periods of involvement for different defendants. In light of the proof that defendant Carrasquillo-Ocasio participated in the conspiracy only during a specific period of the entire life of the conspiracy, the district court sentenced him based only on the quantity distributed during his time of participation. In upholding that sentence, the First Circuit noted that

> "When sentencing a participant in a drug-trafficking conspiracy, the district court must make an individualized finding concerning the quantity of drugs attributable to, or reasonably foreseeable by, the offender." *United States v. Cintrón–Echautegui,* 604 F.3d 1, 5 (1st Cir.2010) (footnote omitted); *see also United States v. Colon–Solis,* 354 F.3d 101, 103 (1st Cir.2004) (noting that in a drug conspiracy case a "defendant-specific determination of drug quantity" is a required "benchmark for individualized sentencing under the guidelines").
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> ....
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> At the sentencing hearing, the court made a clear individualized quantity determination, concluding that *Carrasquillo–Ocasio was responsible for the entire drug quantity sold during the time he participated in the Piñero conspiracy from sometime in 2007 until early 2008, rather than the entire 2006–2008 lifespan of the conspiracy. The court stated: "[A]s to the specific drug amount ... [i]f it had been conspiracy-wide, it would have been greater, but it's specific to his participation during the time he was present.... And let me note, it's different [from] other Defendants ... This one specifically narrowed to his presence 2007 to early 2008."*

Id. at 29 (emphasis added).

For sentencing purposes, Carrasquillo–Ocasio was responsible for the drugs distributed "during the time he was present." In other words, "foreseeable" amounts would include quantities

distributed by other members of the conspiracy *during the time the defendant was a participant, but not after his participation concluded.* Had the Petitioner been sentenced in the First Circuit rather than in the Sixth Circuit, he would have been sentenced based on the Guidelines range of 324-405 months imprisonment rather than 360 months to life imprisonment.

The Sixth Circuit's overly broad view of "relevant conduct" is also in conflict with the Seventh Circuit. Like the First Circuit, the Seventh Circuit has applied the duration-of-participation analysis to determine foreseeability in the context of a wire fraud scheme with multiple participants. In *United States v. White*, 883 F.3d 983 (7th Cir. 2018), following a guilty plea, the district court established the amount of loss for which the defendant would be held responsible under the Guidelines. The indictment and plea agreement described a fraud scheme which spanned the period of the fall of 2009 until the summer of 2013. However, the defendant was incarcerated "for most of that time, having been out of prison during that range only from August 19, 2011 until August 20, 2012." *Id.* at 988. The Seventh Circuit vacated the district court's sentence which relied on fraudulent conduct of others which predated the defendant's conduct which was established by the evidence. The court commented as follows: "Without a more specific and supported finding on when White's participation in the scheme began, we cannot assume that his participation began any earlier than the September 11, 2011 arrest. We must therefore vacate the sentence and remand." *Id.* at 991.

The Petitioner acknowledges that the cases discussed herein address the starting point of the duration of a defendant's participation in a conspiracy. The analysis is no different, however, when the question of duration is the ending point of participation. In Petitioner's case, his involvement ended upon his arrest in Oklahoma on December 31, 2004. Fardos testified at trial that the arrest and

seizure of 26 kilograms of cocaine prompted him to stop utilizing Patterson's system of transporting the drugs in passenger vehicles and began using tractor-trailers instead which Fardos–rather than Patterson–commissioned. As with the defendant in *White*, sitting in a jail cell in Oklahoma from December 31, 2004 until August 9, 2005, Petitioner could in no way foresee any activities of the Fardos-Patterson conspiracy. Likewise, absent any evidence whatsoever of contact between Petitioner and any of the members of the Fardos-Patterson conspiracy from August 9, 2005 forward, none of that organization's conduct was foreseeable to the Petitioner.[2]

The Sixth Circuit has stretched the definition of "relevant conduct" to punish a man for his former associates' activities based solely on that man's presumed ability to imagine that their drug trafficking continued after his departure. The Sixth Circuit has misconstrued § 1B1.3 of the United States Sentencing Guidelines and has thereby failed to individualize sentencing as commanded by this Court in *Booker v. Washington*, 543 U.S. 220 (2005). This Court should grant the petition because the Petitioner has been prejudiced by his counsel's failure to present a legally and factually supported challenge to the Guideline calculations in the trial court and on appeal. *See Glover v. United States*, 531 U.S. 198 (2001).

Question Presented No. 2: Whether trial counsel's failure to argue for a sentence concurrent to petitioner's 10-year state sentence constitutes ineffective assistance under the Sixth Amendment to the United States Constitution.

The lower courts' rejection of Petitioner's argument that his counsel rendered ineffective

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[2] The district court mentioned in a footnote that the Petitioner did not assert that he had withdrawn from the conspiracy. Inasmuch as the Petitioner maintained his innocence throughout trial, sentencing, and on appeal, he could not avail himself of that affirmative defense to the drug quantity calculation without forfeiting his Fifth Amendment protection against self-incrimination. Accordingly, the Petitioner's silence as to "withdrawal" is irrelevant to the foreseeability determination.

assistance by failing to advocate for a sentence concurrent to his 10-year state sentence was based on a presumption that the trial court consciously, albeit silently, chose to impose consecutive sentencing and that any such argument would have been futile. The district court based its presumption on an unpublished district court decision, *Johnson v. United States*, 2016 WL 1259354 (E.D. Mich. 2018); the Sixth Circuit upheld that finding without citation to any authority, yet acknowledged that the trial court did not explicitly consider the undischarged 10-year state sentence. [App. 7a.] Because the circuit court's ruling disregards the mandate in *Gall v. United States*, 552 U.S. 38 (2007) this Court should grant review.

As a threshold matter, it is unreasonable to presume that the district court knew that it had the option of imposing concurrent or consecutive sentences and deliberately chose to impose a consecutive sentence. If reviewing courts could make such presumption, we would not have this Court's decision in *Gall* which requires a trial judge to "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall v. United States*, 552 U.S. at 50. The articulation required by *Gall* enables the appellate court to

> ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence--including an explanation for any deviation from the Guidelines range. imposed under an abuse-of-discretion standard.

Gall U.S. 552 at 51.

Indeed, the Sixth Circuit itself, prior to the unpublished opinion in Petitioner's case, has consistently applied *Gall* to its review of sentences, including decisions to impose consecutive sentences. For example, in *United States v. Berry*, 565 F.3d 332 (6th Cir. 2009) the court noted that

> The district court's decision whether to impose a concurrent or consecutive sentence under 5G1.3 is reviewed for abuse of discretion. *United States v. Watford*, 468 F.3d 891, 916 (6th Cir. 2006). A court does not abuse its discretion when it "makes generally clear the rationale under which it generally imposed the consecutive sentence and seeks to ensure an appropriate incremental remedy for the instant offense." *United States v. Owens*, 159 F.3d 221, 230 (6th Cir. 1998). Although the district court retains discretion in imposing a consecutive or concurrent sentence, such discretion is not "unfettered" and "'the record on appeal should show that the district court turned its attention to § 5G1.3(c) and the relevant commentary in its determination of whether to impose a concurrent or consecutive sentence.'" *Johnson*, 553 F.3d 553 F.3d 990, 997-98 (6th Cir. 2009) *quoting United States v. Covert*, 117 F.3d 940, 945 (6th Cir. 1997).

United States v. Berry, 565 F.3d at 342.

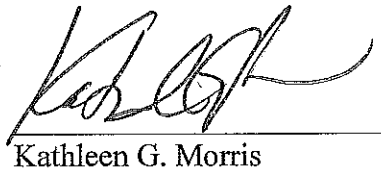
In Petitioner's case, the trial court was silent. Silent as to whether it intended to impose consecutive sentencing. Silent as to any rationale for imposing consecutive sentencing. Silent as to whether it sought to "ensure an appropriate incremental remedy for the instant offense." In the face of that silence, the Sixth Circuit disregarded the teaching of *Gall* and instead relied on presumptions – both procedurally and substantively.

This Court should grant the petition to consider whether trial counsel rendered ineffective assistance by his own silence in failing to advocate, in briefs and in open court, for concurrent sentencing. Petitioner submits that, upon full review, this Court should find that only a new sentencing hearing that complies with *Gall* will remedy the constitutional violation.

Conclusion

Petitioner's counsel rendered ineffective assistance in sentencing by the failings described herein. This Court should grant the petition to resolve a split among the circuits as to the breadth of "relevant conduct" and to require the lower courts' adherence to *Gall*.

Respectfully submitted,



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