

No. 18-609

In the
Supreme Court of the United States

JOSEPH DAVID ROBERTSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

**MOTION TO SUBSTITUTE
CARRI ROBERTSON AS AUTHORIZED
REPRESENTATIVE FOR PETITIONER
JOSEPH DAVID ROBERTSON UNDER
SUPREME COURT RULE 35.1**

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Counsel for Petitioner

Counsel advises the Court that Petitioner Joseph David Robertson passed away on March 18, 2019, in Basin, Montana. Counsel was first made aware of Mr. Robertson's demise on March 26, 2019.

Movant Carri Robertson is Petitioner's widow; she is in the course of being appointed his legal representative under Montana law. She moves this Court to substitute her in place of Petitioner, as his authorized representative, pursuant to Supreme Court Rule 35.1.

The sentence imposed on Mr. Robertson included a restitution order for approximately \$130,000. Pet. App. at C-11. Very little of that amount has been paid, and the balance is secured by a lien in favor of the government, *see* Attachment A, on real property owned by Mr. Robertson, *see* Petition at 9 (Robertson owns the White Pine Lode, a patented mining claim). Movant Carri Robertson has an inheritance interest in Petitioner's real property under Montana law. Under 18 U.S.C. § 3613(b),¹ Petitioner's estate will remain liable for the outstanding balance of his restitution sentence, and Movant's interest in the property against which the government's lien attaches, is impaired. This prevents the Petition from being moot and warrants granting this motion to substitute under Rule 35.1.

In the alternative, the Court should grant the Petition, vacate the judgment of the Ninth Circuit, and remand for dismissal of the indictment. *See*

¹ Petitioner had not completed his remaining supervised release at the time of death. Movant reads Section 3613(b) to apply whether or not the individual obliged to pay restitution has completed supervised release at the time of death.

Claiborne v. United States, 551 U.S. 87 (2007) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)); cf *Berninger v. F.C.C.*, 139 S. Ct. 453 (2018) (Gorsuch, Thomas, Alito, JJ., dissenting from denial of certiorari) (GVR rather than denial of certiorari required under *Munsingwear*.).

Because Petitioner’s estate would be subject to execution of the government’s restitution lien, to Movant’s harm, this Court’s practice of simply dismissing petitions for writ of certiorari upon the death of the defendant, *see Dove v. United States*, 423 U.S. 325 (1976), is inapplicable² and would be unjust.³ Since the Petition is not moot, the two equitable alternatives are to substitute movant for Petitioner under Rule 35.1, or to grant the petition, vacate the lower court judgment, and order dismissal of the indictment, consistent with the Court’s prior

² *Durham* is not inconsistent with the disposition in *Dove* and therefore not affected by *Dove*. 423 U.S. 325 (“The Supreme Court dismissed the petition on being advised that petitioner died and, furthermore, held that to extent that *Durham* . . . was inconsistent with such ruling it was overruled.”) (emphasis added). There is no evidence in this Court’s per curiam disposition in *Dove*, or the unpublished opinion of the Fourth Circuit below, that the defendant in *Dove* was sentenced to a restitution obligation that would survive his death.

³ Petitioner filed the petition on November 7, 2018, and the United States’ response was originally due December 10. The government sought and was granted three successive extensions, and finally filed its opposition on March 11, 2019. Absent these extensions, the Court would in all likelihood have acted on the Petition by now, and the practice in *Claiborne* (i.e., GVR) would be clearly applicable. It would be unjust for the government to get the benefit of dismissal of the Petition rather than a GVR when the reason the Petition has not been acted on is the routine practice of extending the government’s time to respond.

practice in *Durham v. United States*, 401 U.S. 481 (1971), and as recently done in *Claiborne*.

DATED: March, 2019.

Respectfully submitted,



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Counsel for Petitioner

EXHIBIT A



259857 Fee \$5.00 Page 1 of 1

JEFFERSON COUNTY
Recorded 7/22/2016 At 3:14 PM
BONNIE RAMEY, Clerk and Recorder
By _____ Deputy

Return to:
U.S. Attorney's Office
Attn: FLU
2601 Second Avenue North, Suite 3200
Billings, MT 59101

DEPARTMENT OF JUSTICE

NOTICE OF LIEN FOR FINE AND/OR RESTITUTION IMPOSED PURSUANT TO THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

United States Attorney's Office
District of Montana

Serial Number
2015A01255

NOTICE is hereby given of a lien against the property of the defendant named below. Pursuant to Title 18, United States Code, § 3613(c), a fine or an order of restitution imposed pursuant to the provisions of subchapter C of chapter 227 is a lien in favor of the United States upon all property belonging to the person fined or ordered to pay restitution. Pursuant to § 3613(d), a notice of lien shall be considered a notice of lien for taxes for the purposes of any State or local law providing for the filing of a tax lien. The lien arises at the time of the entry of judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to § 3613(b).

Name of Defendant/Social Security Number
Joseph Robertson/**-**-8501

Court Number
CR 15-07-H-DWM

Residence
1 McCafferty Creek Road
Basin, MT 59631

Date of Entry of Judgment
July 20, 2016

Amount of Fine/Restitution
\$130,233.50

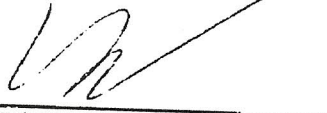
Court Imposing Judgment
U.S. District Court - District of Montana

If payment becomes past due, penalties totaling up to 25 percent of the principal amount past due may arise. 18 U.S.C. § 3612(g).

IMPORTANT RELEASE INFORMATION—With respect to the lien listed above, this notice shall operate as a certificate of release pursuant to 18 U.S.C. § 3613(b) by operation of law, but no later than January 20, 2038.

Place of Filing: Jefferson County Clerk and Recorder, P.O. Box H, Boulder, MT 59632.

This notice was prepared and signed at Billings, Montana, on this 22nd day of July, 2016.



VICTORIA L. FRANCIS
Assistant United States Attorney